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PHILOSOPHICAL SENSE OF THE STATE SUBJECT TO THE RULE OF LAW AS APPREHENSION OF THE SOCIAL CONTRACT SCHOOL

Phd.Proffesor Iulian NEDELCU*

Abstract: *Society is created and develops through coercion, it is a natural environment of humans who become sociable out of necessity, for food and protection purposes. When interests are opposite, people are in conflict, war arises, which is a phenomenon characteristic to the natural condition. In order to avoid it there must be, as Hobbes states, established a new contract which should oblige people to the State, the first mentioned giving up to their natural rights in favour of the State which protects them. It is about a private law assignation in favour of the public law area as, after the fall of the Roman Empire, a free man preferred to become a slave as exchange for his master's protection, similarly to society which entrusts its full sovereignty to the State. Even the representation of the Leviathan1 from the frontispiece of Hobbes' work, states its outlook upon State: Leviathan, name taken over from Jov's book, is a giant who holds in one hand the papal rod, and in his other hand the sword, reuniting spirituality with temporality and of whose body is made up of agglutinated little men. The State - Leviathan, thus portrayed, is based on the contract which binds all people together and subjects them completely. People do not keep any right or their own will for themselves, as result of indefeasible give up to asserting sovereignty, entrusted to the State once and for all. State's power is unlimited, ethical or religious reasons are removed since only the State establishes the norms of good and bad. State, represented by the king, has no duty to people, the contract concluded between them for the subjection purposes, does not affect it, between the king and the people there is no contract.*

Keywords: *state, social contract, legislative power, executive power, federative power, judiciary power*

Essentially, Thomas Hobbes has formulated the thesis according to which the society is created and develops by constraint, and this constitutes a natural environment of man who becomes sociable by necessity, in order to feed and defend himself. When the interests become opposable, people are in conflict and here occurs the war, phenomenon characteristic to the state of nature. Hobbes states that, in order to avoid it, it must be established a new contract which obliges people towards the State, the first ones renouncing to their natural rights in favour of the State which protects them. It is about a transfer of private law in favour of the domain of public law as well as, after the fall of Roman Empire, a free man preferred to become slave in return for the master's protection, as well as the society in its entirety entrusts its sovereignty to the State.

Even the representation of the Leviathan[2] on the title page of Hobbes's work specifies his conception about the State: Leviathan, name taken from Job's book, is a giant who keeps in a hand the papal rod, in the other hand the sword, reuniting the spiritual with temporal and whose body is made of agglutinated little men. The State - Leviathan, thus portrayed, is based on the contract, which bounds all people between them and entirely subjugates them.

People do not keep rights for themselves, nor own will, following the definitive renunciation in exercising sovereignty, entrusted to the State for good. The State's power is

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[1] Thomas Hobbes, *Leviathan,* Polirom Publising House, Iasi 2001.
[2] Thomas Hobbes, *Leviathan,* Polirom Publishing House, Iaşi 2001.

unlimited, the ethical and religious reasons are removed, as only the State establishes the norms of good and evil.

The State, represented by the sovereign, has no obligation towards people, the contract concluded between them to subject them does not affect it, and between sovereign and people there is no contract.

The declaration of rights (The Bill of Rights - 1689), which encompasses the indefeasible rights of people and the clear limits of the royal power, may be considered the institutionalized expression of ***John Locke's*** *thinking*, the materialization of its contractual ideal. Locke considers that „*natural right is based on reason and a state of nature,* first of all peaceful. „*People live in society from the beginning, not to fight, but to ensure permanent peace"*[3]. Being under the domination of rationality, people naturally organize in families, hold personal gods and live in the harmony ensured by natural law, recognized and accepted. At the same time, this first stage of the society loses ground in front of progress, which increases the complexity of relations between people and determines them to sign a social treaty to protect themselves. This treaty is freely accepted, without being needed constraint and mostly they do not represent, under the shape of delegation of sovereignty, but a temporary renunciation, accepted, modifiable, only of a part of human rights. In Hobbes's work, where man renounces for good at all his rights, Locke substitutes a temporary delegation of a part of sovereignty which the State needs so much to ensure general security.

The analysis of civil powers comes back, in most cases, to the analysis of limits which are imposed following the contract freely concluded, Locke differentiates three types of powers, which he does not separate them so much as Montesquieu did. He makes a subtle differentiation among powers, as well as a precise delimitation of executive power. The accurate study of this work underlines the fact that he considers, in fact, that there exist five powers: first of all, *the constituent*, which allowed the creation of the State, *the legislator*, *the judge*, *the executive power* and, eventually, *the federative powers*. Locke ends by proposing two classifications of powers. The first appears when he analyses the insufficiencies which justified the adoption of social contract, through which man renounced to his state of nature, (when people lived isolated) and grouped into political society. In this analysis, Locke implicitly uses the tripartite schema, which shall become the fundament of theoreticians of politics in the 18th and 19the century: *the legislative* (legislator), *the executive, the juridical* (judicial power). He names these powers only to find out their absence in real States[4].

The second classification is emphasized when Locke analyses the functioning of political society. This is the single moment when he mentions the idea of *federative power*, and the triangle becomes: *legislative power, executive power, federative power.* As it can be seen, the judicial power disappears in this differentiation, but we cannot deduct from this cause that Locke has renounced to conceive it as a power. He continues to remind us in his book called *The Second Treatise of Civil Government* that „*it is needed a judge known by all, impartial, who has the competence to judge all disputes, according to the established law*"[5].

The judicial power remains the determinant criterion of any political society, the initial juridical fundament, indispensable, of legislative and executive powers, as well as that of governments and societies. For a philosopher, the trilogy of power (legislative, executive, federative) is the unique valid constitutional expression of power in political society. To a

[3] John Locke, *An Essay concerning Human Undesratnding*, Editura Ştiinţifică, Bucharest 1961, pag 18.
[4] John Locke, op cit. page 76.
[5] John Locke, *The Second treatise of civil government*, Nemira Publishing House, Bucharest 2007.

certain extent, it remains subordinated to the existence of constituent power (that which gives the Constitution) through which individuals created that society and through the permanent necessity of the existence of judicial power which must not be questionable.

Locke has precisely defined this trilogy of political power. *The legislative* is the power which establishes the procedures through which the force of political power is directed to preserve the community and its members. Its main mission, but not the only one, is to adopt laws. *The executive* is the power to execute the laws and to decide what is convenient for conciliation between protection of public interest and interest of individuals. *The federative power* is the power to make peace or war. It refers to conduction of foreign affairs, including the function of collective representation of people and State outside the national territory. Thus, federative power combines *is tractum* (the power to sign treaties), *jus legationis* (the power to appoint and have ambassador, but also the power to receive embassies on the national territory) and *jus ad bellum* (the power to make war). Locke's originality consists in the inclusion here of *jus tractum* which constitutes a function of normalization, which *the School of law of nature* placed it rather in the legislative function. This fact reinforces the *executive.* Although, we do not conclude that the philosopher would approve a strict separation among powers.[6]

The fundamental notion which ties the management to the people is that of trust, of received mission, expressed by the term *political trusteeship.* This law, in case of breach of contract, may be developed at the people's initiative, which withdraws its trust granted to the management. Holder of sovereignty, the people takes back its power when considers that the purposes entrusted to management, namely the protection of life, freedoms, prosperity are not fulfilled. The system elaborated by Locke legalizes the right to insurgence, legitimates revolution and offers a large space to individual, thus laying the foundations of a social contract of free association.

Jean Jacques Rousseau is the real theoretician of people's sovereignty which, later on, becomes the national sovereignty understood as totality of citizens. At the same time, both notions carry out a true revolution, transferring the management of people in the detriment of the individual, the king or a group, aristocracy.

J.J. Rousseau's main political work is *The Social Contract*, where the author carries out a political analysis starting from the state of nature. Man, in state of nature, is a pre-moral human being outside any notions of good and evil, free and equal to other people, by the nature itself. Due to this freedom, he is perfectible and this perfectibility offers him the possibility to come back in history. If he enters an alienated society, he corrupts himself, losses his freedom and equality, but, instead of bearing the State's power, he is ensured of this appropriate legislative framework, by a contract which shall guarantee the freedom of each person, the equality, both at civil level and at ethical level, and therefore he becomes a new man. This man, who voluntarily renounced at his state of nature, makes part of the sovereign people and manifests his wish, guided by rationality, searching for the laws which ensure the good to each individual. By the social contract, man as individual, conforms to unanimous and universal *general will*.

General will presents certain different particularities: is inalienable, infallible and indivisible. It is inalienable as each individual represents a part of the people, so it holds a small segment of sovereignty and must exercise it directly, without using an elective system or mandate system. It is infallible as, in order to make a decision, it is needed the will of all, namely

[6] Ioan Alexandru, Mihaela Cărauşan, Sorin Bucur, op.cit., p. 24 and following.

the totality of citizens' wills, offering the possibility to form a majority, criterion which is achieved by general will. The minority, excluded from the general will framework, is wrong. General will, defined in its entirety by each citizen that forms the people, is indivisible.

The expression *„general will"* is the law voted by the people, with a view to achieving the community's good. The law is the same for all and must be observed by all. The man, leaving his state of nature, creates laws, expression of general will and is subject to them, so that his freedom could not exist without the acceptance of law. Wishing to act outside the law means alienation, as the law expresses the general will.

General will may impel not to blind obedience, lacking will, but to freedom. *„Whoever would refuse to subject to general will – Rousseau says – shall be constraint by the entire body; which means nothing but he will be forced to be free".*[7]

After he defined the criteria according to which rationality must lays the foundations of the social contract, J.J. Rousseau examines the possible forms of political regimen. He admits monarchy, provided that is elective, the prince being elected by the people. But he prefers an aristocratic management, understood as democratic State, where leaders are elected in a restraint number, fact which creates the State's cohesion. We have no contradiction with general will that cannot be transmitted, as it refers to sovereignty and not to the management in itself. The ideal would be direct democracy, but Rousseau considers it impossible, by practical reasons, the people not being able to be reunited all the time and by political reasons, in order to avoid that executive power remains different from the legislative power. *Democratic regimen remains the appanage of Gods' people, men still being too corrupted.*[8]

If in Hobbes work the state of nature is lacking freedom, as it is a war of each individual against all, for Rousseau this is the state of absolute freedom. This freedom shall be assigned in order to constitute the social body, but the state of society is evil, is considered depravation. Thus Rousseau opens the path of absolute distrust in social structures and then in the State. By recognizing their conjectural necessity, but refusing in principle their necessity, he shows them as they are, conditions resulting from a fall of individuality. Thus, we observe that Rousseau rejects intermediary bodies, the social structures: *„It is very important, says he, if we want indeed to enunciate general will, not to exist partial societies in the State and each citizen expresses only his opinion".*[9] Similarly, the government institutions cause him repulsion, which often are mistaken with the State, even if they are elected. He says that, as *„the moment the people chooses its representatives, this people is no more free".*[10]

In the conception of Rousseau, without the people exercising its sovereign right, there is no legitimate power, no legitimacy. This is the deep meaning of the contract. Thought this way, popular will cannot be represented. „*Sovereignty cannot be represented by the same rationality that it cannot be alienated. It essentially consists in general will and general will cannot represent. All the laws which the people itself did not ratified, are not laws".*[11]

By virtue of sovereignty, the theory of representation of popular will is excluded. The Government must be exercised directly, namely the legislative power must belong to citizens. Under these conditions, the people may transmit only the power, and not the will. Thus, there is one government, but this one has only executive functions; it does not

[7] J.J. Rousseau, *The Social Contract*, Editura Ştiinţifică, Bucharest, 1957, p. 106.
[8] Florence Braunstein - Silvestre, Jean Francois Pepin, op.cit., p. 51.
[9] Jean Jacques Rousseau, op.cit., p.122.
[10] Idem, p. 225.
[11] Idem, p. 129.

beneficiate from a delegation of general power, because this is inalienable; it is not an instrument of general will which makes only particular deeds, and never general deeds.

Rousseau wrote in this sense: *„Legislative power, which is the sovereign, needs another power which executes, which reduces law to particular deeds. This second power must be established so that always executes laws and only laws. Here intervenes the institution of government? Is an intermediary body between subjects and sovereign, created to ensure their mutual correspondence, enabled with the execution of laws and maintenance of civil and political freedoms".*[12]

It is certain the fact that Rousseau does not make confusion between Sovereign and Government, the latest being understood as public authority, which differentiates from the supreme authority, called sovereignty; the distinction between the two consists in holding the legislative right by the Sovereign, right which can oblige, in certain purposes, the social body itself and the executive power held by Government, which can oblige only individuals..

More or less, it seems amazing that Rousseau wants to differentiate the Sovereign from the Government, as this automatically implies direct government. However, the paradox is only apparent. First of all, Rousseau asserts that the sovereign can coincide with the State. This proportion of identity would lead to a direct democracy where, logically, the government would be useless. Therefore, in a second stage, he admits that, in order for a people's republic, and not a Gods' one, be constituted, it needs a government which establishes a mediation between Sovereign's laws generality and the subjects' behaviors particularity, which include private business in public rules.

Rousseau asserts that, if the Sovereign would want to govern himself, he would be too powerful as compared to the government; but if the government would want to legislate, its abusive power would make it too powerful as compared to the Sovereign. In both cases, the despotism could appear. If the subjects do not obey laws, the Sovereign and the Government would be so weak that anarchy would appear. In order to avoid these two extreme trends, citizens' compliance with laws must be compensated by the citizens' authority over government.

In tradition of classical typology, Rousseau finds that „*the Government may take on three different forms, depending on the number of those that compose it"*[13]: the democracy – present when the Sovereign confers the government to the entire people or most of its part; *aristocracy* – present when the government is conferred to a small number of magistrates and monarchy when the government is in the hands of a single magistrate. In all cases is preserved the distinction between the Sovereign and the Government. The Sovereign wants, the Government executes: he has the force, not the will. And, in order for the force be legitimate, *„any government must be republican"*. Monarchy is condemned.[14]

We notice that the social contract theory, as it is asserted by J.J. Rousseau, seems to replace the monarchic absolutism by democratic absolutism, manifested by domination of majority over minority.

Within the context of supremacy of feeling as compared to rationality, ***David Hume*** has formulated the most important objection regarding the grounding of politics and morality on the idea of law of nature. Nevertheless, the feeling too is also a natural constant of man depending on which is ensured social cohesion. *„Exactly these regularities make possible the political theory, whose first axiom is that any attempt to modify human nature*

[12] J.J. Rousseau, *VIe Lettre de la Montagne*, Oeuvres complètes, Tomes III, p. 808.
[13] J.J. Rousseau, *The Social Contract*, op.cit., III, III.
[14] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, op.cit., p. 191.

through interventions operated by political power is simply illusory."[15] However, Hume's theory differs from the theories of law of nature, which is based on human rationality. For the latter, morality and law originate in human rationality and not in spontaneous deeds of human action based on feelings, as Hume asserts.

He has a different opinion as compared to those who say that the State appeared as result of a contract. Contractualist theories are based on the idea of consent, as threshold in forming the State. Hume maintains that people are able to live in society in absence of any government. *„This is possible when people limit themselves to strict necessities, so that each of them has exactly what he/she needs".*[16]

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[15] A.P. Iliescu şi E.M. Socaciu, *Fundaments of modern political thinking*, Polirom Publishing House, Iaşi, 1999, p. 74.
[16] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, op.cit., p. 198.

NEW PHILOSOPHY OF CIVIL CONTRACT

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Abstract: *Despite the imperative pacta sunt servanda born to live forever, a principle of which moral substance nobody has ever doubted, its substantiation has known two centuries of idea evolution which followed so as explain the reasoning imposing such principle. The freedom long time clamored by the philosophy of the late 18th century, the one having imposed the idea of autonomous will in contracts, invested with law power of contractual parties, has soon proven to be the freedom of the most powerful. Since the time when one considered that all and any contracts are fair and therefore that he who thinks in contractual terms thinks fairly ("qui dit contractuel dit juste") and up to the new contractual order anticipated by the drafts on European contract codification, adopted by the current Romanian civil Code, a whole evolution of its substantiation has been consumed, theories laid down always proving to be only temporary. The end of a myth, i.e. the myth of autonomy of will, marked by the new regulation of the contract, occurs by retracing the borders between public and private order, which makes the judge a true actor of the contract, and not „a slave of parties' will". The judge is thus the one who can reestablish the equilibrium of the services agreed upon by parties. We are witnessing a „threesome", a real „invasion" of the public order into the space of will reserved to parties, the contract becoming thus less and less „contractual".*

Keywords: *pacta sunt servanda, autonomy of will, solidarism, public policy, contractual equilibrium, adaptation contract.*

1. Constant Decline of Autonomy of the Will in Contracts

The principle of autonomy of the will, juridical paradigm of the illuminist epoch governed by the Kantian individualistic motto *sapere aude*, of which corollary in law *pacta sunt servanda* eulogizes the rightful individual freedom, has been under the crossed target of the doctrines of the past centuries.

In accordance with the individualistic philosophy which constituted the ideological ambiance in which Napoleon's Civil Code was conceived, and later on, in line with our Civil Code, which followed Napoleon's model, the man is fundamentally free upon birth so that he cannot have obligations in relation to another man unless such obligations are the consequences of his own will. Society itself is seen as a contract, while the author of the social contract, J.J. Rousseau, places the agreement at the basis of all authorities over the man. The legitimacy of any obligation is rendered by the will, conception which led Alfred Fouillée to affirm not only that „qui dit contractuel dit juste"[1] but also that „toute justice doit être contractuelle". Juridical reflex of the economic liberalism expressed in the „*laisser faire, laisser passer*" wording, the theory of the autonomy of the will indicates us that nobody may compel the parties to legally bind by contract; yet, it also tells us that once they have

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[1] The meaning of such famous working is a subject matter of doctrine dispute. If most authors consider that it is the most legitimate expression of the autonomy of the will, there are other authors according to whom such dictum, so often invoked, would actually consider the social contract, the only way to get to justice, and not the legal contract, *ab initio* considered fair and so worthy of absolute respect. In relation to this, see Cr. Jamin, *Le procès du solidarisme contractuel: brève réplique*, in the volume *Le solidarisme contractuel,* sous la direction de Luc Grynbaum, Marc Nicod, Paris, Éd. Economica, 2004, p. 160

concluded such contract, it shall be observed as such, without further norms to authorize its effectiveness. The contract is also mandatory for the judge, „the minister of the parties' will"[2], who, if solicited to interpret it, shall relate to common intention of the signatory parties. For the same reasons, the judge could not interfere with the contract, could not amend or revise it, even though the initial contractual conditions had changed.

The decline of the autonomy of the will starts with the very wording of the *pacta sunt servanda* principle*,* when Portalis was to highlight that the freedom of the will may not be limited, since it is subject to public order and good morals[3]. Influenced by the thinking of those times, the authors of the French Civil Code failed to rightfully take over the theory of the autonomy of the will, so that the enunciation in art. 1134 takes into consideration „the legally constituted agreements", wording taken over by our Civil Code at art. 969, which, *illo tempore,* suggested that it is not the will of the parties that renders the binding force of the contract. It is the law which renders such force to the agreement between the parties. Only a short while later, one could see how the liberalism transposed to law was to represent a genuine utopia or even a „chimera", which led to more and more limits and conditions coming to adjoin to these primordial milestones of the will in the contract law, only briefly drafted. Such limits and conditions imposed, during these two centuries of social evolution, by a series of moral imperatives, have been more and more refined, fact which triggered the contestation of the name of the principle itself.

The doctrine of the late 19th century disclaimed the individualistic conception about the contract, noticing that, under the accumulation of capital, the parties to the contract are no longer equal, that the weak contracting party needs legal protection. The contract no longer appears as an expression of the force ratio, but as a union of balanced interests, instruments of loyal cooperation and execution in good faith of obligations undertaken. The public order and the good morals are more often invoked through a series of imperative regulations.

2. Protection of Weaker Party to the Contract

In terms of contract groundwork, the history of the past three centuries „is the history of the liberalism itself, of its birth, its ignoring and its combating"[4]. The theories on the foundation of the contract oscillate between „two philosophical, political and economic conceptions: liberalism and positivism, with its variant, social utilitarianism"[5]. Even though the doctrine of solidarism is considered to have been born at the end of the 19th and the beginning of the 20th century, the idea of solidarity between people, used as legal term later on, is much older. It „was born nearly five centuries before our era"[6], crossing times under various forms of expression. Theorization of the idea of solidarity was significantly accelerated after the discovery of the cell, over 300 years ago, as the fundamental form of organizing living matter[7], discovery which was transposed to political and social analyses

[2] Fr. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, Paris, 10e Éd. Dalloz, 2009, p. 32
[3] Portalis, *Discours préliminaire prononcé lors de la présentation du Conseil d'Etat du projet de la commission du gouvernement,* apud V. Pătulea and Gh. Stancu, *Law of Contracts*, C.H.Beck Publishing House, Bucharest, 2008, p. 21
[4] P. Vasilescu, *Relativity of the Civil Juridical Act. Guidelines for a New Theory on the Private Law Act, Rosetti Publishing House, Bucharest,* 2003, p. 20
[5] L. Pop, *Civil Law Treaty. Obligations. Volume II. The Contract*, Universul Juridic Publishing House, Bucharest, 2009, p. 38
[6] M. David, *La solidarité comme contrat et comme éthique*, Institut international d'études sociales (Genève), coll. Mondes en devenir, Série points chauds, Paris, Imprimerie Berger-Levrault, 1982, p. 18
[7] The cell was discovered by the British Robert Hook in 1665; the cell theory was first enunciated by Mathias Jakob Schleiden and Theodor Schwann in 1839

through an organic vision, by Auguste Comte, according to whom society is a live organism while its individuals are its organs and cells.

The solidarism wave in the political thinking is usually linked to the personality of the political man Léon Victor Auguste Bourgeois, the author of the work Solidarité, published in 1896, of which analysis does not start from the individual as holder of some abstract rights but from the relations between people „linked to one another in time and space"[8]. While the autonomy of the will, of liberal nature, deems people to have been born free and equal, the solidarism considers that people are *de facto* unequal. The man is not free upon birth, as he lives in a given society and is thus unable to live outside it. He becomes the „debtor of his contemporaries, not only in his lifetime; he is born debtor in relation to society"[9]. The aim the author himself stated was to prefigure a „vast system of collective assurance targeting prevention and especially repair, by adding in a social solidarity debt, some evil consequences resulting from occurrence of some social risks"[10]. While after the French Revolution in 1789, the dominant conception would always place the political before the social, the solidarism wave always starts with social, to which the political factor subordinates. Dukheim, in sociology, and Léon Duguit, in law, see the legal norms as expressions of some facts and not of a political will of the government representatives. The evolution of this doctrine failed to be spectacular, as anticipated. After the Second World War, such reflections were mainly circumscribed to political speech, as mere ritualistic references.

The contestation of the autonomy of the will was actually noticeable in the second half of the 19th century, when the positivistic doctrine focuses on the objective law[11]. Referring to contract interpretation, Raymond Saleilles claimed at the turn of the 20th century that one must consider the „social purpose of this instrument of juridical solidarity and not the fantasy of each party"[12], while Louis Josserand, the one who was to theorize the law abuse, supports the idea that the subjective laws are to be exercised in accordance with their social finality[13]. Consequently, the solidarism transmuted to law sees the contract as a social fact expressing solidarism relations between individuals. Author of a monumental treaty on obligations in general, mandatory landmark for any doctrinarian approach of this important discipline for civil law, René Demogue considers that all contracts are concluded due to a social need[14], expression of the more and more bright-line division of work. To him, finality of the law is not the individual but the society. The law must take account of not only the man, whose rights are respected, but especially of the people in various legal situations, rich or poor, particularly poor"[15]. The fundament of the binding force of the contract does not lie in the will but in the social utility of any contract concluded[16]. The unilateral juridical act is defined as „the one in relation to which the social purpose targeted is coordinated with the individual will"[17] whilst the contract is perceived as „a small society inside which every person must work in order to reach a common goal, the sum of all individual purposes targeted by each individual, as well as in all civil societies or

[8] L. Bourgeois, *Solidarité*, Paris, Armand Colin, 1896, re-edited in 1998, Ed. Presses Universitaires du Septentrion, pp. 33
[9] Ibidem, pp 38-39
[10] Ibidem, p. 25
[11] See A.S. Courdier-Cuisinier, *Le solidarisme contractuel*, Paris, Litec, 2006
[12] R. Saleilles, *De la déclaration de volonté*, Paris, Pichon, 1901, p. 229
[13] L. Josserand, *De l'abus des droits*, Paris, Rousseau, 1905
[14] R. Demogue, *Notions fondamentales de droit privé*. Essai critique, Paris, A. Rousseau, 1911, p. 169
[15] Ibidem
[16] R. Demogue, *Traité des obligations en général, Sources des obligations*, Paris, A. Rousseau, 1923, t. I, no. 23, p. 69
[17] Ibidem, t. VI, *Effets des obligations*, Paris, A. Rousseau, 1932, no. 3, p. 9

companies"[18]. Starting from this analogy, Demogue is closer to the idea of a fair distribution of losses, typical of companies, wondering whether it would not be more equitable to divide the prejudicial consequences between debtor and creditor, for all cases of contract termination due to force majeure occurrence[19]. The question remains only rhetorical since the author does not support however this idea resourcing from the doctrine of solidarism elaborated by Bourgeois.

The theme of solidarism in contracts was re-updated at the time when the consumer protection movement expanded, when the triad „loyalty, solidarity, fraternity" tended to become a new slogan[20], replacing the famous wording by Fouillé, *qui dit contractual dit juste* with the one stating *entre le fort et le faible, c'est la liberté qui asservit, le juge qui affranchit*[21], expression legitimating the judge's intervention in contracts in order to reestablish the contractual equilibrium breached, as is the case in harm, unpredictability, penal clause, contract adaptation etc. Nevertheless, the author admits that „the contract hasn't yet become the sociability and solidarity place, as some hope and others fear..., this being the reason why it would be dismissive to pretend that we have entered a providence-contract era"[22]. Other times, the new solidarism vision gains pathetic accents, which trigger off approaches on loyalty, collaboration, etc every time meaning of good faith is analyzed in relation to contracts, all subordinated to „a strong sociability and friendship relation"[23] between parties, relation assimilated to love, „a brotherly-like love"[24].

At times, the contractual solidarism is used in a narrower meaning, admitting that the term „fraternity" is the expression of an idyllic or sentimental vision and thus unrealistic in connection with human nature and contractual relations"[25].

Renowned civil law authors do not hesitate to articulate their doubts in relation to this new concept, as it is occasionally understood, asking themselves whether the weaker party to the contract will not be therefore too favored, dictating his or her own law, so that the so long debated „contract crisis" is in reality the solidarism crisis, refused as basis of the contract"[26], while Jean Carbonnier, with his typical irony, states that „in a period when marriage has excessively turned into contract, some aim to transform all contracts into marriages.."[27]. The authors of manuals on civil obligations have nuanced positions: they either decline solidarism understood as love for our close ones, affirming that „to contract does not mean to enter a religion"[28], that the reality shows us interests of parties, most time divergent, even though they may converge on some precise aspects. According to them, if we subordinate the contract to such utopian vision, we will witness a „threesome", the judge being able to always intervene in the contract, substituting himself to the parties, which would mean a return to

[18] Ibidem
[19] Ibidem, nr. 274, p. 308
[20] D. Mazeaud, "*Loyauté, solidarité, fraternité: la nouvelle devise contractuelle*? in *L'avenir du droit, Mélange en homage à François Terré,* Presses Universitaires de France, 1999, nr. 6, p. 608
[21] The complete wording is *Entre le fort et le faible, entre le riche et le pauvre, entre le maître et le serviteur, c'est la liberté qui opprime et la loi qui affranchit.* It belongs to the French lawyer, high-priest and public speaker Henri Lacordaire (1802-1861)
[22] D. Mazeaud, *works quoted*, p. 609
[23] A. Sériaux, *Droit des obligations*, 2 edition, Éd. Presses Universitaires de France, 1998, nr. 55
[24] Ibidem
[25] Cr. Jamin, "*Pledoyer pour le le solidarisme contractual*", in *Le contrat au début de XXI-e siècle. Études offerts à Jacques Ghestin*, Éd. Librairie Générale de Droit et de Jurisprudence, Paris, 2001, p. 441
[26] Ph.Malaurie, L. Aynès, Ph. Stoffel-Munck, *Les obligations*, 4th edition, Paris, Éd. Defrénois, 2009, p. 369
[27] Jean Carbonnier, *Les obligations*, 22nd edition. Paris, Éd. Presses Universitaires de France, 2000, p.227
[28] Fr. Terré, Ph. Simler, Y. Lequette, *works quoted*, no. 42, p. 44

dirigisme. Other authors discreetly avoid this topic and continue to relate themselves to the will of the parties, „a controlled will, groundwork of contract"[29].

This debate is far from being closed. Under the title „Contractual Solidarism, Myth or Reality?", the Law School in La Rochelle hosted in 2002 a reunion which had as guests two of the most important promoters of this trend, as well as other reputable French Civil Law personalities. The discussions held highlighted both arguments supporting the contractual solidarism theory and arguments combating such theory. They were all published at a later date[30].

To the arguments already mentioned further doubts were attached, as Professor Laurent Leveneur expressed them. Among the most central we mention the following[31]:

- the solidarity as evoked by the partisans of this trend lacks support in real life. The ambiguous term „fraternity" relates to an idyllic or sentimental vision and is thus unrealistic in contractual relations;

- the same author asks himself what parties' union would consist in when relating to sale-purchase contracts, the main civil contract, given that their interests are structurally divergent: the seller would want to sell a good for a higher price, contrary to the interests of the buyer. The same contrariwise exists in the other civil contracts as well as contracts between professionals, so that „the contract law must be conceived in relation to the man, as he actually is and not as he should be"[32];

- the pre-contractual obligations relating to informing may be autonomously substantiated, without the theory of solidarism explaining them. A non-follower of solidarism, Georges Ripert rightfully mentions that „every contracting party is the guardian of his o her own interest and must thus inform himself or herself. The party failing to provide the other party with the information the latter could get on his or her own shall not be deemed accountable. The situation changes only if the reticence becomes guilt imputable to either party who has abused the ignorance of the other party"[33];

- the informing and counseling-related obligations of the parties during contract performance, tough possibly qualified as expressions of solidarity typical of our epoch, find however their grounds in express stipulations of the law or of the contract;

- demanding the contracting parties to form a union with a common goal, in good faith, is a much too imprecise objective. One may not practice law using such general and equivocal concepts;

- the new wording „loyalty, solidarity, fraternity" by Denis Mazeaud represents three vague directives which leave room for arbitration to the detriment of parties' security. Ever since 1937 Eugène Gaudement warned that such solidarism conception „risks to suppress the freedom in relation to agreements and to lead to a state solidarism"[34], while they increasingly legitimate the intervention of the state in the space of the parties' will[35];

- the abovementioned author affirms that the objective of solidarism to institute „a law of unequal contractual relations" in order to ensure protection of the weaker party to the contract is not practical and hence he does not subscribe to such project, even though,

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[29] Ph. Malinvaud, *Droit des obligations*, Paris, Éd. Litec, 2007, no. 75, p. 55
[30] Under supervision of L. Grynbaum, M. Nicod, *Le solidarisme contractuel*, Paris, Éd. Economica, 2004
[31] L. Leveneur, *Le solidarisme contractuel: un mythe,* in *Le solidarisme*, works quoted, pp. 173-191
[32] Apud Fr. Terré, Ph. Simler, Y. Lequette, *op. cit*., nr. 42, p. 47
[33] G. Ripert, *La règle morale dans les obligations civiles*, 4th edition, Éd. Librairie Générale de Droit et de Jurisprudence, Paris, 1949, p. 89
[34] *Théorie générale des obligations*, 1937, p. 31, apud L. Leveneur, works quoted p. 187
[35] M. Mekki, *L'intérêt général et le contrat*, Paris, Éd. Librairie Générale de Droit et de Jurisprudence, Paris, 2004, pp. 258-369

considered in itself, it is correct. Such objective may be achieved only by making use of the classical instruments of law, building laws apt to prevent any abuse of the economic power. If disloyal maneuvers must be repressed, encouraging sentimentalism shall not be required.

The stated skepticism of one of the promoters comes to unite with all of the above. According to him, solidarism does not concur with the ideology of the man's fundamental rights, being perceived as an instrument of individual emancipation[36].

Having to make statements in connection with the essence of the contract in his recent treaty on obligations, Professor Liviu Pop states: „the free and constrained will of the contracting parties does not miss and may not miss from the groundwork of the contract; a contract is unconceivable unless the will of the contracting parties exists. The essence of the contract is made up of two inseparable elements: the will of the contracting parties and the contractual interest of each individual party. Nevertheless, the parties shall also observe the imperative law"[37].

This new relation between the freedom of will and the need to ensure a contractual balance is an orientation which we find in all European drafts of contract law codification, taken over by our new Civil Code as well, through a set of new legal solutions, both for the pre-contractual stage and for formation and execution of the contract. We will now refer to some of them, the ones which evidently illustrate the metamorphosis of our contractual law under the influence of a new wave of its moralization, imposed by the solidarism vision.

3. Equilibrium between Services, New Contractual Justice Consecrated by the Romanian Civil Code in Force

Published in a period when the European offer on contract law codification is richer than ever, represented by the Principles of the European Contract Law (PECL or the Lando Project), the Unidroit Principles applicable to international commercial contracts (PU), the Contract European Code (CEC), proposed by the private lawyers of Pavia under the leadership of Professor Giuseppe Gandolfi, the Draft Common Frame of Reference (DCFR) proposed by the Study Group for a European Civil Code led by German Professor Christian von Barr, the French obligation law and lapse of time Reform Pre-Project elaborated by a team of university professors led by Professor Pierre Catala, the current Civil Code offers us a regulation meant to ensure protection of the weaker party to the contract. A moralizing regulation which separates from the conception of the Civil Code to respect the sovereign will of the parties and which allows the intervention of the judge every time contractual equilibrium re-establishment is required, through a series of legal solutions taken over from both the Civil Code of Quebec (CCQ) and from Civil Code of Italy (CCI).

1. Good faith, guiding principle in relation to contract. The Civil Code in force consecrates the good faith as a guiding principle in contracts, in accordance with the model of the Civil Code of Quebec[38]. According to art 1170 Civil Code, „the parties must act in good faith both upon negotiation and conclusion of the contract, and while it is in force. They may not remove or limit this obligation". The extent to which the new regulation considers this principle essential makes it appear again in connection with contract formation in art. 1183 Civil Code regarding „good faith upon negotiation". Among others,

[36] Cr. Jamin, *Le solidarisme contractual: un regard Franco-Québécois*, www.themis.umontreal.ca
[37] L. Pop, *works quoted.*, p. 76
[38] 1375. La bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son exécution ou de son extinction.

one considers „contrary to requirements of good faith the conduct of the party initiating or continuing negotiations without having the clear intention of concluding the contract", action which, pursuant to par. 4, triggers the delictual liability.

The confidentiality obligation related to pre-contractual negotiations also forms part of this generic concept of good faith. This obligation is set forth at art. 1184 Civil Code and goes as follows: „when confidential information are divulged by either party during negotiations, the other party shall not divulge and use them to his or her own benefit, regardless of whether the contract is concluded or not". Failure to observe this obligation shall trigger delictual liability for what one calls *culpa in contrahendo*.

2. An enhanced protection of consent. Unlike legal solutions rendered by the old Civil Code, preoccupied with ensuring contract stability, the regulations on vitiations of consent in the current Civil Code considerably enlarge the cases of contract annulment, in their attempt to ensure an efficient protection to the party disfavored upon contract conclusion.

The new legal characterization of *error* abandons the classical association with the substance of the object. According to art. 1207 Civil Code, „the party who, upon contract conclusion, was in an essential error, may request its annulment provided the other party knows or, as the case may be, would have known that the fact connected to the error was essential to contract conclusion". Paragraph 2 of the same article enumerates the cases of essential error, among which rightful error and error regarding mere contract reasons.

As for the criteria used in assessing the error, there are two possible perspectives to relate it so as to decide whether it was decisive upon contract conclusion: a psychological *in concreto* assessment of the circumstances deemed by the parties to be crucial upon contract conclusion and an *in abstracto* approach, in connection to which error is assessed in relation to an evaluation standard, to the requirements of a reasonable individual, opinion shared by a large majority.

Even though inspired by the Civil Code of Italy (CCI), the regulation of the current Civil Code adopts the subjective conception and takes into consideration only „the circumstance deemed by the parties to have been essential". Nonetheless, in order to avoid questioning the stability of both the contract and the legal trade, admitting annulment for cause of error claimed by one party who may be driven by the desire to avoid executing his or her obligations, the current Civil Code stipulates that one may demand annulment „provided the other party knew or, as the case may be, would have known that the fact connected to the error was essential to contract conclusion". It is what the CCI defines at art. 1428 to be the relevance of error, linking the contract annulment not only to the essential character of the error but also to its „recognizability" by the other party.

Unlike the classic regulation, the current Civil Code admits contract annulment for *error connected to own service*. In synallagmatic contracts, the error is usually tied to the service rendered by the other party. The circumstance that art. 1110 French Civil Code refers to „the object of the agreement" in singular was interpreted by the French doctrinaires as a sign towards the fact that the writers of the Napoleon Code aimed only the error concerning the counter-service, the service received and not the service rendered[39], motivating that the solution of contract annulment for error tied to own service would imply unacceptable consequences. However, both the doctrine and the jurisprudence promoted the

[39] Fr. Terré, Ph. Simler, Y. Lequette, *works quoted*, p 203

contrary thesis[40], according to which annulment of contract may also be called for in connection with own service, solution prepared by the current regulation.

A regulation different from the classic one is concerned with recognition by the current Civil Code of *the rightful error* as vitiation of consent, solution which incontestably indicates some progress and lines up in the orientation of the modern European legislations[41] by which an end is put to doctrinarian controversies on this subject, in connection with applicability of the *nemo censetur ignorare legem* principle.

A new innovation of the current Civil Code is the recognition of the error over some external elements of the contract, among which *the reasons for which such contract was concluded*[42]. In accordance with art. 1207 par. 2 point 4 Civil Code, „the error regarding the mere contract reasons is not essential, except when the parties, by their own will, considered such reasons decisive[43]"

The new regulation is part of an increasingly contract moralizing tendency, a tendency which refuses the legal protection to those proven to have been negligent, in line with the *de non vigilantibus non curat praetor* rule. According to art. 1208 par. 1 Civil Code, „the contract may not be annulled if the fact related to the error could have been, as the case may be, known with reasonable diligences". As it looks, such refusal of legal protection in case of inexcusable errors is proven to be a genuine punishment substantiated on the fault of the *errans* who has failed to previously inform himself or herself on the concrete service of the co-contractor or failed to request support of a specialist when such operation would have implied expertise.

As for the concrete determination of the excusable or inexcusable character of the error, it is a matter of fact which must be assessed by the judge who shall take account of the circumstances under which the contract was concluded, as well as the age, the experience, the education of the errans. For example, the petition filed by an architect in reference to annulment of a contract concluded for the purchase of a piece of land, grounded on the error concerning the impossibility of erection on that land, was denied by the French jurisprudence[44]. The same reasons are valid for the rightful error. What is yet to be necessarily stated is that the error triggered by deceit is always excusable.

Along the same lines of the contract moralizing preoccupation, art. 1209 New Civil Code states that „the contract shall not be annulled for errors relating to an element in connection to which the error-related risk was assumed by the party invoking it or, as the case may be, should have been assumed by such party". This stipulation may be found both in the PECL (art. 4:103 par. 2 letter b) and in the PU (art. 3.5 par. 2 letter b). The new regulation is more complete as it also includes among reasons for contract annulment: deceit by omission, deceit by reticence.

As regards *violence*, according to art. 1216 (1) Civil Code, „the request for contact annulment may be filed by the party who signed the contract under a „justified fear inflicted with no right by the other party or a third party". Par. 2 states that one can speak of violence „when the fear inflicted is of such nature so that the party under threat may have believed, as the case may be, that, without his or her consent, his or her life, own person, honor or goods would be exposed to a serious and imminent danger" while par. 3 stipulates that „the violence

[40] For details see D. Chirică, *Error, Vitiation of Consent in Contracts*, Law no. 7/2005, pp. 20-21

[41] The Italian Civil Code acknowledges in art. 1429 point 4 the rightful error as cause for annulment of contract provided it is essential, i.e. was the only or the main reasoning to conclude it.

[42] Among other indifferent cases of error are errors in connection with non-essential qualities of services, consequences of contract, other than its effects, error in connection with value, calculation error.

[43] Final part of the text was introduced as a result of an amendment we proposed.

[44] B. Starck, H. Roland, L. Boyer*, Droit civil. Les obligations. 2. Contrat*, 6th edition, Litec, 1998, p. 182

may also trigger off contract annulment when it targets a close person, such as husband, wife, predecessors or successors of the party of whose consent was vitiated". Pursuant to the last paragraph, „violence is assessed to exist taking into consideration age, social status, health and character of the party on whom violence was exercised, as well as any other circumstance which might have influenced the latter's condition upon contract conclusion".

The current Civil code assimilates *threat with exercise of a right* to violence. In line with art. 1217 Civil Code, „violence also means the fear inflicted by the exercise of a right or the threat with the exercise of a right made in order to gain obviously excessive advantages"[45]. The regulation inspired, among others, by the Civil Code of Italy (CCI) and the Catala Reform Pre-Project, could have been more refined. According to art. 1114-1 in the Catala Pre-Project, it is preferable as it refers to abusive exercise of a right, i.e. change of exercise of such right from its initial purpose. In accordance with the French civil law doctrine[46], a right is abusively exercised not only when an obviously excessive advantage is gained, as defined in the text proposed for analysis but also when the legal means used are either imaginary or have a different legal finality compared to the initial one.

In line with the same attempt to enlarge the possibilities of annulment for contracts concluded under external pressures, the new regulation assimilates the *state of necessity* to violence in contracts, accepting it as vitiation of consent when it is also exercised by another person outside the contract. In this case the obligation of the other party to have been informed is no longer required, such as the deceit. The same solution is prepared by the Catala Pre-Project which extends the violence by art. 1114-3 to the case when „a party undertakes under a state of necessity or dependence, provided the other party exploits such situation of weakness and gains by agreement an obviously excessive advantage".

According to art. 1218 Civil Code, „the contract concluded by a party under a state of necessity may be annulled providing that another person benefited from such circumstance". In order to motivate the amendment, we are told that „every time a person agrees to conclude a contract which offers the other party an excessive advantage under the pressure of a threat which does not originate from another person but from an external event, such threat does not constitute violence to the extent to which the other party acted in good faith. The person who causes, maintains or amplifies a state of necessity shall not be deemed to have acted in good faith".

A new regulation retracing the border between the public and the private order in contract is the one reserved to *harm*[47]. The current Civil Code visibly opts for classifying harm as vitiation of consent. Therefore, according to art. 1221 par (1) „one may speak of harm when one party, taking advantage of the need, inexperience or lack of knowledge of the other party, stipulates in his or her favor or another person's favor, upon date of contract conclusion, a service of a value considerably higher than the value of his or her own service". This option of the new regulation was influenced by the tendency of the contract law codification drafts to admit harm, either as a cause for annulment of agreements which brought one party an excessive profit, or to allow the judge to adapt such agreements in order to re-establish the contractual equilibrium.

[45] The phrase "advantages which are excessive in an obvious way" is difficult and may be replaced with the wording „obviously excessive advantages."
[46] Ph. Malinvaut, *works quoted*., p. 140
[47] For details, see S. Neculaescu, *Harm – vitiation of consent or contractual misbalance?*, in RRDP no. 3/2010

In terms of doctrine and wondering in connection with the future of harm, the French civil law authors rule in favor of the objective conception[48], stating that the most appropriate punishment is contract revision so as to ensure its stability, solution which is preferable to retroactive annulment of harmful agreement.

Most Romanian civil law authors qualify harm as a vitiation of consent[49], legal classification which is sometimes contested, since there is support of the theory according to which harm is related to the capacity to contract,[50] or is an objective vitiation of contract consisting in an economic misbalance[51]. Other authors side with the ones who support the objective theory of harm, analyzing it inside the object of legal act and not of consent[52]. There have recently been arguments in connection with the theory according to which harm should be a special cause for contract cancellation and not a vitiation of consent, the following statement being made „it is recommendable that the harm should b regulated in close relation to contractual equilibrium, as a condition that the object of any onerous and commutative contract will have to comply with"[53].

We support this opinion, considering that the vitiations of consent, whichever they may be, are exclusively punished by contract annulment and lead to reinstatement of the parties in statu quo ante, solution which most time fails to satisfy the interests of the victim who is more concerned with contract revision and rearrangement of services rather than its cancellation. In fact, this solution is also laid down by PECL, art. 4:109 point 2, text according to which, at the request of the party harmed, the court may adapt the contract so as to align it with what the parties should have agreed upon in compliance with requirements of good faith. We find the same solution in art. 3. 10 par. 2 PU.

To the arguments already mentioned by the Romanian doctrine in favor of the objective conception on harm, we may add a few more considerations regarding finality targeted by punishment of harm in contracts.

The authors of the normative texts of the Civil Code motivate the option to classify harm as vitiation of consent by an „extension of the scope of harm" because „in the contemporary society it is required that the law maker should protect the party significantly disfavored in economic and informational terms against the abuses made by the stronger party".

If such further extension of harm to contracts concluded between adults corresponds indeed to this stated finality, subordination of harm to subjective condition that the party would have received a considerably higher service „by taking advantage of the need, the inexperience or lack of knowledge of the other person", may not protect the interest of the victim of such contractual misbalance, forced to provide evidence to support such circumstance. By conditioning harm to the attitude of the person who benefited from the need, the inexperience or the lack of knowledge of the other person we will favor the

[48] Ph. Malinvaud, *works quoted*, p. 212, B. Starck, H. Roland, L. Boyer, *works quoted*, p. 351, Fr. Terré, Ph. Simler, Y. Lequette, *works quoted*, p. 297

[49] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Treaty on Romanian Civil Law*, vol. II, All Publishing House, Bucharest, 1997, p. 506, Gh. Beleiu, *Romanian Civil Law. Introduction to Civil Law. Subjects of Civil Law,* Universul Juridic Publishing House, 9th edition, revised and supplemented by M. Nicolae and P. Truşcă, Bucharest, 2007, p. 160, G. Boroi, Civil Law. General Part. Persons. 3rd edition, revised and supplemented, Hamangiu Publishing House, Bucharest, 2008, p. 229, *O. Ungureanu*, Civil Law. Introduction. 8th edition, C.H. Beck Publishing House, Bucharest, 2007, p. 185

[50] I. Rucăreanu, *Vitiations of Consent*, in *Treaty on Civil Law. General Part*, vol. I, Academiei Publishing House, Bucharest, 1967, pp. 182-187

[51] P. Vasilescu, in I. Reghini, Ş. Diaconescu, P. Vasilescu, *Introduction to Civil Law,* Colecţia Universitaria Publishing House. Sfera juridică, Cluj-Napoca, p. 465

[52] S. Neculaescu, *Civil Law. Introduction to Civil Law*. Hamangiu Publishing House, Bucharest, 2008, pp. 144-145

[53] L.Pop, *Contractual Equilibrium and Harm in Contracts*, Law no. 11/2008, pp. 79-98

stronger party, presumed to have acted in good faith and disfavor the weaker party, forcing the latter to provide evidence which is most times impossible as it related subjective aspects. Or, under such circumstances, we could ask ourselves, what is more important in case of harm, to punish the strong or to protect the weak? An elementary spirit of justice urges us to be firm in this option and to prefer the weak party. In fact, the word „harm" refers to injuring the disfavored and not to shrewdness of the party who has taken advantage from the contract concluded.

3. Contract adaptation, a solution in case of breakdown. In accordance with art. 1213 Civil Code „the party who is the victim of the essential error remains bound to the contract provided that the other party agrees to its execution; in this case the contractual provisions shall be appropriately adapted". The same solution, yet more minutely regulated, may be found in art. 4:105 PECL setting forth that in case the *errans* states that he or she understands to execute the contract, the latter is deemed to have been concluded under the terms and conditions set forth by the victim of error. The other party shall notify his or her intention to execute the contract or shall promptly execute the contract after the victim informed him or her on the meaning rendered to the contract. Acceptance by the victim to execute the contract shall cancel his or her right to annul the contract while all prior notifications will be null and void. When both parties have committed the same error, the court may, at the express request of either party, align the contract with what was reasonably agreed upon. We believe that this solution is by far better and complies with the *potius valeat quam ut pereat* principle. This is the reasons why it should be taken over.

Additionally, contract adaptation occurs in case of *lack of foresight*. In line with art. 1271 par. 1 Civil Code „the parties shall execute their obligations, even though such execution has become more onerous", while par. 2 stipulates that „the parties shall negotiate in order to adapt or terminate the contract if the execution has become excessively onerous to either party due to a change of circumstances". Should the parties fail to carry out conventional adaptation of contract within a reasonable timeframe, judiciary adaptation of contract is stipulated „in order to equitably distribute between parties both losses and profits arising from change of circumstances".

4. Conclusions

The regulation offered by the Civil Code in force retraces the borderline between public order and private order in relation to contracts, tackling again the fundamental meanings of the contract, concept which no longer designates a space reserved to the sovereign will but which constitutes the most important legal instrument of the market economy. In order to represent the law of the parties having concluded it, the contract itself has to observe the public order. A new order meant to protect the weak link of the contract and to ensure contractual justice as well as balance between services rendered.

THE DEPOSIT CONTRACT IN THE NEW CIVIL CODE

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Abstract: *The new Civil Code mainly maintains the dispositions of the Civil Code in 1864 regarding the deposit contract, in both its forms (the deposit itself and the deposit held in escrow). Nevertheless, in art. 2103-2143 of the New Civil Code, for the deposit agreement a juridical regime is defined, one that has new elements contributing to the improvement of the agreement and its adjustment to the new realities. The present study is focused on the current regulation of the deposit agreement containing a series of changes, among which the most important refers to the effects of the agreement. The dispositions of the art. 2127-2137 also kept our attention, article in which the hotel deposit is separately regulated, as a variety of the deposit itself.*

Keywords: *regular deposit, necessary deposit, hotel deposit, unregulated deposit, deposit held in escrow.*

1. Introduction

In the present paper we will approach the juridical regime of the deposit contract whose existence, especially in the current economical conditions, cannot be ignored from the juridical point of view.

The deposit is part of the category of real civil contracts and it is a contract with its own, specific rules, which give it autonomy. The element that distinguishes it is the creation of a mechanism necessary to develop all the juridical relations whose purpose is to keep and conserve the asset. Besides, the importance of the deposit was noticed since ancient times when some varieties of the contract were also created.

In the current paper we aim at analyzing the regulation of the deposit contract in the New Civil Code, while emphasizing the novelty elements.

Stepping on the traditional analysis structure we will consider aspects such as: notion, juridical features, types, validity conditions and the effects of the deposit contract.

2. Content

2.1. Notion, juridical features, delimitation from other contracts

2.1.1. Notion

According to art. 2103 par. (1) in the New Civil Code: The deposit is that contract by which the depositary receives from the depositor a movable asset and has the obligation to keep it for a certain period of time and to return it in kind. As we have already shown, by means of the deposit contract one can only transmit the asset storage[1]. This passes from the depositor to the depositary, and good-faith plays an essential part in the contract execution[2].

The contract validly is concluded by the mutual agreement of the parties and the effective hand over of the asset to be stored. In case the asset is already in the depositary's possession, the mutual agreement of the parties is enough [art. 2103 par. (2)].

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[1] Etimologically, the word *depositum* means to deposit the asset in a place.

[2] This is also the reason why in the Roman law that who violetd the deposit was declared an infamous.

2.1.2. Juridical features

The lease has the following juridical features:

- is a *unilateral* contract*,* as it creates obligations for the depositary only;

- by its nature the deposit is a *gratuitous* contract*.* If the depositary is a professional, the contract is presumed to be a contract for good and valuable consideration [art. 2106 par. (1)]. In such a case, if the parties did not stipulate the remuneration in the contract, the court will set it in relation to the value of the services rendered [art. 2106 par. (2)];

- it is a *real* contract*,* which means that besides the parties agreement, one must also hand over the asset to the depositary. Thus, art. 2103 par. (2) in the New Civil Code is categorical: „Returning the asset is a condition for the valid settlement of the deposit contract". There are also cases in which the asset hand over does not take place effectively, as it is already in the depositary's possession. In such a case the parties' agreement is enough, and the loan contract turns into a deposit contract[3]. Just like other real contracts, the deposit contract can be preceded by a *pre-agreement*, which can be concluded by the simple agreement of the parties, and the asset transmission is not necessary[4];

- it is an agreement that does not transfer any property rights, as by its settlement the property right is not transferred, and neither is the asset possession to the depositary, as this one is a simple temporary holder;

- it is a *intuitu personae* agreement when referring to the depositary. But, by exception, the law allows a sub-lease with the depositor's consent, or in case the hand over of the good must be done to another person (art.2112).

2.1.3. Delimitation from other contracts[5]

By its features the deposit contract is an autonomous agreement which is different from other agreements, like the loan for consumption basis, the bailment or the mandate. Thus, the deposit is different from the loan for consumption basis (mutuum) as, although in both contracts we can find the asset remittance, in the deposit case the asset is returned, while in case of the loan for consumption basis, the asset is used. Thus, the New Civil Code sets that, in case the deposit's object is constituted by fungible and consumable assets, the deposit is similar to the loan for consumption basis, the same ruled being applied, except in the case expressly stipulated by the law, case in which the parties' intention was to keep the asset for the depositor's benefit [art. 2105 par. (2)].

Compared to the loan for use basis in which case the bailee can use the asset, the deposit is different as the depositary is forbidden to do this. At the same time, while the bailor cannot ask for the asset restitution before the due date, the depositor can ask it before. Another difference is that, while the bailing contract is by its essence a gratuitous contract, the deposit can also be an agreement for good and valuable consideration.

In relation to the mandate agreement, the deposit is different by the fact that while the depositary keeps an asset, the agent is forced to do something.

2.1.4. Types of contract

Similarly to the previous regulation, the New Civil Code distinguishes two types of deposit: *the deposit itself and the seizure.* The last one is different from the deposit itself by

[3] Eugeniu Safta-Romano, *Contracte civile,* vol. 2, Graphix Publishing House, Iaşi, 1995, p. 68.

[4] Francisc Deak, *Tratat de drept civil. Contracte speciale,* Actami Publishing House, Bucharest, 1998, p. 318; Eugeniu Safta-Romano, *op.cit.,* p. 68; Liviu Stănciulescu, Vasile Nemeş, *Dreptul contractelor civile şi comerciale,* Hamangiu Publishing House, Bucharest, 2013, p.405.

[5] For details see Francisc Deak, *op.cit.,* pp. 322 – 323.

the fact that its object is made by litigious assets, movable or non-movable, and it may be both conventional and judiciary.

The deposit itself is in all cases conventional and its object is constituted by movable non-litigious assets. It has the following varieties: the regular deposit (voluntary and regulated), the necessary deposit, the unregulated deposit and the hotel deposit. As rules applicable to the regular deposit also represents common law in the matter of the deposit, we can consider the necessary deposit, and the unregulated deposit and the hotel deposit as only its varieties[6].

2.2. The regular deposit (volunteer)

2.2.1. Validity conditions

Just like in the previous regulation, the regular deposit's object cannot be but movable assets (fungible and consumable) individually determined, given the fact that the depositary has the obligation to return the asset deposited itself. As an exception, when the restitution is no longer possible, it can be achieved by equivalent [art. 2109 and art. 2116 par. (3)].

For the contract validity, the law asks to the depositor to be able to do administration deeds, nevertheless being more concerned with the depositary, who needs to have full exercise ability, as the main obligation is in his charge. In case the depositary is not a capable person, the depositor can ask for the asset restitution or, in its absence, fir its counter value (art. 2109).

Usually, the depositor is also the asset owner but as the contract is not an agreement that transfers any property rights, another person's asset can be the object of the deposit agreement. Thus, the user, the lessee, the pledgee can have the position of depositor. From the dispositions of art. 2110 in the New Civil Code, which faithfully repeat the dispositions of art. 1610 in the Civil Code from 1864, the conclusion is the validity of the deposit made by a depositor who not the asset owner[7].

As for the contract proof, the New Civil Code also disposes that in order to prove it; the deposit agreement must be set in writing. The doctrine and the judicial practice unanimously rendered the fact that its written form is demanded by the law *ad probationem*, in order to prove the contract existence and not *ad validitatem.* The proof of remitting the asset, as it is a *stricto sensu juridical fact*, can be achieved by means of any proof.

2.2.2. The effects of the agreement

I. The depositary's obligations

a) The obligation to keep. The depositary's responsibility.

According to art. 2107 par. (1) in the New Civil Code, the depositary is asked to take care of the asset kept, as if it were his own asset. Consequently, his fault is interpreted *in concreto*, meaning that the depositary's responsibility is less significant than that of the debtor in general. The explanation resides in the fact that as the deposit is gratuitous, the depositary has no benefit from the agreement[8].

[6] Liviu Stănciulescu, Vasile Nemeş, *op.cit.,* p. 407.

[7] According to ar. 2110 in the New Civil Code: "*If the law does not stipulate otherwise, the depositary cannot ask the depositor to prove that he is the owner of the asset stored. This proof can neither be asked to the person assigned by the depositor in order to return the asset".*

[8] Francisc Deak, *op.cit.,* p. 325; Eugeniu Safta-Romano, op.cit., p. 70; C.Hamangiu, I. Rosetti-Bălănescu, Al Băicoianu.... p. 627.

But more rigorous is the depositary's culpa assessed when the deposit is for good and valuable consideration, the depositary is a professional or when he was allowed to use the asset [art. 2107 par. (2)]. In such a case, the depositary is responsible for the asset according to the abstract type of the cautious and diligent person, applying the general rule in the matter of contractual liability– *culpa levis in abstracto.*

As in the previous regulation, the depositary is allowed to use the asset received to keep only if the depositor expressly set this in his agreement (art. 2108).

As he cannot use the asset received to keep, the depositary can neither entrust it to another person, unless the depositor agrees to this or unless he is forced by circumstances to act otherwise. In such cases, on condition the depositor is informed of the sub-deposit, the depositarty will be liable only for the sub-depository's choice or the instructions given to him [art. 2113 par. (1)]. If the above mentioned condition is not observed, the depositary is liable for the sub-depositary's deed as if it were his own [art. 2113 par. (2)]. In all cases, the depositor can dispose of a direct action against the sub-depositary [art. 2113 par. (3)]

As a consequence of the depositary's diligence obligation regarding the asset storage, the law stipulates that this one must change the place and type of storage set in the agreement, if such a change is necessary to keep the asset from destruction, loss, theft or damage and it is so urgent that one cannot wait for the depositor's consent (art. 2111).

In art. 2114, the New Civil Code expressly regulates the depositary's liability for acts of God as well, when he did not observe the obligation to change the place or type of storage, he used the asset without having the depositor's agreement or he set a sub-deposit. In this case, the depositary will be exonerated of this liability if he proves that the asset would have perished even if these obligations had been observed.

b) The obligation to return the asset stored

The depositary must return the asset received to store, obligation that is usually executed at the agreement expiry. As for the term of the restitution, art. 2115 par.(1) in the New Civil Code stipulates that the depositor may ask at anytime for the restitution of the asset stored, even within the term set. Also, the depositary may compel the depositor to take hold of his asset, even before the due date, for serious reasons [art. 2115 par. (3)]. If such a due date for restitution is not set in the agreement, the depositary can return the asset at any time but only for well-grounded reasons [art. 2115 par. (4)]. According to art. 2116 in the New Civil Code, if the parties did not agree differently, the depositary must return the asset in the place where it should have been stored, and the expenses occurred by the restitution constitute the depositor's charge. As an exception, when the depositary unilaterally changed the place where the asset was stored, the depositor can ask either to bring the asset in the same place in order to return it, or to pay the difference between the expenses occurred by the restitution and the expenses paid without such a change. The asset is returned in the same condition as at the moment of restitution and any damage that was not caused by the depositary's deed is in the depositor's charge [art. 2116 par. (2)]. In the final paragraph of art. 2116 one regulates the depositary's obligation to pay damages to the depositor in case of culpable non-execution of the obligation to return the asset, at its updated value.

When the depositor dies, the asset is returned to his heir, although in the agreement another person was assigned for this purpose. If there are several heirs, the restitution made to one or several of these does not give them other rights, but those resulting from the legal stipulations referring to heritage. These rules also apply if the depositor is a juridical entity (art. 2117).

Once the asset was returned, the depositary must also remit the fruit of the asset deposited, referring to the fruit harvested, as he cannot use the asset. As for the financial funds deposited, the interest is due from the day when the depositary was in delay (art. 2118).

Article 2119 in the New Civil Code regulates the situation of the asset restitution in case of multiple depositaries, and in such a case the effects of jointly obligation apply, as in the case of several depositaries, case in which the restitution obligation represents the charge of that/those who possesses/possess the asset.

As an exception from the depositary's obligation to return the asset, the New Civil Code expressly stipulates those cases when he is justified to refuse the restitution, which are: when the asset was demanded by the owner or another justified person, when the asset was seized but the public authority or was taken from him otherwise, when the asset kept was lost by an act of God. In all these cases, the depositary must inform the depositor about the way he returned the asset or it was taken from him, otherwise he will have to pay damages, (art. 2120).

Where, without cause, the depositary refuses to return the thing deposited, the depositor can promote either an action for recovery of possession, as owner of the asset or a personal action, resulting from the deposit.

In art. 2121, the New Civil Code keeps the disp. of art. 1607 of the Civil Code in 1864, referring to the obligation of the depositary heir in case of sale of the property in good faith. Thus, if the depositary heir sold the property in good faith, without having known it is stored, he is forced to return only the price received or to submit the depositor his action against the purchaser, if the price has not been paid.

II. The depositor's resposibilities

The deposit is a unilateral contract which does not generate obligations for the depositor. The depository is the only one bound. However, situations may arise in which obligations can be created for the depositor, situations regulated by the New Civil Code in art. 2122 to 2123. Thus, these articles stipulate the depositor's responsibilities to reimburse the depositary the costs of keeping the property, to indemnify him for any losses due to storage and to pay remuneration in case of good and valuable consideration. If the restitution occurs prematurely, the depositor will be required to pay compensation only for the storage time. All these are contractual obligations that do not arise from the deposit contract but from actions following the agreement conclusion[9].

2.3. The necessary deposit

In art. 2124-2126 of the New Civil Code the necessary deposit is regulated. Considered a variety of the voluntary deposit, the necessary deposit is the deposit made under the threat of unforeseen circumstances that represent a real threat, the depositor being forced to entrust the property to another person without having the possibility to choose the depositary, or to prepare an agreement (written proof) [art. 2124 par. (1)]. Given the circumstances of signing the contract, the necessary deposit may be proved by witnesses and other evidence, regardless of the value of [art. 2124 par. (2)].

According to art. 2125 of the New Civil Code, the depositary may refuse to accept the goods only if they have a good reason for it. The text expressly regulates the depository's obligation to accept the asset, seen as a consequence of the agreement given prior to the depositor. This obligation is a benefit of the depositor as a guarantee on any refusal of the

[9] Liviu Stănciulescu, Vasile Nemeş, *op.cit.,* p. 410.

depositary to receive the property. The existence of this obligation is justified by the need to conclude the necessary deposit, as otherwise art. 2125 would be inconsistent with the principle of the agreement that governs any contract. Except the special provisions, the necessary deposit will have the same legal regime as the voluntary deposit [art. 2126 par. (1)]. The depositary's culpa will be assessed in concreto, depending on the care taken in preserving their own goods [Art. 2126 par. (2)].

2.4. The Hotel Deposit

The judicial practice in the matter determined a separate regulation of the hotel deposit in the New Civil Code. The base of this matter is art. 2127 - 2137 of the New Civil Code. In art. 2127 - 2130, the legislator establishes the liability of the hotel keeper for the theft, destruction or damage of goods brought into the hotel, goods detailed in art. 2127 par. (2). As this deposit has a good and valuable consideration, the hotel keeper's liability is assessed according to the type of abstract prudent man (bonus pater familias). The New Civil Code limits the hotel keeper's liability up to a value of one hundred times higher than the price displayed per day of the room offered for rental to a customer (art. 2128). The hotel keeper's liability is unlimited in those cases provided by art. 2129, considering his guilt, his refusal to take custody of goods in the store room and the expressed entrust of an asset. The hotel keeper is relieved of any liability in case of force majeure, or if it is proved that the theft, damage or destruction was caused by the client or the nature of the property (Art. 2130).

Article 2131 of the New Civil Code provides that the hotel keeper's obligation is to receive goods belonging to customers unless they are excessively valuable, uncomfortable or dangerous for both the hotel keeper and the location offering accommodation. But the hotel keeper has the right to examine the goods, to ensure they are kept in the safest conditions.

A special situation is considered by the provisions of art. 2132, according to which the responsibility for the goods deposited by the customer in the safe of the hotel room is limited up to a value 100 times higher than the price displayed for one day accommodation in that room.

In order to demonstrate the introduction of goods into the hotel, the client can use the testimony, regardless of the value of goods (art. 2133).

In art. 2134 the legislator expressly regulates the conditions under which the customer loses the right to claim compensation to the hotel keeper for theft, destruction or damage of the property brought by him or for him at the hotel. As an exception, if the goods are entrusted to the hotel keeper for safekeeping, or if the hotel keeper refused to receive and deposit the customer's goods that, by law, he had to receive, the customer is entitled to compensation.

For the situation when the client does not pay the deposit, the legislator provided a guarantee, setting a lien on the deposited goods for the hotel keeper, except for documents and personal effects without commercial value (art. 2135). The hotel keeper will be able to foreclose the lien, while applying the rules in relation to forced pursuit securities.

In art. 2137 of the New Civil Code, the legislator expressly stipulates those places that have the same legal regime as hotels. These are nursing homes, hospitals, hostels, sleeping cars and the like.

2.5. The unregulated deposit

A form of voluntary deposit is the unregulated deposit, whose object is fungible and consumable goods. In this case, the depositary may use and may consume the goods,

including the fruit thereof, as he is considered their owner[10]. At termination, the depositary will reimburse other goods of the same kind, quantity and quality to those received. When the deposit object is an amount of money, the unregulated deposit can be confused with the loan agreement (mutuum). In essence, for a proper separation of the two contracts, it is necessary to determine the real intention of the parties, as if they have decided to keep the money for the depositor's benefit, we are in the presence of the deposit agreement, and if they intended to hand over the money so that the amount of money can be used to satisfy a need of the recipient, the contract will be loan.

2.6. Conventional seizure

It is governed by the New Civil Code in art. 2138 2142. The seizure is a variety of the deposit, whose object is to store an asset in litigation until the end of it. Specific to this deposit is that property - movable or immovable - is retained by an individual called seizure administrator and is subject to dispute. Conventional seizure is based on the parties' agreement compared to the judiciary that is decided by the court. Thus, the parties, in a sovereign way, establish the seizure administrator's duties, rights and powers, otherwise the provisions of the New Civil Code being applicable. Like the depositary, the seizure administrator must keep the goods subject to seizure with the diligence and caution of a good manager [art. 2140 par. (1)]. When the nature of the asset requires, the seizure administrator shall conclude administration acts on the account of depositors, and the applicable rules are those of the mandate [art. 2140 par. (2)]. As the goods entrusted for storage to the manager seizure are in dispute, it is necessary to allow the court to sell them [art. 2140 par. (3)].

Given the reasons for setting this deposit, the goods will be refunded only on completion of the litigation proceedings, earlier return being possible only with the consent of all parties or by court order (art. 2141).

Conventional seizure is for good and valuable consideration, the seizure administrator being entitled to remuneration for the asset preservation. In all cases, he is entitled to demand payment of the costs of conservation and management of the seized property and compensation for losses related to it (art. 2142).

According to art. 2143 of the New Civil Code, judicial seizure is ordered by the court and is governed by the Code of Civil Procedure.

6. Conclusions

From the analysis undertaken in this paper, taking into account the novelty aspects posed by the deposit contract in the light of the new Civil Code, results an obvious reconfiguration of this very useful tool for civil relations.

The New Civil Code largely retains the previous regulation but it also brings important changes we sought to highlight in this paper.

In line with the evolution of the doctrine and jurisprudence on the matter, we note the interest of the legislator to incorporate in the legal text the solutions provided by them up to present for the new situations arising naturally in an evolving society. The novelty issues concern several new components of the legal regime of the deposit contract, which also

[10] Eugeniu Safta-Romano, *op.cit.,* p. 77.

caused a number of changes in the old provisions of which the most important relate to the effects of the contract (liability, termination of the deposit, return of the property).

We also noticed the provisions of art. 2127-2137 in the New Civil Code, which regulated separately the hotel deposit as a variant of the deposit itself.

As for the seizure deposit, together with the conventional form regulated by the New Civil Code, the legal form adapts itself to the new realities once with the entry into force of the new Code of Civil Procedure.

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ABOUT GOODS AND THEIR PRODUCES

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Abstract: *The importance of the goods determined the legislator to revise their mode of regulation by taking into consideration the doctrinaire comments upon this subject. Although, on the main, it's maintained the classification of the goods known by the civil Code of 1864, the new civil Code brings some notable novelties. Amongst these we mention the definition of goods made by law; the regulation of the tangible goods and of the intangible property; the division of the real estates into tangible real property and fixtures (this category has a new configuration which distinguishes between the goods that remain real estates and the goods that become real estates); the regulation of the movables by their nature, by anticipation and by the law determination and especially the products' regulation.*

Keywords: *goods, corporal goods; intangible goods, produces of the goods, fruits, products.*

1. Preliminaries. The fundamental categories of the civil law are the goods and the persons. But, they are not placed on the same level because the persons and especially the natural persons are values by themselves, the goods present importance because they serve for the satisfaction of the person's needs.

Within the theory of the civil law the matter of goods is treated in relation with the object of the civil report. Thus, although by object of the civil report it's understood the *parties' conduct, meaning the action or the non-action at which the active subject is entitled and at which the passive subject is bound*[1] because the respective conduct is often established in relation with goods, these are considered to be as derivative objects of the civil legal report[2].

Despite their importance, the goods hadn't a coherent regulation in the old civil Code which only resumed to make some disparate references to them. As an unitary and complete regulation of the goods didn't exist, the doctrine took the responsibility to develop and to polish up the concepts utilized by the civil Code and it elaborated a genuine theory of goods. The new civil Code's drafters[3] have revaluated the doctrinaire ideas and they have worked out the first complete regulation of goods and of their produces. This regulation was inserted in chapter I named "About goods in general", from the first title of the IIIrd book.

2. Notion. In the definition of the goods, the new civil Code starts from the notion of "things" as entities that are exterior to the person and that are useful to her. This definition is given by the provisions of art. 535 according to which "There are goods the tangible or intangible things which form the object of a patrimonial right". The Code includes in the definition a classification of the things that can be goods and they are the tangible things and the intangible things.

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[1] *G. Boroi, C.A. Anghelescu*, Curs de drept civil. Partea generala, second edition, Hamangiu Publishing House, Bucharest, 2012, p. 74.

[2] *Gh. Beleiu,* Drept civil român. Introducere in dreptul civil. Subictele dreptului civil, Xith edition revised by M. Nicolae, P. Truşcă, Universul Juridic Publishing House, Bucharest, 2007, p. 95.

[3] Law number 287/2009 which was republished as a consequence of the alterations brought to it by Law number 71/2011.

2.1. The tangible things. The tangible things are those which have a physical existence. There are included in here not only those who exist in a form which is directly perceptible by the human senses (for instance, they have a "body" which can be touched) but also those which can be detected only by special devices as the electromagnetic waves or those which are assimilated to them, the energies of any type which are collected and transmited at which article 539 paragraph (2) of the NCC refers, some micro-organisms.

Under the conditions clearly stated by law, elements or produces of the human body can be included in the category of things. We take into consideration the cells, the tissues and the human organs which can be extracted for transplants under the conditions of law, as article 68 of the NCC provides[4]. The humanity of these antropomorphic things (in Greek *antropos* meant human and *meros* – part) gives them a special status which is mainly characterized by their non-patrimonial feature[5]. Thus, a third juridical category appeared which is placed between persons and goods, category for which the law hasn't found yet a term for naming her[6].

2.2. The intangible things. Within the terminology of the new civil Code, the intangible things are those which do not have a physical existence, a natural one and they are creations of the human intellect. For this reason, it can be said that the intangible things are economic values which have an ideal existence, an abstract one and that is why they cannot be touched. As part of this category, we mention the following: the debts, the value titles (shares, bonds, the derivative financiary tools and others which are similar to them), the intangible properties (the commercial funds[7], the clients of a person who exercises a free profession, the literary and artistic property, the patent, the trade mark and others) and the commercial effects (the bill, the bill payable to order and the cheque).

The old civil Code considered that the patrimonial rights are goods by themselves and for this reason the doctrine included in the category of the intangible things the real estate rights and the real movable rights[8]. Thus, the old civil Code, by article 471 clearly qualified the usufruct and the servitudes as estates by the object they are applied to, category which included the actions which intend to vindicate an immovable.

According to the new Code, only the tangible or the intangible things which form the object of a patrimonial right, they are goods. Consequently, not all the patrimonial rights which have as an object a good can be qualified as goods, but only those which become appropriated by themselves, meaning that they turn into intangible goods and they form the object of other patrimonial rights, as are the patrimonial rights included in the commercial fund and the property right over a debt[9].

The intellectual property rights (which include the literary and the artistic property, the patent and others) have as an object an intangible thing and that is the intellectual creation which is not confounded with the property right over the material object in which this creation is incorporated[10].

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[4] To be seen *E. Chelaru,* Drept civil. Persoanele, in reglementarea NCC, third edition, C.H. Beck Publishing House, Bucharest, 2012, p. 25-31.
[5] *O. Ungureanu, C. Munteanu*, Tratat de drept civil. Bunurile. Drepturile reale principale, Hamangiu Publishing House, Bucharest, 2008, p. 73-74.
[6] *A. Tarby,* La bioéthique: ce qu'elle est, ce que dit le droit..., du Puits Fleuri Publishing House, Héricy, 2008, p. 84.
[7] *St. D. Cărpenaru,* Tratat de drept comercial român, Universul Juridic Publishing House, Bucharest, 2009, p. 135.
[8] *Gh. Beleiu*, op. cit., p.p. 105-106
[9] To be seen *V. Stoica*, Drept civil. Drepturile reale principale, C.H. Beck Publishing House, Bucharest, 2009, p. 38.
[10] *Idem*, p. 40.

The distinction between the tangible and intangible things stays on the base of some differences concerning the juridical regime. Thus, it was decided that only the tangible things,,category which includes the nominal shares too, only they are susceptible to be possessed and they are under the provisions of article 1909 of the civil Code, but not the intangible things[11].

However, the legislator's preference for the notion of "intangible things" it seems disputable to us. The notion of "thing" evokes by it the corporality so that in order to comprise in the same definition both the tangible goods and the intangible ones, we consider that it would have been preferable the reference to "economic values" as the doctrine has proposed under the influence of the old Code.

2.3. The criterion of the patrimonial character. Not all things are goods but only those which can be valuated in money and thus they can form the object of a patrimonial right.

As the property right is the principal patrimonial right, under the influence of the old civil Code it was said that the goods are only the things which are susceptible to be appropriated. As it resulted from our paper, there are other rights which can have as an object goods. For this reason, the new regulation preferred a more ample formulation and it referred to the things that can form the object of any patrimonial right. But, the idea of appropriation is implied as all patrimonial rights have as a ground the property right.

3. The classification of goods. The goods' infinity makes impossible their enumeration. On the other hand, the field of goods continously proliferates, especially for the intangible things. This is one of the reasons for which the legislator resorted to the classification of goods. Another reason, even more important, consists in the fact that the inclusion of the good in one or in other category, it gives us indications about the legal regime to which is submitted.

For the old civil Code, the fundamental distinction which practically included all goods it was the one between real estates (immovables) and movables. In other words, this division represented *summa divisio* in the matter of goods.

The classification was criticized by the juridical literature and it considered as imperfect and incomplete.

It is imperfect because there are goods about which it cannot be said they are immovable or movable, as the rights of debt or the copyright law. It is incomplete because it utilizes a single criterion (the one of fixity) and the old civil Code didn't took into account the fact that the goods may have many other features which produce legal consequences although within the content of its regulations has evoked sometimes such consequences (for example, concerning the obligation of giving a good, in lack of a contrary stipulation, the individually determined good had to be delivered at the place where it was on the date when it was contracted – article 1319 of the civil Code – the delivery of a generically determined good had to be done at the debtor's home, the payment was portable but not "cherabilă" – article 1104 of the civil Code).

On the other hand, the development of the society led to the apparition of new goods which were unknown when the old civil Code was adopted, as are the commercial funds and the various intangible properties.

It's the doctrine's desert the fact that by an updated interpretation of some disparate provisions of the civil Code it revealed other criteria and thus it offered more classifications

[11] ICCJ, commercial section, decision number 916/2010, Dreptul number 9/2010, p. 266.

of the goods. From all the classifications proposed by the doctrine, the new civil Code has retained only the following:

- real estates and movables (articles 536-540 and article 542);
- fungible goods and non-fungible goods (article 543);
- consumptible and non-consumptible goods (article 544);
- divisible goods and non-divisible goods (article 545);
- principal goods and accessory goods (article 546).

The classification of goods into tangibles and intangibles is only suggested by the reference to these two categories of things within the definition which article 535 NCC gives to the goods.

We'll present some of these classifications.

3.1. Real estates and movables. For the new civil Code too, the principal classification of goods is made into real estates and movables. The division into the two categories is made depending on the goods' nature and on the qualification given by law. The main criterion after which the division is made is the one of the goods' position in the space, of their fixity. The immovable or movable nature of a good is defined by law and the parties, by their convention, they cannot change it[12].

3.1.1. The real estates. The *real estates* (named also as immovables) are those that have a fix position or that are considered as having such a position by the legislator. If the old legislation divided them in three categories (immovables by their nature, estates by destination, estates by the object they are applied to), the new civil Code states only two categories: estates by their nature and estates by destination.

The immovables by their nature are those which directly enforce the physical criterion of a good's fixity[13]. From the provisions of article 537 NCC results that the goods' fixity can be natural or acquired.

The fixity is established in connection with the soil, so that the lands are the first estates by their nature which are mentioned by the legislator. These estates comprise both the ground's surface and the subsoil. Then, the legislator qualifies as goods that have a natural existence the springs of water and the water courses and also the plantations fixed in roots. Even if the water itself characterizes by mobility, the springs and the water courses are included by the legislator in the category of real estates because they have the origins in the soil which serves for the flowing.

A second category of estates by their nature is formed of the goods that fix or incorporate somehow in the lands, no matter if it's about goods that have a natural existence or they were built or manufactured by the person. But, it's necessary that the fixation or incorporation must have a permanent character.

From the artificial creations which are part of the category of estates by their nature, the legislator clearly enumerates the buildings and any other works fixed in the land with a permanent character, the platforms, the installations of exploitation the submarine resources situated on the continental plateau. The enumeration made by the legislator is not a restrictive one, but it's an exemplification. Within the final part of article 537 NCC it's mentioned that also it is an estate by its nature all that, in a natural or in an artificial mode, it's incorporated in lands or in the other estates clearly mentioned. It's about the plants fixed in the soil even if they are not part of the plantation and also it's about buildings or

[12] *O. Ungureanu, C. Munteanu*, op. cit., p. 79.
[13] *N. Reboul-Maupin*, Droit des biens, second edition, Dalloz Publishing House, Paris, 2008, p. 33.

works that are fixed somehow in the buildings or in pre-existing works. For instance, the plumbing of a building is an estate by its nature.

The immovables by destination are movable goods by their nature but that are considered as immovable by the legislator, taking into consideration their future situation.

Article 538 NCC divides these goods into two categories: goods that remain immovable and goods that become immovable. It's about the goods that remain immovable after they were separated from an immovable good and the goods that become immovable because of the destination given by their owner. In both cases, the goods we talk about are movable by their nature but, by a fiction, the legislator considers them as immovable.

The first category is regulated by the provisions of article 538 paragraph 1 of the NCC which distinguishes two hypotheses: the first is when some materials are temporary separated from an immovable and the second situation when it's about the temporary detaching of some integrant parts of an immovable.

The provisory separation of some materials from the immovable they are part it could be possible in the case of some reparation works, fittings up, extensions and others like them. Although by separation, the mentioned materials become movables by their nature, by considering their future situation, the legislator considers them as immovables if two conditions are fulfilled.

The first condition is a subjective one and it consists in the proprietor's intention to incorporate again the respective materials in the same immovable from which they were separated. If this intention doesn't exist and the separation is definitive, the materials will keep their character of movables by their nature which they got as a consequence of the separation.

The second condition is an objective one and it consists in keeping the materials in the form they had in the moment of the separation so that they could be incorporated again as they are within the immovable from they were taken out. The form's modification can be considered as an indication of the destination's change which takes out these goods out from the category of immovables.

The second thesis of the first paragraph of article 538 NCC indentically solves the situation of the integrant parts of an immovable. For instance, it's about the case of some modules or installations which are temporary detached from an immovable by its nature from which they made part.

These become movables by their nature too, but the legislator considers them as immovables if the two conditions are fulfilled: the subjective condition which consists in their destination to be integrated in the immovable from which they were detached (conditions that are clearly stated) and the objective condition of keeping the detached part in its initial form. This second condition is implicated because only by this mode the reintegration is possible.

According to article 538 paragraph 2 NCC, the materials brought in order to replace the old ones, they become immovables. It's about the materials brought to replace the ones that were detached from a pre-existent immovable, which whether they cannot be utilized or they were given another destination by the proprietor. Taking into account their future destination, the legislator qualifies these goods as immovables (it could be said that it's about "immovables by anticipation", but the legislator doesn't utilize this term).

In this case too, two conditions have to be satisfied: an objective one which consists in bringing the materials on the place of the immovable they are to be incorporated and a subjective one which refers to the fact that the owner has to give them the destination to replace old materials which were separated from the same immovable.

The moment when the materials become immovables is the moment when their destination is established. If we interpret the legal text in the sense that this moment would be the one of their effective incorporation in the building it would mean that the regulation is useless because this situation is already provided by the final part of article 537 NCC.

The legislator gave up to the category of immovables by the object they are applied to which it was formed of the real estates rights[14]. The solution is imposed because according to article 535 NCC, the goods are only the things that constitute the object of a patrimonial right and are not goods the patrimonial rights by themselves. Despite all these, the legislator submits the rights of estate concerning the immovables to the same rules that are enforceable to the latter ones, if is not provided in a different mode (article 542 paragraph 1 NCC).

3.1.2. The movable goods. The movable goods (named also as "movables") are those which haven't a fix seating in the space.

According to article 539 paragraph 1 NCC "The goods which are not considered by the law as immovable, they are movable goods". The criterion utilized by the legislator for the establishment of the movables is the one of exclusion: any good which isn't immovable, it's movable. This criterion proves its utility not so much in order to delimit the category of movables from the one of immovables by their nature which it's an easy thing if we consider the fixity of the second ones, but it's useful to delimit these goods from the immovables by destination, taking into consideration thr fact that they are movable by their nature.

Under the influence of the old civil Code, the movable goods were divided in three categories: movables by their nature (article 473 of the civil Code), movables by the determination of law (article 474 of the civil Code) and movables by anticipation (category which was created by the doctrine). The new civil Code keeps this division.

Thus, there are part of the category of movables by their nature all the goods which don't characterize by fixity and the law doesn't consider to be immovables. Within this category there are included the electromagnetic waves or those assimilated to them, the energies of any type that are produced, collected and transmitted, under the conditions of law, by any person and they are put in his service, no matter the movable or immovable nature of their source (article 539 paragraph 2 NCC).

The movables by anticipation are immovables by their nature, which under some aspects they are submitted to the juridical regime of the movable goods, taking into consideration that they are meant to become, in the near future, movables by their nature.

The utility of this classification reveals when the parties draw up juridical acts by which they intend to transfer the property of these goods which, at the moment of drawing up the act, they are component parts of an immovable from which they are to be detached in the near future. The qualification of the goods as movables, depending on their future situation, it will lead to the fact that the juridical act it will be submitted to the legal regime of alienation for movables and not to the one specific to the real estates (immovables).

Article 540 paragraph 1 NCC enumerates the goods which can be qualified as movables by anticipation: the fruits of an immovable (both the natural and the industrial fruits) as long as they were not gathered, the riches of any type of the soil and subsoil (as the stone from the quarry, the

[14] In the juridical literature, it was stated the opinion that, according to the NCC's provisions the real estates are divided in the three categories: immovables by their nature, immovables by destination and immovables by the determination of law. The immovables by the determination of law would be the real estates rights, except for the property right over an immovable good, this is nothing else but the new name of the immovables by the object they are applied to. To be seen *G. Boroi, C.A. Anghelescu*, op. cit., p.p. 75-76.

mineral deposits, the mineral water and others); the plantations which are to be cut and the buildings incorporated in the soil which are to be demolished.

The enumeration made by the legislator is an exemplification and other goods, as the trees from the forest which are sold before the cutting, they can be considered as movables by anticipation. Because of the relativeness of the effects of a legal act, in the rapport between the parties, the respective act produces its effects beginning with the moment of its drawing up, while for the third parties the respective goods become movables only beginning with the moment of their separation. This is the reason why by the second paragraph of article 540 NCC it's provided that the opposability for the third of the legal act is got only by noting in the land register.

The movables by the determination of law are the rights, others than those over the real estates, which can be appropriated by themselves, meaning that they turn into intangible goods and they form the object of other patrimonial rights. As part of this category are the rights of debt, the patrimonial rights included in the commercial fund and the intellectual property rights[15].

Concerning the rights of debt, it has to be mentioned that they constitute the majority of the movables by the determination of law. Even the obligation to deliver a real estate which is consecutive to its sale, it has a movable character (with the exceptions mentioned above), therefore the correlative right of debt has the same character. The other patrimonial rights are not considered to be movables, but they are only submitted to the rules referring to them, within the limits provided by law (article 542 paragraph 2 NCC).

3.2. The fungible goods and the non-fungible goods. The division of the goods into fungible and non-fungible is made by the provisions of article 543 paragraph 1 NCC. The mode in which the fungibility is defined in the next paragraph of the same legal text[16], it evokes also another classification, known by the doctrine and that is the one which divides the goods in goods that are individually determined and goods that are generically determined, the last are the very goods which are determinable by number, measure or weight.

The dependence which exists between the classification of goods as fungibles or non-non-fungibles and their qualification as generically determined or individually determined and also the circumstance that the last qualification has another legal consequences [for instance, if the object of the juridical act is an individually determinated good, the real estate right transmits, as a general rule, in the moment when the parties' simple agreement is realized, even if the respective good was not delivered [article 1273 paragraph 1 first thesis and article 1674 NCC]; if the object of the juridical act is formed by generically determinated goods, the real estate right transmits in the moment of the individualization or of the delivery, except for the case when the parties distinctly provided [article 1273 paragraph 1 second thesis and article 1678 NCC], all these make us consider that it would have been preferable that the new civil Code had contained a distinct article especially for it. This fact imposed all the more, as article 1678 NCC clearly refers to "goods of genus".

The criterion utilized to divide the goods between fungible and non-fungible is their aptitude to be replaced ones by others in the execution of an obligation [article 543 paragraph 2 final part of the NCC].

[15] In the juridical literature it was stated too that the following are movables by the determination of law: the real rights over a personal estate, all the rights of debt, the intellectual rights (named also as intellectual property rights or rights of intellectual creation), the legal action concerning a movable right. *G. Boroi, C.A. Anghelescu*, op. cit., p. 77.

[16] According to article 543 paragraph 2 NCC "There are fungible the goods which are determinable after number, measure or weight thus they can be replaced ones with others in the execution of an obligation".

According to article 545 paragraph 3 of the NCC, the parties can qualify by the juridical act, a good which is divisible by its nature as indivisible. Such a qualification will transform the obligation from divisible into indivisible.

4. The goods' produces. The legislator has given up to the classifications of the goods between fruit-bearing goods and non-fruit bearing goods which was stated by the doctrine under the influence of the old civil Code, but it has regulated the fruits and the products. From these provisions it can be deduced that there are fruit bearing goods and productive goods. Thus, article 547 NCC clearly establishes that the goods' produces are the fruits and the products.

The fruit bearing goods are those which periodically produce other goods named as fruits and by this their substance is not affected.

The productive goods are those which, by affecting their substance, they give rise to other goods, named as products.

4.1. The fruits. The fruits have 2 characters: the periodicity and the conservation of the good's substance. The definition given to the fruits by the legislator within the first paragraph of article 548 NCC ("The fruits represent those produces which derive from the utilization of a good without diminishing its substance") it evokes only this feature of not diminishing the substance of the fruit bearing good. The periodicity is mentioned only within paragraph 2 and 3 of the same article as a characteristic of the natural and industrial fruits.

Thus, it could be understood that the civil fruits don't characterize by periodicity although the existence of this character cannot be contestable at least in the case of those enumerated as examples by the provisions of article 548 paragraph 4 NCC (the rents, the leases, the interests, the rents' income and the dividends).

As in the old regulation contained by article 522 and 523 civil Code, the fruits are divided in three categories: natural, industrial and civil.

According to article 548 paragraph 2 NCC "The natural fruits are the direct and periodic produces of a good, which are obtained without the human's intervention, as it would be those that the land produces by itself, the production and the animals' spore". From the content of this definition results the fact that the natural fruits have the following characters: they are natural, spontaneous and periodic. The periodicity can be regular or not.

Article 548 paragraph 3 of the NCC defines the *industrial fruits.* The name of "industrial fruits" was kept by reasons of tradition, within the terminology of the old civil Code the term of "industry" was utilized in order to name the person's work (for instance, according to article 1492 civil Code, at the constitution of a society, a member's contribution can consist in his "industry"). In order to avoid the confusions, the legislator offered an example of industrial fruits and it clearly referred to the crops of any type.

These fruits have too a direct and periodic character, but they are not spontaneous as the natural fruits because their obtaining is the human's intervention result.

The civil fruits are named also as incomes (article 458 paragraph 1, second thesis of NCC). "The civil fruits are the incomes resulted from the utilization of the good by another person by virtue of a juridical act as are the rents, the leases, the interests, the rents' income and the dividends".

As the third person utilized the good on the strength of a juridical act, the civil fruits have a remunerative character. For this reason, the civil fruits are indirect, their taking by the owner depends on the payment which is made by the third person that utilizes his good.

The distinction is made between the natural and industrial fruits, on the one hand and the civil fruits, on the other hand it's the only that presents a real juridical importance because there are differences concerning the manner in which the respective produces of the fruits bearing goods can be obtained and the moment of getting the property over them. Thus, while the natural and the industrial fruits are directly obtained by the owner without the necessity of other person's intervention, the civil fruits can be only indirectly obtained by the payment made by the third person to the proprietor. From here, there derive the solutions adopted by article 550 NCC concerning the moment of getting the property right over the fruits: from the date of separation from the good which produced them in the case of natural and industrial fruits; day by day in the case of civil fruits.

4.2. The products. Basing on the provisions of article 549 NCC we define the products as it follows: the products are the goods which are extracted at irregular intervals from another good of which substance they consume, in this mode, extraction which will finally end by using up the respective good.

The consumption of the productive good's substance and the absence of periodicity differentiates the fruits from the products.

As in the case of fruits, the products are ought to the proprietor, if the law doesn't provide in other way (article 550 paragraph 1 NCC).

Although into the category of products are included by the legislator the trees and the stone from a quarry, there are situations in which they can be considered as fruits. Thus, if the exploitation of the forest or of the quarries is made in a regular mode, according to the rules established by the owner, the wood, the stone or the sand that are obtained by this mode they will be considered as fruits which are ought to the usufructuary, and not as products. This is the interpretation given by the doctrine to the provisions of articles 530 and 537 of the old civil Code and their correspondent is represented by articles 718 and 721 of the new Code[17].

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[17] To be seen *O. Ungureanu, C. Munteanu*, op. cit., p.p. 101-102.

CONSIDERATIONS ON THE DISCIPLINE COMMITTEE MEETING, IF PRIOR DISCIPLINARY RESEARCH OF EMPLOYEES

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Abstract: *The Labour Code establishes the employer must establish the internal rules and disciplinary proceedings to appoint a person to conduct preliminary investigation procedure in accordance with statutory provisions. It is unlawful to establish a Disciplinary Board, the research is carried out by several persons may void the sanctioning decision, the investigation have not undergone any harm. Their employer is required to establish clear rules on disciplinary research procedure, including mandatory participation which may be legal adviser to the Disciplinary Board meetings in the absence of such claims in the Rules of Procedure, counsel is not required to participate meetings of the Board.*

Keywords: *prior disciplinary procedure, disciplinary committee, legal counsel*

According to art. 40 para. 1 lit. e of the Labour Code the employer has the right to assess the disciplinary offenses and apply appropriate sanctions under the law,to the collectivecontract applicableto internal rules, a situation which led to the conclusion that the employer has the prerogative disciplinary entitled to apply law, disciplinary sanctions whenever its employees he found that they have committed a disciplinary offense. Note that as stated in the practice of law,[1] the employer is not obliged to implement the recommendations or proposals to prior research.

To conduct preliminary disciplinary research[2], says the art. 251 para. 2, the employee shall be convened in writing by the person authorized by the employer to carry out research, indicating the subject, date, time and place of meeting.

It was pointed out that," to the mandatory nature of Article 251,it does not allow the employer to authorize than one person to carry out research as such it is not legal to establish a disciplinary committee because it would violate the letter of the law, even if the bylaw would have say other things, more over, since he can not violate any law under which he is issued, and if the research is carried out by several personsit may void the decision of sanctioning the investigated undergone no harm ".[3]

We consider justified the view that the employer may appoint a committee to conduct the preliminary investigation of the employee who has committed a disciplinary offense as examining issues related to determining the degree of culpability, the existence of the offense, the circumstances of their commission and so on, will enjoy a closer examination and subjectivity will be removed.

It should be noted that the Labour Code establishes the obligation on the employer to establish the internal rules and disciplinary proceedings to appoint a person to carry out the preliminary research, in accordance with statutory provisions.

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[1] Civil Decision No.1739 of 19 November 2010 the Court of Appeal Ploiesti Jurisprudence Bulletin Annual Directory 2010 Juridical Univers Publishing House, Bucharest, 2011, p 40

[2] Dan Țop, *Employment Law- Social security Law,* Bibliotheca Publishing House, Targoviste, 2012, p.245

[3] Şerban Beligrădeanu, *Competent of the rules on obligatory disciplinary research s prior on the application of disciplinary sanctions under Labor Code*,in Law nr.3/2012, p 67 -79

In legal literature[4] it was told that we are in the presence of a prior binding and the establishment of such a procedure is both in the interests of employees, and employers.

Internal Rules as an internal[5] act of the employer, contains, according to art. 242 lit. g of the Labor Code, rules relating to disciplinary proceedings, therefore, it is the employer who is required to establish clear rules on disciplinary investigation procedure, among these being mandatory participation of legal counsel to the Disciplinary Board meetings, in the absence of such claims in the Rules, the counsel is not required to attend meetings of the Disciplinary Board.

No one could argue that such an obligation would returnto legal counsel pursuant to its duties, in general, to protect the rights and legitimate interests of the employer.

According to Law 514/2003[6] provides consulting legal counsel or representation authority or public institution or service which is a legal entity with relationships.[7] Neither the legislation nor the Statute provides professional legal counsel not among the duties of lawyers and therefore required to attend the meeting of the Disciplinary Board to conduct preliminary disciplinary investigation.

Since the law does not contain such an obligation, the presence of legal counsel in the discipline may be required when it is determined by the employer in the bylaw, such participation can be inserted as a task and duty in the job of the counsel.

In relation to art. 252 para. 1 of the Labour Code, according to which" the employer has the sanction issued by a decision in writing within 30 calendar days from the date of knowledge of the commission of the breach, but not later than 6 months date the offense" in practice and doctrine they have emerged two opinions regarding the calculation period of 30 calendar days, the calculation of that period of 30 calendar days is made in relation to the date the employer became aware of the act and not the date on which qualified it as misconduct, the employer is obliged to carry out this term and disciplinary investigation and second opinion [8]that within the period of 30 days is made in relation to the date the employer receives disciplinary research report by the act of the employee is qualified as misconduct, the employer is held that in the 30 days to apply sanctions.

In favor of the second opinion in legal literature they have made the following arguments:[9]"Important is the specific legal nature of the concepts used to calculate the term legislator, date the deed (which may or may not misconduct) and date when the aware of the irregularity disciplinary, about the word commit there are used distinct notions: which may be legal or illegal act and misconduct that is only unlawful, Article 252 para. 2 letter. to distinguishes between fact and misconduct, referring to the description of the act constituting misconduct;

In the civil servants legislature have qualified one judicial qualification, that the misconduct and in the Labor Code deliberately uses two distinct concepts as legal, act and disciplinary action ″.

This oppinion is justified by the intention of the legislator, which can not be related only to a literary argument of, „committing the offense ", which would send only at the time the offense occurred.

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[4] *Idem*
[5] O. Tinca, *Overview and critical comments on the internal rules* in Law no. 11/2009, p. 76-87.
[6] Published in the Official Gazette, Part I no. 857 of 5 December 2003, amended by Law no.246/2006.
[7] Dan Ţop *Features of the employment of lawyers,* Romanian Labour Law Review, no. 2/2004
[8] Al. Athanasiu and collective, *Labor Code. Comments on articles*., Vol II C H Beck Publishing, 2011, p 384 -385
[9] I.T.Ştefănescu, *Some controversial aspects of the Labour Code and Social Dialogue Law*, Law no.8/2012, p 115-123

High Court of Cassation and Justice in Decision no. 16/2012[10] upheld the appeal on points of law and established that „in the interpretation and application of art. 252 para. 1 of the Labour Code, the moment from which time starts to run for 30 days for the sanction is the date of registration of the final report of the disciplinary investigation prior to the registration unit."

The reasoning behind this decision is in the following circumstance:,, when the „act „was committed, „is distinct and previously when determining the „existence of misbehavior", as a consequence of the need to verify the condition that, the act „be committed" in violation of law, internal regulations and so on. In this context, it should be considered the distinction between committee or person authorized by the employer to carry out the preliminary investigation and the person entitled to issue a decision imposing a disciplinary sanction.

The 30 days can not report than when the person entitled to issue a decision imposing a disciplinary sanction is aware of the outcome of prior disciplinary research and only if he found the constituent assembly required for the existing misbehavior.

Reasons for the period of 30 days is that the employer, after studying the complete essay prior disciplinary investigation to establish whether there is misconduct, which are its consequensec and if necessary apply a disciplinary sanction which ones ought to be applied. It was also considered necessary motivation and time allocation in fact and in law by the employer for such a measure, to be censured motivation towards judicial control"

On the situation whether disciplinary investigation of different facts, but committed by the employee in the same circumstance can make a single disciplinary research,by the same disciplinary committee in the absence of legislation to regulate this, we believe that the answer can not only be affirmative.

Conducting a single disciplinary research is subject to the acknowledgment of the employee in our opinion, by calling writing,about all facts he is accused to be able to formulate appropriate conditions defense.

In practice court [11]decided that „the infringement of the rights of defense provided for by art. 3 of Law no. 51/1995 on the legal profession, that the law is not a special law in relation to the Labour Code. Law no. 51/1995 is a law for the exercise of the legal profession, and in this case the law applicable to the employment relationship is the Labour Code. Prior disciplinary research is governed by art. 267 et seq. Labor Code and does not provide any penalty or obligation on the employer to get to the employee's attorney for prior disciplinary research that takes place in connection with the employment relationship. Article 3 para. 1 of Law no. 51/1995 refers to the activities of lawyers, and in the circumstances described in point.a. of the letter. j is found the phrase „in the law "or the law in question, art. 267 Labor Code,doesn't provide that the employer is obliged to accept the presence of a lawyer to assist the employee to one prior disciplinary investigation."

Referring to this, the literature [12]has emphasized that the employee must appear in person at the convocation of the employer to prior disciplinary research, not by proxy, been him even a lawyer, [13]a situation arises in the regulation limiting the text of Article 251

[10] Published in the Official Gazette, Part I, no. 817 of December 5, 2012

[11] Bucharest Court of Appeal, in dec. Civ. 2415 of 14 April 2011, unpublished., In Lucia Uta, Florentina Rotaru, Simona Cristescu, *Labor Law, disciplinary* (2) Hamangiu Publishing, Bucharest, 2013, p 84

[12] Civil Decision no. 341/R/2009 of Alba Iulia Court of Appeal, Division of labor conflicts and social security - www.jurisprudenta.org

[13] Serban Beligradeanu, *Competent of the rules on obligatory disciplinary research s prior on the application of disciplinary sanctions under Labor Code*.art. supra, p 67-79

paragraph 4 of the Labour Code which shows that it is not legally possible to assist the employee to any other person.

However, the author quoted above concludes that," one can not deny the employee the lawyer assistingin the preliminary investigation and provided mandatory and to be assisted by a union representative."

Opinions expressed above we consider justifie,d in support of it can make other arguments, besides the fact that the text of Law no. 51/1995 does not preclude the lawyer assisting in the prior disciplinary research and that „during the prior disciplinary investigation, the employee is entitled to be assisted by a lawyer under rules enacted for the legal profession, the right being upper one and distinct from that to which the employee may be assisted in the application by a representative of the union whose member is. "[14]

Thus, according to art. 267 para. 4 of the Labour Code, during the prior disciplinary research employee is entitled to formulate and support all defenses in his favor and give the person empowered to conduct research all the evidence and reasons they deem necessary... "in this context we consider that it ensures employee disciplinary investigation right of defense, as you may not be properly protected only by recourse to a lawyer.

As has been pointed out,[15] under art. 3. 1 lit. e of Law. 51/1995[16]on the organization and the profession of lawyer, attorney work is done by "defense and representation means specific legal rights and interests of individuals and legal entities in their relations with public authorities, institutions and any Romanian or foreign ".

Thesis II of the article cited, that, „and the right to be assisted, at his request by a representative of the union whose membership is "considered, rather than „a valence social dialogue"[17], we can not appreciate that a restriction on the right of the employee to be assisted by counsel, by virtue of this legal text can not be extended[18] to others, but rather as a reflection of the role of trade unions in defending their members.

If we interpret narrowly the text it would mean that an employee which is not a union member does not have the right to counsel, which would constitute a violation of the rights of defense, a situation which certainly was not followed in any case by the legislature.

Moreover, such a position that the legislature was considered[19]restrictive and discriminatory. It should be noted that very often the members of the Disciplinary Board shall be assisted by legal counsel or by a lawyer without having to think about inadmissibility of such care.

In legal literatureit has also expressed the view that the failure of the employee to disciplinary investigation without objective reason can not constitute a ground for disciplinary. Labour Code, setting, art. 267 para. 3, a specific result, namely, punishment without prior disciplinary investigation, does not establish in this way a special sanction, but merely a procedural facilitation for the employer. Otherwise, the employer's authority would be undermined by accepting theft, without an objective reason of the employee from performing a duty in connection with work

[14] A. Ţiclea, *Considerations on research of misbehaviorin* in Romanian Magazine Labor Law. No. 1/2010, p 26.
[15] Ştefan Naubauer, *Considerations on employee right to be assisted by a lawyer in the prior disciplinary research,* in the Romanian Labor Law no. 2/2010, p 91-92
[16] Law no. 51/1995 on the organization and the profession of lawyer republished in the Official Gazette, Part I, no. 113 of March 6, 2001, as amended and completions.
[17] Stefan Naubauer, art.quated. over
[18] Alexandru Ţiclea, *Treaty of Labor Law*, sixth edition, revised and enlarged, Legal Publishing House, Bucharest, 2012, p.803.
[19] I.T.Ştefănescu *Some controversial aspects of the Labour Code and Social Dialogue Law*, Law no.8/2012, p 115-123

Employee's failure to convene made under the terms of the Labour Code, without any objective reason entitles the employer specifies art. 251 para. 3 have punishment without making prior disciplinary research. However we must consider whether there is an objective reason (eg hospitalization, or was on leave to care for a sick child), in which case the employer is suspended disciplinary approach. Because the legislature did not set a deadline by which it may suspend disciplinary investigation, it will last as long as the there is a cause of suspension of the individual employment contract.

Legislature intended to regulate the exercise of disciplinary power thorough the employer. Thus, as stated above, to the extent not met any of the steps set out in the Labour Code, or was not made in relation to all legal requirements sanction is the nullity of the dismissal decision.

PROCEDURE OF RULING A PRIOR JUDGMENT FOR SOLUTION OF A MATTER OF LAW IN THE REGULATION OF THE ROMANIAN CODE OF CIVIL PROCEDURE - A NEW PROCEDURAL MEAN TO INSURE A UNITARY JUDICIAL PRACTICE?

Maria FODOR*

Summary: *At the art. 519-521 Code of civil procedure it is established the possibility that, ex officio or upon the request of the parties, a panel of the High Court of Cassation and Justice, of the Court of Appeal or of the Court of Law, invested with the solution of the case in last instance, to request the proper section of the supreme court to rule a prior decision to solve as principle, a new matter of law, on which elucidation depends the solution on the merits of the respective case.*

Keywords: *New matter of law: solution as principle; compulsory prior decision.*

1. Preliminaries

The interpretation and unitary enforcement of the laws by the courts of law represent one of the criteria of appreciation and determination of the quality and efficiency of justice[1]and also a necessity resulted from the need to guarantee the security of the legal relationships. The litigants have to be aware that the act of justice is non discriminatory and equitable[2].

A major deficiency of the Romanian legal system, repeatedly notified by the European Commission, is represented by the non unitary judicial practice, on which unification[3] measures have to be taken. Insuring the interpretation and unitary enforcement of the law by the courts of law is therefore, a desideratum of the justice, which achievement has to become a reality. An important part in such purpose is of the High Court of Cassation and Justice, constitutionally and organically[4] appointed to ensure this interpretation and enforcement.

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1 See H. Diaconescu, *Discuții privind neconstituționalitatea instituirii caracterului obligatoriu pentru instanțele judecătoreşti al dezlegărilor date problemelor de drept prin deciziile emise de Înalta Curte de Casație şi Justiție - Secțiile Unite în recursul în interesul legii*, in „Dreptul" nr. 12/2006, p. 90.

2 P. Pop, D. Grosu, *Mijloace procedurale prevăzute pentru unificarea practicii instanțelor judecătoreşti în lumina prevederilor noului Cod de procedură civilă*, in „Revista română de drept privat" nr 3/2011, p. 97.

3 The reform of the Romanian judicial system is a commitment taken by our country since the period of the negotiations in view of adhesion of Romania to the European Union. See: The Decision of the Commission 2006/928/CE of 13th December 2006 (JOL 354, 14.12.2006, p. 56); The Report of the Commission toward the European Parliament and Council regarding the progresses done by Romania within the Mechanism of cooperation and verification of 2008 and the reports of the years 2009, 2010, 2011, 2012, published at Bruxelles, on the web site http:eur-lex.europa.eu.

4 The art. 126 paragraph (3) of the Constitution of Romania outlines that "The High Court of Cassation and Justice provides the interpretation and unitary enforcement of law by the other courts of law, according to its competence", text taken by the Law nr. 304/2004 regarding the judicial organisation.

At the level of regulation, the legislator of the new Code of Civil Procedure[5] consecrates, near the appeal on the law interest[6], in the 2nd Book, 3rd Title, a new mean to ensure the unitary judicial practice, called: „Notification of the High Court of Cassation and Justice in view to rule a prior decision to solve some matters of law"[7]. Although, the legislative instruments do not represent, themselves a solution that solves the lack of unity of the judicial practice, being necessary their effective enforcement in the purpose of the efficiency of the act of justice, as „it eliminates, as possible as it can, any contradiction in decisions of the courts of law, ruled in similar situations"[8].

It is to see in what measure the new regulated mechanism shall efficiently answer to the objective suggested by the legislator and shall lead to the transformation of the Romanian jurisprudence in a predictable one, able to respond to the reasonable expectations of the litigants.

2. *Notification of the High Court of Cassation and Justice in order to rule a prior decision to solve some matters of law*.

From the art. 519-521 Code of civil procedure, consecrated to the procedure under discussion, result the requirements of admissibility, which, as we shall illustrate, customises it in relation to other procedural means to insure a new unitary judicial practice. This way, pursuant to the art. 519 Code of civil procedure, the object of the notification can be formed, as the case of the appeal on the law interest, only a matter of law, not a matter of fact. But, unlike the appeal on the law interest, it can have as object law issues differently

[5] The new Code of Civil Procedure (for which we shall further use the abbreviation „C.pr.civ."(code of civil procedure)) has been adopted by the Law nr. 134/2010 regarding the Code of Civil Procedure (published in the „Official Gazette of Romania", part I, nr. 485 of 15th of July 2010), modified by the law nr. 76/2012 to enforce the Law nr. 134/2010 (published in the „Official Gazette of Romania", part I, nr. 365 of 30th of May 2012) and republished in the „ Official Gazette of Romania", part I, nr. 545 of 3rd of August 2012. Pursuant to the art. I point 1 of the Emergency Government Ordinance nr. 4/2013 (published in the „ Official Gazette of Romania", part I, nr. 68 of 31st of January 2013), Code of civil procedure entered en force on 15th of February 2013. This method to ensure an unitary judicial practice is regulated also by the art. 475 -477 of the new Code of Criminal Procedure adopted by the Law nr. 135/2010, published in the „ Official Gazette of Romania", part I, nr. 486 of 15th of July 2010, still not entered en force. I mention that the regulation of the juridical institution under discussion from the new Code of Criminal Procedure is quite different from the one provided by the art. 519-521 Code of civil procedure, but similar to the regulation from the form of the Code of Civil Procedure before its modifications brought by the Law nr. 76/2012.

[6] The appeal on the law interest has been regulated for the first time in the French law in 1790 and it has been taken also in the Romanian law by the Law of the Court of Cassation of 1861, art. 13, being suppressed in 1949 and reintroduced by the Law nr. 59/1993.

[7] Obviously, ensuring an unitary judicial practice can be also achieved by other legal means (for example, pursuant to the art. 501 paragraph (1)of the Code of Civil Procedure, in case of cassation, the decisions of the appeal courts on the solved law issues are compulsory for the court that judged on the merits), because, as it has been affirmed, „it is illusory the hope that the unitary enforcement of the law and an unitary jurisprudence is ensured only by appeal on the law interest" (V. M. Ciobanu, pe hhtp://www.juridice.ro/198680/inalta-curte-de-casţie-si-justitie-intre-aniversarea-a-150-de-ani-de-la-infiintare-si-lupta-sa-cu-noul-cod-de-procedura-civila.html.). See also M. Fodor, *Mijloace procesuale vizând unificarea practicii judiciare în noul Cod de procedură civilă,* in the volume of the national Environment Law Conference „Noile Coduri în evoluția dreptului românesc", Universul Juridic Publishing House, Bucharest, 2011, pp. 110 and following. With regard to the fact of ensuring the interpretation and uniform and effective enforcement of the Union law it has been established the special procedure of pre-judicial reference and important rules have been developed in such purpose by the jurisprudence of C.J.U.E. The procedure of the preliminary question, conceived as a connection, a cooperation instrument between the Romanian courts of law and the Union courts of law in the member states of the European Union, has been initially established by the art. 234 of the Treaty of Establishment of the European Union and the art. 150 of the Euratom. (See M. Fodor, *Întrebarea preliminară (prejudicială) în aplicarea uniformă a dreptului comunitar în statele membre*, in the volume „Dreptul comunitar şi dreptul intern. Aspecte privind legislația şi practica judiciară.", Hamangiu Publishing House, Bucharest, 2008, pp. 89 and following.). Following the modifications brought by the Treaty of Lisbon (2009), the new main legal frame of the matter is represented by the art. 267 of the treaty, where the provisions of the art, 234 are taken over with some modifications.

[8] P. Pop, D. Grosu, *quoted opera*., p. 102.

solved by final legal judgments, the procedure of rendering the prior judgment is applicable only in the situation in which the courts of law are facing a „new matter of law", which is ascertained ex officio or upon request of the parties. Therefore, the ascertaining of the novelty of the matter of law implies knowledge of the jurisprudence. But which jurisprudence? As it has been already told, the „new matter of law" usually appears, in case of recent normative documents or which, due to different reasons, for a while there was an obscurity and only recently, their enforcement became actual[9].

In the same time, the administration of the procedure under discussion is conditioned by the fulfilment of the following requirements: the supreme court would not determined a new matter of law; the new matter of law is not subject to any appeal on the law interest in course of solution; the case or the trial where it is ascertained the new matter of law to be under trial at the higher level of the court of law, namely, appeal.

From the art. 519 Code of civil procedure it is noticed also the fact that the legislator excludes from the category of subjects that have the possibility (and not the duty such as the case of the appeal on law interest)[10] to notify the supreme court, the panel of the court of law; by this text, it is acknowledged the active legitimation of the panel of the High Court of Cassation and Justice (I.C.C.J.), of the appeal court and of the court of law invested with the case solution in the last instance. The panel can notify the High Court of Cassation and Justice, that finds ex officio or upon the parties request, that the above mentioned conditioned are fulfilled, the trial courts having this way the liberty to appreciate whether the de facto situation is limited to the sphere of the matter of law that mainly the supreme court[11] shall settle. Therefore, the failure to comply with the requirements imposed by the art. 519 Code of civil procedure implies the rejection of the request as inadmissible.

A particularity of the procedure of solving a matter of law is also the one of notification of the competent court of law is done by a conclusion[12], which is not subject to appeal; the conclusion shall contain the reasons sustaining the admissibility of the notification, the point of view of the panel and parties; by the same conclusion, the case shall be suspended till ruling a prior decision on the matter of law[13]; the conclusion is published on the internet page of the High Court of Cassation and Justice, after the registration of the notification with this court (art. 520 paragraph (1)-(4) Code of civil

[9] Ş. Beligrădeanu, *Reflecții critice cu privire la caracterul vădit dăunător bunului mers al justiției al reglementării în noul Cod de procedură civilă a posibilității sesizării de către anumite instanțe judecătoreşti a Înaltei Curți de Casație şi Justiție în vederea pronunțării unei hotărâri prealabile, pentru dezlegarea unor chestiuni de drept*, in „Dreptul" nr. 3/2013, p. 111.

[10] With regard to the exercise of appeal in the law interest, the legislation admits the active capacity to stand trial of the general attorney of the Public Ministry within the High Court of Cassation and Justice, ex officio or upon the request of the Minister of Justice, Management Board of the High Court of Cassation and Justice, management boards of the appeal courts and also of the Lawyer of the People, with the specification that these persons or bodies have the "duty" and not the possibility to notify the competent court of law on a matter of law.

[11] Although no notification term is provided, from the syntagm "during the trial" (art. 519 Code of civil procedure) it results that notification can be done as soon as the panel authorised to judge the case on the merits finds the new matter of law on which the respective case solution depends.

[12] Similarly, the Constitutional Court is notified still by a conclusion to rule on an unconstitutionality exception. Also, the pre-judicial questions are addressed to C.J.U.E. in a conclusion (See M. Fodor, *Drept procesual civil,* vol. I, 2nd edition, Universul Juridic Publishing House, Bucharest, 2008, p. 278; *Idem, Drept procesual civil. Procedura necontencioasă. Arbitrajul. Executarea silită. Proceduri speciale.,* Universul Juridic Publishing House, Bucharest, 2010, p. 547).

[13] Till the solution of the notification, the similar cases on the docket of the courts of law can also be suspended (art. 520 paragraph (4) Code of civil procedure), measure that can be ruled after the rigorous verification of the matters of law, otherwise the art. 520 paragraph (4) Code of civil procedure can be a mean to tergiversate the trial of the respective cases, and therefore, a violation of the right to an equitable trial, within an optimal and predictable term.

procedure), with the specification that this solution shall be judicious after the proper administration and update of the respective page.

By derogation from the rule of random distribution of the files, the art. 520 paragraph (5) Code of civil procedure establishes that the distribution of the notification is done by the president, or in his/her absence by the vice-presidents of the High Court of Cassation and Justice or by the person appointed by them.

The competence of the solution of the notification is, pursuant to the art. 520 paragraph (6) Code of civil procedure, to the proper section of the High Court of Cassation and Justice except for the case in which the matter of law regards the activity of several sections of the supreme court of law, hypothesis in which the notification shall be sent by the president or, in his/her absence, by one of the vice-presidents of the supreme court of law, presidents of the sections interested to solve the matter of law (art. 520 paragraph (8) Code of civil procedure). In the same manner it shall be proceeded also in the case in which at the High Court of Cassation and Justice there is no section corresponding to the one where the matter of law has been found, since the art. 520 paragraph (9) Code of civil procedure refers to the provisions of the paragraph (8) of the art. 520 Code of civil procedure, which apply accordingly. Although, the art. 520 paragraph (9) Code of civil procedure refers to the matter of law that „has not been unitary solved in the practice of the courts of law", we consider that this an inadvertence of the legislator, which has to be eliminated and that all the provisions of the art. 519-521 Code of civil procedure has in view a „new matter of law", on which the High Court of Cassation and Justice does not decide and is not object of an appeal on law interest.

With regard to the composition of the panel, the art. 520 paragraph (6) Code of civil procedure establishes that the notification is judged by a panel consisting of the president of the proper section of the High Court of Cassation and Justice or by a judge nominated by him/her and 12 judges of the respective section, the president of the section or, in case o impossibility, the judge appointed by him/her is the panel president and shall take all the measures necessary for a random appointment of the judges. But these provisions are enforceable for the notifications made in the trials initiated since 1st of January 2016, because the notifications made in the trials initiated since 15th of February 2013 and till 31st of December 2015 are judged (pursuant to the art. XIX of the Law nr. 2/2013)[14] by a panel consisting of the president of the respective section of the High Court of Cassation and Justice or by a judge appointed by him/her and 8 judges of the respective section[15].

After the establishment of the panel under the conditions of the paragraph (6) or, as the case may be of the paragraph (8) 2nd thesis of the art. 520 Code of civil procedure, its president (namely, the president of the section, or, in case of impossibility, the judge appointed by him/her or in his/her absence, the vice-president of the High Court of Cassation and Justice) shall appoint a judge (in the case provided by the art. 520 paragraph (8) 3rd thesis of the Code of Civil Procedure a judge of each section shall be appointed -

[14] The Law nr. 2/2013 regarding some measures for the relieving the courts of law and also to prepare the enforcement of the Law nr. 134/2010 regarding the Code of Civil Procedure has been published in the "Official Gazette of Romania", part I, nr. 89 of 12th of February 2013.

[15] For the situation provided by the art. 520 paragraph (8) Code of civil procedure, in which the matter of law regards the activity of several sections of I.C.C.J., the panel shall consist of the president, or, in his/her absence, of the vice-president of I.C.C.J., who shall preside the panel, of the presidents of the competent sections for the solution of the matter of law and also of 5 judges of the respective sections randomly appointed by the panel's president. The panel's president shall appoint one judge of each section to elaborate the report, who does not become incompatible to solve the matter of law.

s.n.) for the elaboration of a report on a law matter subject of trial. The judge or the judges appointed as reporting persons do not become incompatible. With regard to the elaboration and content of the report, and also with regard to the session of the panel, the provisions related to these aspects from the appeal on the law interest are applicable to which the art. 520 paragraph (11) of the Code of civil procedures refers to. So, this means that, in order to elaborate the report, the panel's president shall be able to request to well-known specialists[16] the written opinion that shall be contained in the report; also, the report shall contain, where appropriate, the doctrine in the field, the relevant jurisprudence of the Constitutional Court, of the European Court of the Human Rights or of the Court of Justice of the European Union. In the same time, the reporting judge, or where appropriate, the reporting judges shall elaborate and motivate the project of the solution that is suggested to be done on the matter of law, object of the notification. The report shall be communicated to the parties, who, within maxim 15 days from the communication, shall submit in written, by lawyer or as the case may be, by legal councillor, their points of view on the matter of law subject of trial (art. 520 paragraph (10) Code of civil procedure).

The president of the panel shall convoke the session with at least 20 days before the day when it takes place, and in the same time with the convocation, each judge shall receive a copy of the report and of the suggested solution. The notification is judged without the participation of the parties[17], in maxim 3 months from the date when the section is invested with the trial and the solution is adopted by at least two thirds of the number of the panel's judges, without allowing abstentions (art. 520 paragraph (12) Code of civil procedure).

On the matter of law with which the panel has been notified, the panel rules a decision by which it shall give a solution as a rule; the decision is motivated within 30 days from ruling and it is published in maximum 15 days from the motivation in the Official Gazette of Romania, 1st part I (art. 521 paragraph (2) corroborated with the art. 517 paragraph (3) Code of civil procedure).

As far as the effects that the decision causes, the art. 521 paragraph (3) Code of civil procedure consecrates its obligatory character for the court of law that has requested the solution from the date when the decision has been ruled and for the other courts of law, from the date when the decision has been published in the Official Gazette of Romania. Of course, the text establishes the force of the interpretation that the supreme court gives to a matter of law. Therefore, the court of law has to limit itself to the law interpretation, not being allowed to create or to modify juridical norms, exclusive attribute of the Parliament. Although, in relation to the art. 9 paragraph (3) Civil code, that provides that „the interpretation of the law by the court is done only for the purpose of its enforcement in the case subject to trial", and also in relation to the art. 124 paragraph (3) of the Constitution, according to which „the judges are independent and subject only to the law", we consider the compulsory character of the prior decision puts in discussion the independence of the judge invested with the solution of the case on the merits, the jurisdiction plenitude of the court that settles the case. Maybe it would be more properly the solution of the French law. Therefore it deserves to underline that at the art. 1031-1 - 1031-7 French Code of Civil Procedure and art. 441-1 of the French Code of judicial organisation a similar procedure is

[16] Probably by the syntagm „well-known specialists" the legislator has in the view famous authors of the specialty literature and remarkable law practitioners, who, by the professional authority and probity of their opinions have outlined the solutions of legislation and jurisprudence.

[17] The procedure of solving the matter of law is exempted from the legal stamp fee and legal fee (art. 520 paragraph (13) Code of civil procedure.), solution meant to encourage the utilisation of this procedural mean.

regulated, which, probably was the source of inspiration of the Romanian legislator, unlike the French court of law (Court of Cassation) rules by a notice, it having only a doctrinal[18] authority; the notice is an opinion for the debate on the merits of the respective case, under the aspect of the invoked matter of law[19].

Finally, by a reference norm to the art. 521 paragraph (4) Code of civil procedure, a doctrinal solution suggested for the decision given in the appeal on the law interest is legislatively consecrated, and namely the one regarding the date when the compulsory character of the decisions ruled on the notification ceased. Therefore, pursuant to the art. art. 518 Code of civil procedure, the decision given in the procedure of solution of a new matter of law ceased its enforcement on the date of the modification, abrogation or contestation of unconstitutionality of the legal provision that was object of the interpretation.

[18] Pursuant to the French legislation: „Before deciding on a new matter of law, presenting a serious difficulty and which is raised in many conflicts, the courts of law of the judicial order can by a decision not subject to appeal to request the noticee of the Court of Cassation". It can be noticed that, unlike the art. 519 of the Romanian Code of Civil Procedure, the French text imposes that the new matter of law presents a "serious difficulty" and which is "raised in many conflicts".

[19] See: L. Cadiet, *Droit judiciaire privé*, 3e éd., Litec, 2000, nr. 645 and following.; H. Croze, C. Morel, O. Fradin, *Procédure civile*, Litec, 2001, p. 353; I. Deleanu, *Privire asupra Codului de procedură civilă, aprobat prin Legea nr. 134/2010*, in „Pandectele române" nr. 9/2010, p. 22. See also I. Leş, *Noul Cod de procedură civilă. Comentariu pe articole. Art. 1-1133*, C.H. Beck Publishing House, Bucharest, 2013, p. 776.

SOME CONSIDERATIONS ABOUT CAPACITY IN THE FIELD OF LIBERALITIES

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Abstract: *In comparison with the former civil regulations (the 1864 Civil Code), the Civil Code in force acknowledges a few novelty elements in regard to the capacity related to liberalities (donation and legacy). The present work aims to point out these novelty elements and to make an assessment of their appropriateness and justness. The same work will also pay attention to the constant elements present in the field under discussion, in order to accomplish a complete analysis of the theme discussed.*

Keywords: *donation, legacy, legal competence, special incapacities, relative nullity.*

1. General considerations

Similar to the 1864 Civil Code, the Civil Code in force institutes, through the provisions of its articles 987-992, special rules regarding the capacity to order and to receive liberalities. According to the provisions of article 984 paragraph (1) of the Civil Code, liberalities constitute those legal acts „… by means of which a person makes provisions by free title regarding his assets, on the whole or partially, on behalf of another person". Liberalities include donation and legacy.

According to provisions of article 985 of the Civil Code, donation represents „… a contract by means of which a party, called donor, having the intention of offering a reward, makes irrevocable provisions in relation to an asset on behalf of another party, called donee". According to article 986 of the Civil Code, legacy represents „… the testamentary provision by means of which the testator stipulates that, upon his death, one or several legatees will obtain his whole patrimony, a part of the latter or certain determined assets".

Just like the former civil regulations, the current Civil Code regulates capacity related to liberalities in a unitary manner (within Section 2 – „Capacity related to liberalities" – of Chapter I – „Common provisions" – of Title III – „Liberalities"). Consequently, are regulated both the capacity necessary for ordering and receiving something by means of a donation, and the capacity demanded for ordering or receiving something by legacy. The Civil Code lists the special incapacities with general enforceability in the field of liberalities, but regulates separately a series of special incapacities with incidence only on the field of legacy.

According to the provisions of article 987 paragraph (1) of the Civil Code, „Any person can order and receive liberalities, by abiding by the rules regarding capacity". Therefore, the main rule when it comes to liberalities is represented by capacity, whereas incapacity constitutes the exception. By representing an exception, incapacities must be clearly regulated by law and strictly interpreted.

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2. Capacity to order and receive liberalities

2.1. Capacity to order by means liberalities

As already pointed out, any person can make provisions by means of liberalities, having the possibility to acquire the quality of donor and, respectively, of testator. The condition regarding the capacity of making provisions by means of liberalities must be met at the moment when the person involved expresses his consent [article 987 paragraph (1) of the Civil Code], that is the date when the donor concludes the donation contract in the form requested by law and, respectively, the date when the testator drafts his last will act, in one of the forms provided for by the Civil Code.

By containing such provisions, the Civil Code enforces the principle of the liberality to make provisions, acknowledged by article 12 paragraph (1), according to which „Any person can dispose freely of his assets, if law contains no contrary provision". By exception, an insolvent person cannot make provisions by means of liberalities [article 12 paragraph (2) of the Civil Code]. Consequently, when it comes to liberalities *inter vivos,* the notary public is bound to attach an affidavit of the person ordering a liberality, acknowledging that he is not insolvent[2]. The insolvency statute results from the inferior value of patrimonial assets which can be subject to foreclosure, according to law, in relation the total value of the debts to be demanded [article 1417 paragraph (2) of the Civil Code]. Taking into account the legal provisions mentioned above, it emerges that has the capacity to make provisions by means of liberalities (which constitute provisional documents), the natural person who turned 18 years old, the minor aged 16 years old who is married and the minor who acquired anticipated legal competence.

It must be therefore mentioned that, by *lege lata*, is allowed for a minor aged 16 years old, who gets married, to acquire full legal competence [article 39 paragraph (1) of the Civil Code]. Moreover, the Civil Code regulates the possibility of the court ruling the tutelage to acknowledge the full legal competence to the minor turning 16, by means of the provisions of article 40. In this case we can speak about anticipated legal competence.

It can be thus noticed that the current Civil Code innovates when it comes to the capacity to make provisions by means of liberalities, by allowing the court establishing the tutelage to provide anticipated legal competence to the minor turning 16 years old. Consequently, the minor aged 16 acquires full legal competence and can make provisions by means of liberalities.

As to the incapacity of making provisions by means of a will, the Civil Code, through the provisions of article 988, points out that the person deprived of legal competence (the minor who has not turned 14 and the person under court interdiction) or possessing restricted legal competence (the minor with an age between 14 and 18) cannot make provisions regarding their assets by means of liberalities [article 988 paragraph (1) of the Civil Code]. Yet, by exception, according to provisions of article 175 of the Civil Code, named „Liberalities received from the descendants of the person having court restriction", „the descendants of the person having court restriction can receive liberalities from their tutor, with the consent of the family council and the approval of the court ruling the tutelage, but they are still bound to report them".

It can be identified another novelty element brought by the current regulations in the civil field, in relation to the capacity of a person to make provisions, which takes the form of a protection measure offered by law to the descendants of the person having court

[2] National Union of the Romanian Public Notaries, *Codul civil al României. Îndrumar notarial*, Monitorul Oficial Publ. House, Bucharest, 2011, p. 348.

restriction. On the ground of this measure, the descendants of the person having court restriction can receive some of his assets, but the donations which are ordered on their behalf will always have to be reported, according to law.

Continuing our analysis, we mention that „… not even after acquiring full legal competence can a person order liberalities on behalf of the one who had the quality of his representative or legal tutor, not before the latter receives from the court ruling the tutelage an acknowledgement that he accomplished the management of the patrimony accordingly" [article 988 paragraph (2) of the Civil Code]. Yet, by exception, a person of age can make provisions on behalf of his tutor or legal representative, even before the latter receives the legal acknowledgement that he accomplished the management of the patrimony accordingly, if his representative or legal tutor, according to the case, is his ascendant [article 988 paragraph (2) of the Civil Code]. The non-observance of the incapacity mentioned above triggers the relative nullity of the liberality in question.

According to specialized literature[3], the incapacities of making provisions by means of liberalities constitute incapacities related to use, as the person receiving the incapacity is deprived even from the right of making provisions by means of donations or legacy, and not only that. Therefore, it can be noticed that the persons deprived of legal competence or with a restricted legal competence cannot make provisions related to liberalities by means of their legal representative. Nonetheless, according to provisions of articles 41 and 43 of the Civil Code, the persons mentioned above can conclude on their own provisional acts with small value, current character and being enforced at the moment when they are concluded (such as small, regular gifts).

We also mention that the incapacities in question are considered legal by specialized literature[4] and can be invoked without presenting any evidence.

In comparison with the 1864 Civil Code, the current Civil Code brings another novelty element in the field subject to analysis, namely that which does not allow anymore the minor aged 16 to make provisions by will for half of his assets.

2.2. Capacity to receive by means of liberalities

According to provisions of article 987 paragraph (1) of the Civil Code, any person can receive something by means of liberalities. The condition for one having the capacity to receive a donation must be met at the date when the donee accepts the donation [article 987 paragraph (3) of the Civil Code], whereas the condition for one having the capacity to receive a legacy must be met at the moment when testator's inheritance is open [article 987 paragraph (4) of the Civil Code].

Therefore, a donee must have the capacity to receive donations at the moment when he accepts them. This does not mean that the persons deprived of such capacity or with limited legal competence cannot receive donations. In the latter case, the acceptance of a donation can be performed by observing legal conditions: it must be carried out by a legal representative, for those persons lacking legal competence, with their consent and, respectively, that of the court ruling the tutelage, when it comes to persons with limited legal competence.

[3] M. Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România*, Academiei Publ. House, Bucharest, 1966, p. 158.
[4] Fr. Deak, *Tratat de drept succesoral,* II edition, updated and completed, Universul Juridic Publ. House, Bucharest, 2002, 163.

A conceived natural person can receive something by means of a will, if he or she is born alive (article 36 of the Civil Code) and, therefore, if he or she is a natural person with anticipated power of user.

A legal person can equally receive something by means of a donation or will ever since the moment is set up in acts or, if is the case of a testamentary foundation, from the moment the testator's inheritance is opened, even when liberalities are not necessary for a legal person to be legally set up (article 208 of the Civil Code).

A legal person can acquire any right and duty by means of liberalities, except for those which, due to their nature or law, can only belong to a natural person [article 206 paragraph (1) of the Civil Code]. Moreover, legal non-lucrative persons can acquire by will only those civil rights and duties which are necessary for accomplishing their purpose established by law, articles of incorporation or articles of association [article 206 paragraph (2) of the Civil Code]. It therefore emerges that the principle regarding the specific character of capacity of user enjoyed by a legal person must be observed only if the legal person under scrutiny is non-lucrative.

As for special incapacities of receiving liberalities, the Civil Code distinguishes between special incapacities in the field of liberalities (therefore incapacities common to donations and legacy) and special incapacities in the field of legacies.

Consequently, are considered special incapacities operating both in the field of donations and legacy the following:

a) Incapacity regarding doctors, pharmacists or other persons (such as those practicing medicine illegally or the nurse going beyond her duties by providing specialized treatment to the person ordering the donation or legacy) who, directly or indirectly, provide specialized treatment to the persons ordering the donation or legacy, for a disease which caused his or her death [article 990 paragraph (1) of the Civil Code]. In order for such incapacity to operate, is necessary for the persons mentioned above to have provided specialized treatment exactly during the period when a person made provisions my means of a donation or legacy.

By exception, the following categories of liberalities are valid [article 990 paragraph (2) of the Civil Code]:

- liberalities ordered on behalf of one`s spouse, ascendants, descendants or privileged collaterals, even if they provided specialized assistance to the person ordering the liberality, for the disease which caused his or death, during the period when such liberalities were ordered by he or she.

- liberalities ordered on behalf of other relatives, up to fourth degree, if the person ordering the liberality in question did not have a spouse, ascendants, descendants or privileged collaterals.

b) Incapacity regarding priests or other persons who provided religious assistance to the person ordering the liberality on their behalf, during the disease which caused his or her death. Just like in the case of doctors, pharmacists and other persons included by law in these categories, the liberality ordered on behalf of a priest or other person included by law in this category is valid only if they are the spouse, ascendant, descendant or privileged collateral of the deceased, or, if it is not the case, if they are relatives up to fourth degree of the deceased [article 990 paragraph (3) of the Civil Code].

The non-observance of the special incapacities presented above triggers the relative nullity of the liberality in question. If the person ordering the liberality died because of the disease concerned, the statute of limitations term for the legal action demanding relative nullity starts to elapse from the moment heirs found out about the liberality [article 990

paragraph (4) of the Civil Code]; if it has been reestablished the person ordering the liberality, then the latter becomes valid [article 990 paragraph (5) of the Civil Code].

It must be mentioned that the incapacities described above are based on the absolute presumption of captation and suggestion, which cannot be removed until contrary evidence[5], and that the list of the persons described by such incapacities is not exhaustive.

Are considered special incapacities operating only in the field of legacies, according to provisions of article 991 of the Civil Code, the following:

a) incapacity to receive of the notary public who authenticated the will;

b) incapacity to receive of the interpreter who participated to the authentication procedure of the will;

c) incapacity to receive of the witnesses assisting the testator when authenticating his will and of witnesses having to sign privileged wills;

d) incapacity to receive of the agents handling privileged wills (the competent civil servant of the local civil authority involved, in case of epidemics, disasters, wars or other similar exceptional circumstances; the captain of the ship or plane, or the person replacing him; the chief of the military unit or the person replacing him; the manager, doctor in chief or doctor on duty of the medical service provided);

e) incapacity to receive of the persons who equally provided legal assistance at drafting the will.

The non-observance of the incapacities mentioned above triggers the sanction of relative nullity as well.

It must be mentioned that the incapacities described above are based on the absolute presumption of captation and suggestion, which cannot be removed until contrary evidence[6].

By comparing the provisions of the current Civil Code with the corresponding ones from the former regulations, it can be noticed that, *by lege lata*, the sanction which intervenes when special incapacities are not respected is clearly provided. This sanction concerns the relative nullity of the liberality in question, as pointed out before. In the light of the 1864 Civil Code, which did not regulate this aspect, specialized literature unanimously considered that the sanction which had to be applied in the case discussed was absolute nullity.

It can also be noticed that the current Civil Code expands the field of exceptions involved by the special incapacity to receive of doctors, pharmacists or other persons included in such categories.

2.3. Simulation

A liberality can be annulled even if the person ordering it, with the aim of making inapplicable the legal provisions which institute incapacities to receive liberalities, resorts to the interposition of other persons, by offering something to someone (capable) and giving him the duty to restore the liberality of the incapable person.

The non observance of law in such cases must be proven. In order to make it easier to bring evidence for that, the lawmaker has instituted the relative presumption (article 992 paragraph (1) of the Civil Code), according to which are considered interposed persons the following: ascendants, descendants and spouse of the person incapable to received by means of liberalities, but also the ascendants and descendants of the spouse of the person in

[5] C. Macovei; M.C. Dobrilă, „Cartea a IV-a: Despre moştenire şi liberalităţi", în Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publ. House, Bucharest, 2012, p. 1039.
[6] Ibidem, p. 1041.

question. Consequently, the persons mentioned above become incapable to receive, and the liberalities ordered on their behalf can be annulled.

It can be consequently noticed that the current Civil Code on the one hand transforms the presumption regarding interposed persons into a relative one (following the French model), while on the other hand it expands the field of the persons for whom relative presumption can be applied. Then, the Civil Code in force also points out that the sanction applicable for simulation is relative nullity. As to us, we consider that these novelty elements are useful and just as well.

Conclusions

By analysing the provisions of the Civil Code in force, which affect the capacity to order and, respectively, to receive liberalities, it emerges that this normative act, in comparison to the 1864 Civil Code, has brought the following novelty elements, which we consider necessary and just:

- the minor aged 16 can acquire anticipated power of exercise, according to legal conditions;
- the tutor of the person in incapacity can order liberalities on behalf of that person's descendants;
- the minor who has already turned 16 can no longer make provisions for half of his assets by means of will;
- any legal person can receive something by means of a donation or will, from the moment it has been set up in acts or, when it comes to testamentary foundations, from the moment when testator's inheritance is opened, even when liberalities are not necessary for that foundation to be legally set up;
- the principle regarding the specificity of the power of use must be observed only by the non-profit legal persons;
- some special incapacities in the field of legacies are regulated;
- is expanded the sphere of the exceptions which characterize the incapacity of doctors, pharmacists and persons assimilated to them;
- is acknowledged the sanction of relative nullity for the transgression of special incapacities;
- the absolute presumption of interposed person is transformed into a relative presumption;
- the sphere of the persons subject to the interposition presumption is expanded.

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THE RECEPTION IN FRENCH LAW OF DISABILITY STUDIES

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Abstract: *Disability Studies establish a disciplinary field in full emergence having interdisciplinary basis and across the Atlantic. This new discipline refers generally to the examination of disability as a social, cultural, and political phenomenon. In contrast to clinical, medical, or therapeutic perspectives on disability. Disability Studies focuses on how disability is defined and represented in society. First, the objective of this research is to demonstrate how this new discipline is seized in French law by the influence of the international nomenclature and the consequences on the social representation of the persons in situation of handicap. Then, it will be necessary to explain the evolution of french social policies on the handicap and new judicial practice.*

Keywords: *disability studies, policies, paradigms, evolution*

1. Introduction

The French legislation promotes a social conception of disability and the right to compensation of its consequences. With the influence of Quebec anthropology works on the International Classification of Functioning, Disability and Health, World Health Organization 2001, the observation prism of disability has changed. For the first time, the law of 11 February 2005 defines disability as "*any activity limitation or restriction of participation in social life suffered in its environment by a person due to a substantial, lasting or permanent impairment of or more physical, sensory, mental, cognitive or psychological, of a multiple disability or disabling health condition*". The definition includes the role of the wider environment in the development of the disadvantage. It is no longer the person who is unsuited to the environment but the world around that generates barriers to social participation of people. The second contribution of this act is to provide content to the right to compensation already stated as a fundamental right by the social modernization law of 17 January 2002. Currently, following an interdisciplinary test, an administrative decision allows the granting of a financial, material or human benefit (PCH). It must allow the person to achieve life goals.

Today, associations and professionals express their disappointment with the conditions of implementation of the right to compensation. In fact, he was reduced to the provision of a service. It does not allow the full project life. Expectations generated by the proclamation of a right to compensation provided by law as the guarantee of effective participation in the life of the city have not been satisfied.

However, a holistic approach to the need for compensation of the person with disabilities, in accordance with the new definition of disability, involves understanding the variety of environmental barriers (economic, physical, natural, social, legal, architectural, technological, ergonomic...) impeding the insertion and activity of the person.

There are three frames of reference through which analyzes the impact of the law on social practices. First, measure the effectiveness of a norm is used to verify if it is applied, then the efficacy is to determine whether it reaches full its purpose and efficiency allows assessing whether the means used to achieve The objective is optimized.

The indicator we choose to study here is the efficacy of the right to compensation. Indeed, we do not question here because agencies responsible for the implementation of the

attribution of the disability compensation benefits work. Their rate of return criticized for the slowness of the administration and lack of places in institutions is the result of lack of resources that the community offers.

Rather we focus on the non-conformity of a comprehensive approach of disability compensation and reduction of the right to compensation to the grant of a benefit.

The interest to examine more closely the care of people with disabilities in France comes from the fact that it faces two influential currents. The first is international and the second is national. Both sources have an impact on the construction of legislative discourse giving rise to a right to compensation (I). Today, it is experiencing a new dynamic of judicialization (II).

2. Construction of French legal discourse on disability

To understand the progressive legal validity of the term "handicap", it is necessary to draw a parallel between the evolution of the treatment of people with disabilities in relation to the main laws and the advent of disability studies.

In fact, this word has been extracted from common language to be scientifically defined. He is discharged from his irrationality and it's more objective.

Social representations have attributive function in the sense that they influence social behavior. Downstream, the legislative discourse is a social product and bears the marks of them. Upstream, it generates social representations as prescribed what to think. C.M. CAGNOLO besides points out the tension including by observing an improvement in living conditions in institutions despite the crystallization of fear or rejection. First, the legal standard that reflects the idea of lack. Now, this is a situation produced culturally and it demands the solidarity of all.

The origin of the term "handicap" is derived from the phrase "hand in cap" used in the Irish sport mid-nineteenth century and reflects this disadvantage. The rule was that to compensate for the inferiority of a competitor, it should give him points in advance or impose a disadvantage to those who had the best chance of winning. But before using it, the legislature chose the words referring to a lack: mutilated, infirm, invalid... Since the founding of the Royal Decree of the General Hospital in Paris in 1656 and the time of the great confinement, the intention was to combat idleness and put everyone to work. Around the issue of labor is built assistance to wounded soldier war by repairing, readapting the individual to society and especially to work. At the emergence of the sense of national debt we find particularly between the wars. This support extends gradually including injured workers. The first time the legislator uses the term "handicap" is once again in a text on the work. It was then a question of protected workplace and disability was seen as a barrier to entry or continued employment.

In 1975, two committees (one in charge of the children, the other in charge of adults) have the task of assessing whether a person can be declared "disabled person" as a result of multiple especially medical examinations. These people then have various aids that are not specific to return to work.

Alongside this legistic building experts felt the need to measure disability and also to classify as other societal phenomenon. WHO is then responsible for establishing a classification of diseases to determine the public health needs. She delegates a revision work to a team of experts led by Philipp WOOD which develops the International

Classification of Impairments, Disabilities and Handicaps in 1980. It refers to three distinct levels of the original health problem:

Impairment: "*any loss or abnormality of structure or function psychological, physiological or anatomical.*" This is the lesion appearance.

The inability: "*Any partial or total reduction of ability to perform an activity in a normal manner or within the range considered normal for a human being.*" This is the functional aspect.

Disability: social disadvantage.

Beyond organic impairments and functional deficits they cause, this classification recognizes socially harmful consequences caused by disability.

In 1976, the Office of Persons with Disabilities of Quebec is created. It is responsible "*to the state of affairs needs of people with disabilities and their families and an inventory of available resources to respond*". It is in this context that P. FOUGEYROLLAS has tested the classification of WOOD. From criticism of the latter, he developed the model of the production process of disability. He claims the predominant role of the environment in the development of disability face a biomedical paradigm. This conceptual clarification makes a distinction between "*what belongs specifically to the person, on the one hand, and the realization of socially defined activities resulting from the interaction between personal factors and environmental factors, on the other hand*". The revised version of classification in 2001 version will not fully validate this work. Preference was the reaffirmation of a medical conception and to place this nomenclature in the heart of the family of classifications of health. This suggests a distinction between "*the" activity "that a person can do it alone in a" standardized uniform environment "and" participation "as the performance for the same activity in a real environmental context*". It recalls the idea of personal responsibility of the person with disabilities. This choice contradicts the work of disability studies. This new discipline generally refers to the examination of disability as a social, cultural, and political phenomenon. In contrast to clinical, medical, or therapeutic perspectives on disability. It opposes rehabilitation sciences "*centered on impairments and disabilities, focusing on rehabilitation, functional compensation and technical aids*".

The new classification is seen by the doctrine as "*an attempt to compromise* " of these two approaches obscuring the active intervention of the environment in the development of disability.

However, France had clearly taken the side of the model of the production process of disability during the debate on the revision of the classification. It is also be noted that these discussions take place at the dawn of the advent of the 2005 Act.

This uncomfortable situation between position and respect the official nomenclature brought our legislators to choose an ambiguous definition. He therefore refused to use the term "disability" and evokes the environment as the context of the restriction of social participation because its cause is deficiency. This analysis provides a better understanding of the phenomenon of reduction of the right to compensation. Indeed, he was reduced to the granting of a benefit when the law had originally erected it next human rights as the way of ensure access..

Administrative and technical responses in terms of management are unsatisfactory and auspicious, then, a tendency to judicialization of the right to compensation seized as an individual right.

3. Judicial practice in aid of the effectivity of the legal norm

The dissatisfaction with the inefficacy of the right to compensation contemporary appeal to associations. During the twentieth century, parents of children with disabilities came together to make recognize the rights of persons with disabilities and their families. This is an important point in the history of legal and social assistance for their support policies. In an emergency and in the face of the lacks of government policy, they had to provide solutions to support their children. Associations have developed to establishment management and social support specific to disabilities. Their functions lobbyist and manager are now well seated. Some of them now approach a new project which is to recognize that the right to compensation seized as an individual right to be brought before the court when management fails or a person encounters a difficulty in achieving his life project. It is the will clearly displayed at the last Regional Advisory Council of the National Union of Parents and Friends of unsuitable Children,

As we did in the first half during which we explain why the right to compensation was reduced to the award of a service, we focus not on the "how to" make the judicialization but the "why" proceed with the judicialization.

The definition of handicap, as we have established, has not endorsed the approach of disability studies which is nevertheless scientifically necessary to understand this daily phenomenon. To fill this gap, the law affirmed the wide accessibility of the public life and has fleshed the text of Article L. 114-1 of the Code of Social Action and Families of a paragraph relating to the provision of disability compensation.

The thirds of law, no less than 36 articles, is devoted to the issue of accessibility. This concerns both access at school and work, but also to buildings, roads, public spaces, transportation, and emerging technologies.

This is the entire movement chain must be available for 2015 for each person regardless of his physical or mental impairment.

Each disability brings its share functional difficulties. When a lift next to the stairs is enough to make an office on the first floor accessible to a person with reduced mobility, it is difficult to imagine how this accessibility can be effective against a person with an intellectual impairment, a cognitive impairment or a psychological trouble. There is therefore a real obligation to the community to change the architectural environment, technological environment, but also human environment because every agent to greet the public should be in 2015, formed this phenomenon.

The allocation of the benefit which was rigged the right to compensation is performed following the investigation of a file examined by the Rights Commission and independence of people with disabilities. It is located within the county home for disabled people. It has become the one stop shop for people with handicap and the commission is the entity responsible for determining the amount of the PCH and people orientation. This multidisciplinary committee should measure activity limitation and social participation based on the life project. The Committee asks to the person with disabilities the formulation of life goals (to have a job, live at home, playing sports). Then she estimates the benefit granted in terms of financial, material and human resources to fill the gap between activity limitation and ambitions of the individual.

Then, the right to compensation is an individual right recognized in both Modernization Act of 2002 and the law "handicap" in 2005 as a guarantee of access to fundamental rights. We can list them. It is the right to health, education, training and vocational guidance, employment, the guarantee of a minimum of suitable resources, property, social integration, freedom of movement and travel, to legal protection, sports, leisure, tourism and culture. Each of these two laws identifies the creditors of rights. Those are the state and beyond, the entire community. Indeed, national solidarity based on it. Holders of this duty shall people with disabilities and their families, For example, the State Council recognized 16 May 2011 the responsibility of the State for failure to support an autistic child.Il is possible to identify the content of the law, its holder and the debtor. The dynamics of legalization of the right to compensation is legitimate because the legal discourse created an obligation.

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THE OBLIGATIONS OF THE PUBLISHER UNDER THE PUBLISHING CONTRACT

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Abstract: *According to the Law nr.8/1996 the publishing contract is defined as the contract where the "owner of the copyright gives the publisher, in exchange for a remuneration, the right to reproduce and distribute the work."*

Keywords: *copyright, author, work, publishing contract, publisher, rights, obligations*

Introduction

Since ancient times, the law regulated the goods which are subject of property in common law. Due to the evolution of society, social progress, technological, economic and spiritual development of man, it was born the need for regulating the "intellectual creations", also known as creations of the mind. All this is justified because the legal status of the creations of the mind is one apart from common property law.

As a result of socio-human evolution, it was noticed the emergence of relationships between individuals as a result of the preparation of scientific papers, the appearance of inventions and their subsequent use by third parties. These products, resulting from man's intellectual creative activity, is closely related to the human being, is basically an invisible part of it, and this is why they must belong undeniably to a person. It is surprising that those who have established the legal system, were first concerned about formalizing the material goods and then, very late, in the chronological scale of human evolution, was elaborated the set of legal rules on intellectual property.

However, the justification for regulation of intellectual property arises from the fact that "intellectual property rights reward creativity and human effort", effort and creativity are only human attributes, considered the engine of humanity progress.[1]

1. Brief history of intellectual property law

Following a careful analysis of Justinian Digests was concluded that they contained numerous references to situations where some manuscripts were subject to acts of theft. Because of the fact that there are specific references to acts of theft over manuscripts, we can say that lawyers of that time were aware of these particular types of facts, in other words they saw a fine difference, that the specific manuscripts were not seen only as regular assets with an economic value. They represented something more, were in close contact with the person who drew them up, with their creator, because they contained nothing but an externalization of being, a manifestation of thoughts, ideas. [2]

The fact that these moral rights over the manuscripts enjoyed recognition, is proven by the existence of the library of Alexandria and the existence of plagiarists who were penalized by

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[1] Dan Săvescu, Adrian Budală, *„ Intellectual Property in Romania and in some EU countries"*, Lex Libris Publishing, Braşov, 2008, p.3

[2] Viorel Roş, „ *Intellectual property law. Uuniversity course*", Global Lex Publishing, 2001, p. 33

public censure.[3] Another detail that reinforces our idea that the ancients had a conscience in its infancy of the intellectual property law, is drafted by the fact that different authors works which were in circulation in ancient Greece, were often subject to trade. We emphasize that the awareness is in a primary stage, as with all the difficulties of effectively multiplying manuscripts, the author's rights were restricted only to the material existence of the manuscript.

No even later, in the Middle Ages, the vision of intellectual property has not undergone substantial changes. Copying manuscripts was done manually, some content often changed, so we can say that it was not acknowledged any subsequent right for the reproduction and representation of the contents of the manuscripts. If we are to look closely, we will see that there were no claims of creation, as according to those times, the creation had a divine meaning and it was done for divinity.[4]

The moment that would change these trends, was the emergence of the printing press, which generated in the centuries that followed a real *"Gutenberg Galaxy"*[5].

Technological development has led to a massive influx of creation. Intellectual property protection can be seen as a way to encourage and stimulate the development of all industries to improve quality of life for the constant progress towards intellectual emancipation. Permanent increase intellectual potential, along with the creation of balance between the interests of the innovator and the public interest and ensuring recognition and merit to the innovator, will provide stimulating and cultural awareness.

The legislation comes to create a regulatory framework that has as subject the intellectual property, most intimate and most personal form of property.[6]

2. The publishing contract

According to the Law nr.8/1996 publishing contract is defined as the contract where the "owner of the copyright gives the publisher in exchange for remuneration, the right to reproduce and distribute the work."[7]

French legislation enshrines the special definition of the publishing contract naming it as the contract where the author of a work of mind or his successors cease under specified conditions, to another person, the publisher, the right to produce a number of copies of the work, with the obligation to ensure their publication and dissemination.[8]

Reflecting on the two definitions given above for the publishing contract and interpreting them, one can say that what is specific to the publishing process of an intellectually product, is fixing it on a sustainable and physical material, and subsequently the preparation and dissemination of copies required to be published. I will add that those copies made to spread the product, from the legal point of view, are leaving the publisher's property.

Besides Law no. 8/1996 Law, the legal framework of the right of copyright and related rights is completed with the Government Ordinance no. 45/2000 on combating

[3] According to the Explanatory Dictionary of the Romanian Language, the word *blam=ceasure* (fr. *blâme)* is disapproval, public condemnation of the attitude, expressing disapproval of such. Closely related to this is a vote of censure - a sanction which organized community show their disapproval of an act unworthy of one of its members. http://www.webdex.ro/online/dictionar/blam website accessed on 6.04.2013

[4] Viorel Roş, *Op.cit*, pp.33-34

[5] *Gutenberg Galaxy*, work of Herbert Marshall McLuhan (1911 – 1980) Canadian, philosopher in communication theory. The term "Gutenberg galaxy" called during UMAT, refers to the technological advances in transmission of information, creating new channels of information, more efficient and faster.

[6] Cosmin Cernat, *„ Theoretical examination of the publishing contract of a literary work",* p.1

[7] Art.48, alin (1) Law no.8/1996 on Copyright and Related Rights

[8] Viorel Roş, *op.cit*, p.174

unauthorized production and sale of phonograms and the Government Ordinance no. 124/2000 on measures to combat piracy in the audio-video and the computer programs.

As noted in the text of Law no. 8/2006, the parties of the publishing contract are the author or his successor in law, and the publisher. Given the subject matter I will detail the legal provisions relating to the publisher, more precisely its obligations as deriving from the conclusion of the publishing contract.

By publisher it is understood the intermediary person between the author and the public, more precisely the person who undertakes to reproduce and distribute the work provided by the copyright holder, under the terms of the publishing contract. If we were to look from the commercial point of view, the tasks of publishing and distribution of the publisher would be unilateral trade actions, noting that for the copyright holder the publishing contract would be a civil act, while for the publisher, the contract would be an act of trade. Experience has shown that most publishers are legal entities, companies operating under Law No.31/1990.

3. Obligations of the Publisher

Law no. 8/1996 establishes the obligations of the publisher, these are: reproduction of the work required, the obligation to broadcast/disseminate the work; the obligation to use the work and to pay the remuneration due, the obligation to give back the original work. The legislature came, by drafting these obligations, in an effort to defend the legitimate interests of the author, for optimum use and beneficial to both parties to the contract

3.1 The obligation of reproducing the work

Reproduction of work is a task incumbent to publisher. According to art. 14 of Law no. 8/1996, reproduction is "the realization of all or part of one or more copies of a work, direct or indirect, temporary or permanent remaking by any means and in any form including the realization of a sound recording or audiovisual work, and temporary or permanent storage by electronic means." We can see that the publisher is required to maintain the integrity of the work, publish it in accordance with the author and in the form determined by it. So, the publisher cannot make changes to the substance of the work through notes, annotations and comments. What is permitted to the publisher, is to make corrections on errors in spelling, punctuation, syntax. These changes are allowed to the extent of not affecting the work style.

If in the contract is not stipulated by both parties, the form in which the work will be reproduced, the publisher will be the one to decide the form of reproduction.

Law no. 8/1996 stipulates in art. 51, paragraph (1) the clauses that must be included in the publishing contract: duration of the cession, exclusive or non-exclusive nature and the territorial scope of the cession, the maximum and minimum number of specimens, the remuneration of the author, the number of free copies reserved for the author, the term for the realization and distribution of copies of each issue and, where appropriate, of each edition, the deadline to give back the original work to the author, the control procedure of the number of copies produced by the publisher. In paragraph (2) of this article is stated that the absence of any of the clauses: duration of the cession, exclusive or non-exclusive nature of the territorial scope of the cession, remuneration of the author, entitles the interested party to request the cancellation of the contract. So, the legal debate circulates around the ambiguity of the law and lack of penalty for failure to specify the number of copies to be reproduced. This, due to the fact that in the legislature concept number of copies is not of essence for the publishing contract, and consequently its absence is not sanctioned. In other words, the author is unable to control the number of copies made and the number of copies distributed. We could say at

first sight, that this would not be a problem, but, the problem arises, however, when the author receives its remuneration not as overall right, but share - part of the gains made by editor in broadcast work. Such situations occur frequently, and the author is prejudiced.

If the number of copies clause is missing, the parties may subsequently agree on the number of reproductions of the work. Without this agreement, in order to determine the number of copies, one may take into account such factors as: the capacity of the publisher's bookstores, publisher use, the public to which work addresses to, the previous practice for similar works. Other legal systems, such as the Polish and Norwegian, regarding the number of copies, have given a legislative response designed to protect more effective the author's rights in case the publishing contract does not make reference to the number of copies that must be reproduced.[9]

From the analysis and interpretation of the law (art. 56, para. (3)[10]) rises the obligation of the publisher to reproduce the work in good time, but penalties are provided only for failure to comply with the publication only, and not for the realization of the copies.

For new editions of the same work, the publisher is obliged to allow the author to improve or modify the work taking into account that such changes or improvements do not increase substantially the publisher costs, nor change the original character of the work.

3.2 The obligation of disseminating the work

Usually, the distribution of the work is preceded by publicity. By publicity, we understand the process consisting of a set of operations by which the work is promoted and reputation is built, for marketing to attract customers. Unless otherwise indicated, the publicity is in the responsibility of the publisher.

The next step forward is the dissemination of the work. If we look at art. Article 14, para (2)[11] of Law 8/1996 we notice that the main ways of disseminating the work of the editor are: sale, rental or lending of the work. Paragraph (3)[12] of the same article excludes the possibility of additional interpretations of lending, and places outside the dissemination methods the free lending when it is done through public libraries

If the method chosen is sale, the price will be determined by the parties or absence of such provisions in the publishing contract, it is presumed that "the transferor has agreed that it should be set by the publisher"[13].

The pricing may not be random, it should not be exaggerated because that would lead to a sharp decrease in sales or foreclosure sales. In this way it would not fulfil the purpose for which the copies were made. The price structure must be based on indicators such as: cultural value of the work reproduced, notoriety of the author, implementation costs made prior to the reproduction and distribution operations. I would add here that in determining the selling price of the work, one should take into account the average price of similar publications or competition for the same range of activity, in order to ensure the sale, and thus to reach its goal of culturing the public, and of making profit.

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[9] Polish law provides for a maximum of 2,000 copies in the event that the contract has not set the number of copies, and the Norwegian law provides for a maximum print of 1,000 copies for the same situation.

[10] Art. 56, para (3) Law no. 8/1996: *„If the publisher does not publish the work within the agreed time, the author may, under civil law, ask the annulment of contract and damages for non-performance. In this case, the author retains the remuneration, or, as the case may require payment of full compensation under the contract"*
Para (4): *„ If the deadline for publishing the work is not stipulated in the contract publisher is obliged to publish within one year from the date of its acceptance."*

[11] *„Dissemination, by the purposes of this Law, means the distribution to the public of the original or copies of a work by sale, rental, lending or any other mode of transfer against a price or free of charge."*

[12] *„It is not considered public dissemination by lending free of charge a work, if it is done through public libraries."*

[13] Viorel Roş, *op.cit.*, p. 183

Regarding the term of publication of the work, this is the one established by the publishing contract by the parties, and in the absence of such deadline, the publisher is obliged to publish in the framework of one year from the date of conclusion of the contract. In case of default of these obligations, the author may request termination of the contract and ask for payment of damages.

3.3 Obligation to use the work and to pay the remuneration

Law no. 8/1996 mentions in the art. 48 and 51 on the remuneration due to the author. Establishing remuneration is by mutual consent, choosing between two systems, namely: to establish an amount proportional to the turnover realized, or to establish a fixed amount. The parties may also agree that the remuneration to be fixed in a different way.[14]

Around the fair remuneration, disputes often arise. For example, if the transferor has benefits considerably lower than the assignee that exploited the opera, the first may require in court the review of the contract or increase the remuneration by the action in rescission.[15]

Moreover, there is the situation where there is an insufficient exploitation of the work by the transferee and transferor's interests are affected thereby, in which case the transferor may request annulment of the publishing contract.

The publishing contract is an onerous contract which means that each of the parties, the author of the work or publisher, are looking for a number of economic advantages. Thus, if the remuneration is missing, the contract is missing its object, remuneration being the purpose that led the author to lease its copyright. In this case, when the remuneration has not been established, the author has two types of action. One is the notification of competent jurisdiction, by law, to determine their remuneration. In this case, the competent authorities shall determine the amount of remuneration payable in relation to the amounts previously paid for the same category of works, destination and duration of exploitation. A second option would be to cancel the publishing contract by the court.

The remuneration has to be paid to the transferor in the amount and agreed deadlines. In addition, the author, under art. 51 paragraph (1) letter e, is entitled to receive a number of copies, by contract, free of charge.

Another issue is when the work was destroyed due to force majeure. If a work is destroyed due to force majeure, the editor is obliged to pay remuneration to the author only if the work was published. If a prepared edition is destroyed due to force majeure before being put into circulation, the publisher is required to prepare a new edition, and the author shall have the right to remuneration only on one of the editions. If a prepared edition is only partially destroyed due to force majeure, the publisher is required to reproduce copies needed to replace those destroyed, without payment of remuneration to the author for these copies.

3.4 Obligation to give back the original of the work

This obligation arises even under the ownership of the copyright of the work. The author, by publishing contract, offers to provide the original work to the publisher for reproduction and diffusion. This should be noted in order to avoid understanding that the author has transferred to the publisher the property right over the physical material embedding the work.[16] In other words, the publisher receives the work only for publication, only to serve as a bridge between author

[14] Gheorghe Gheorghiu, Cosmin Cernat, *„Intellectual property law"*, Universul Juridic Publishing, Bucharest, 2009, p. 72

[15] By action in rescission we understand "*Civil action that entitles the party to ask the court for annulment of a legal act due to damages"*.

[16] Gheorghe Gheorghiu, Cosmin Cernat, *„Intellectual property law"*, Universul Juridic Publishing, Bucharest, 2009, p. 73

and audience. Precisely for these reasons, in the absence of other indications provided in the contract, the publisher is obliged to return the author or his successors, the original work and, where appropriate, any other material received for publication.

Besides this, we observe that art. 56 (5) of the Law. 8/1996 also forces to publisher an additional obligation. The publisher is obliged for the unsold copies after a period of 2 years after publication, to launch an offer to sell them to the author at the price that would be obtained by selling. This offer must be made to the author of the work before the publisher orders the destruction of the remaining copies.

Conclusions

The publishing contract is a consensual agreement intended to provide a framework for collaboration between the author and the publisher in order to achieve individual and common goals. Its need derives from the desire to eliminate any future misunderstandings and disputes that may occur after initiation of collaboration.

The publishing contract comes to regulate a need of social interaction. The contract signed gives rise to reciprocal obligations to the acquired rights. This agreement protects the intellectual property of the author, the link between the author and the work created.

From the study of the literature in the field of intellectual property law, specifically the publishing contract, I believe that the current legislation provides the ground for a good performance of the interaction between author and publisher, but as any legal provision, it cannot be exhaustive.

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THE TRANSLATIVE NATURE OF THE SALE UNDER THE NEW CIVIL CODE

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Abstract: *Ownership is relocated by right to the buyer at the time of clinching the contract, even if the property was not delivered or the price has not been paid yet. Thus, the property is relocated by right to the buyer in all the contracts in which the law does not stipulate otherwise or the parties, through their will, do not consent otherwise. The transfer of the ownership in the case of the sale of immovable property shall be made on the date of the entry in the land register, which is based on an authentic document, certified by a notary public, of a court judgment which became final, which is also a genuine document issued by a court, such as in the case of a sentence delivery in a finding action, the judgment in case of sharing out a succession or partition of property of the former spouses, an action for recovery of possession and so on, an heir certificate or a document issued by the administrative authorities, such is the case of the title deed issued under Law no.18/1991 on the real estate, or a document certifying an act of voluntary separation.*

Keywords: *translative, ownership, authentic document, land register, dismemberments, gender goods, risk of property loss.*

Outline on property

Ownership is the legal expression of property – an economic category.

In our legislation the terms of „property" and „ownership" are synonymous. Thus, in article 44 and in article 136 of Romania's Constitution both the term „property" and „ownership" are used.

The term „property" has two meanings:

a) the economic meaning, a meaning in which this word means the ratio of ownership of the goods;
b) the legal meaning denoting the legal expression of the property, that is to say ownership.

In its turn, the legal meaning may receive a number of meanings:

- property in a broad meaning, in which the word property means both ownership (movable and immovable) and other real rights, generally using the following formulas to describe them: „property of a usufruct", „property of a claim", „intellectual property", etc.
- property in a narrow meaning, that is to say private property as real, exclusive, absolute and perpetual right on movable and immovable goods.
- property understood as object of ownership, which designates the good to which the ownership refers[1].

Usually, the term „property" designates the economic category of the property and the term „ownership" means the legal expression of property seen as economic category.

In our legislation, as shown in the specification of the meanings and from the fact that „property" and „ownership" are, from a certain point of view, synonymous terms, the first term – „property" is used to designate its legal expression, that is to say „ownership."

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[1] Corneliu Bârsan - Drept civil. Drepturile reale principale (Civil Law. Main real rights), All Beck Publishing House, 2001.

Regarding the Romania's Constitution, in article 136 it is stipulated that „Property is public or private."[2]

Article 480 of the old civil code stipulated that „Property is someone's right to enjoy and dispose of a thing solely and absolutely, but within the limits determined by the law."

Property is not defined by the new Civil Code, which in article 552 provides that only property is public or private.

The New Civil Code in article 555 regulates the content of private property so „private property is the owner's right to possess, use and dispose of a property exclusively, absolutely and perpetually, within the limits set by the law.

Under the law, private ownership is susceptible of dismemberments and methods, according to the case."

According to article 553 of the Civil Code, all privately owned goods or private interest goods belonging to individuals, to legal persons of private law or of public law are the object of private property, including the goods that make up the private property of the state and of the territorial-administrative units.

Escheatment is found by estate in abeyance certificate and is part of the private real estate of the village, town or city, according to the case, without registration in the land register. The buildings on which ownership was waived under article 562 paragraph (2) are acquired, without registration in the land register, by the commune, city or municipality, as applicable, and become part of their private property by the decision of the local council.[3]

Vacant heritage and the immovable properties listed, located abroad, belong to the Romanian state.

Goods object of private property, regardless of owner, are and remain in the civil circuit, unless the law provides otherwise. They can be sold; they may be the object of seizure prosecution and may be acquired by any manner provided by the law.

According to article 44 paragraph 2 of the Romanian Constitution „private property is equally guaranteed and protected by law."

The transfer of ownership

According to the stipulations of article 1650 of the Civil Code, the sale is the contract through which the seller sends or, according to the case, undertakes to send the buyer the property of a good for a price that the buyer is obliged to pay. Thus, the translative nature of the ownership results from the very definition of the sales contract, being a feature that regards the very essence of the contract, in its absence we cannot speak about a sales contract, as also in the case of the onerous nature of the contract, the seller is obliged to transfer the ownership, the translative character, in exchange for the price that represents the onerous nature of the sale.

The contract through which each party seeks to procure an advantage in exchange for the obligations assumed are by onerous title.

The immediate purpose aimed by the vendor is to receive the price and the buyer to obtain the transfer of ownership.

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[2] Gabriel Boroi-Liviu Stănciulescu, Instituții de drept civil (Civil law institutions), Hamangiu Publishing House, Bucharest, 2012, p.16.

[3] Article 562 paragraph 2 of the Civil Code
The owner may abandon his/her mobile property or waive, through authentic statement, the ownership of the immovable property, registered in the land register. The right ceases when leaving the movable property, and if the property is immovable, by registration in the land register of, under the law, the waiver declaration.

Dismemberments of the ownership or any other right (article 1650 paragraph 2 of the Civil Code) can also be transmitted through sale, resulting thus, that the sale is a translative contract of rights and not just of the ownership, even if the most commonly met transfer in practice is the ownership transfer. Thus, article 1673 paragraph 3 of the Civil Code provides that the provisions relating to the transfer of ownership are properly applied also when through the sale another right than the ownership is send.

In article 1673 of the Civil Code it is considered that the transfer of ownership of the asset sold to the purchaser is the seller's obligation.

Together with the property the purchaser also acquires all the rights and accessory shares that belonged to the seller.

The transmission of the real rights shall be achieved according to article 1273 of the Civil Code, thus the real rights are established and transmitted by agreement of will of the parties, even if the goods were not delivered, if the agreement refers to some specific assets, or by individualising the goods, if the agreement refers to certain specific goods.

The acquirer is entitled to the fruits of the good or of the right transmitted after the date of the ownership transfer or, according to the case, of the transfer of right, except the case in which the law or the will of the parties provides otherwise.

There appears the issue of when is the moment of the transfer of property of the good sold to the purchaser.

According to article 1674 of the Civil Code, except the cases provided by the law or if the parties' will does not indicate otherwise, the property is relocated to the buyer from the moment of signing the contract, *even if the good has not been delivered or the price has not been paid yet.*[4] Thus, property is relocated to the buyer in all contracts in which the law does not provide or the parties, through their will, do not agree otherwise. For example, in the case of most certain movable goods,[5] or in the case regulated by article 1679 of the Civil Code, concerning the bulk sale of assets and for a single global price, property is relocated to the buyer once the contract was signed, even if the goods were not individualised. This sale has as object a limited quantity of specific goods such as wine from a certain type of barrel.

The regulating the old Civil Code stipulated in article 971 that in the contracts having as object the property translation, or another real right, the property or the right is transmitted by the parties' consent and it remains in the acquirer's risk and peril,[6] even when he/she was not made the tradition of the good, and in article 1295 it is provided that, „The sale is perfect between the parties and the property is relocated to the buyer, concerning the seller, once the parties have consented on the item and on the price, although the item will not have been delivered yet and the price will not have been counted yet.

In terms of immovable property sale, the rights arising by the perfect selling between the parties, cannot oppose, before the transcription of the act, to a third person that would and would have preserved, by law, certain rights over the property sold."

[4] Sache Neculaescu, Livia Mocanu, Ghe.Ghiorghiu, Ilioara Genoiu, Adrian Ţuţuianu – Instituţii de drept civil (Civil law institutions). Selective course for BA. Universul Juridic Publishing House, Bucharest. 2012. p. 343.

[5] In selling, the immediate ownership transmission principle works by fulfilling the following conditions: goods to be individually determined (certain); the contract to be validly concluded (fulfilling the validity conditions); the good to be the seller's property; the good to exist, but it can also be a future good according to article 1658 (except the unopened inheritances); the parties should have not delayed the transfer of ownership at a later time and the goods should not be immovable. In the case of real estate, the transfer of ownership from the seller to the buyer is subject to the stipulations from the land registry according to article 1676.

[6] The risk of accidental destruction of property or the contract risk.

It is necessary to make an analysis of the situations in which the transfer of ownership does not occur at the moment of clinching the sales contract when the transfer of ownership operates as right as provided by article 1674 of the Civil Code, but according to the fulfilment of some conditions and conducting some formalities required by the law.

A. The transfer of the ownership in the case of real estate sale.

The law established though mandatory rules, in the case of the transfer of ownership for certain goods such as the selling of real estate, performing some formalities that do not violate the principle of mutual consent but only provide the legal circuit of these goods.

The rules imposed refer only to the time of the ownership transfer and not to the exercise of this right.

In article 557 paragraph 4 of the Civil Code, the law provides otherwise (as indicated in article 1673 paragraph 3) in that it is expressly provided that „Except the cases specifically provided by the law, *in the case of immovable property the ownership is acquired by registration in the land register*, by complying with the provisions of article 888."

The conditions of entry in the land register are provided in article 888 of the Civil Code, which stipulates that *the entry in the land register is made based on authentic notarial document, of the final injunction, of the certificate of inheritance or under another act issued by the administrative authorities in the cases in which the law provides it*. And according to article 885 paragraph 1 of the Civil Code it is provided that the real rights over the immovable property comprised in the land register are acquired, both between parties and against third parties only by entry in the land register, based on the act or the fact which justified the entry.[7]

Likewise, article 885 paragraph 1 of the Civil Code provides that, subject to contrary statutory provisions, the real rights on the immovable property included in the land register are acquired, both between the parties and against third parties, only by entry in the land register based on the act or the fact which justified the entry.

The disregard of these formalities required by law leads to the fact that the ownership is not transferable from the seller to the buyer and it does not lead to the loss of the sales' translative nature, so that in the case of sale of immovable property the ownership is not transferred at the time of clinching the contract as provided by article 1674 of the Civil Code, which represents the rule, but together with meeting the conditions imposed by the law, respectively the real estate registration in the land registry.

Thus, according to article 1676 of the Civil Code, relating to the sale of immovable property, the shifting of the property from seller to buyer is subject to the Land Registry stipulations.

The result of the text analysis is that, acquiring immovable property is done by authentic document signed under the penalty of nullity, the transfer of ownership shall be made on the entry in the land register, which is made based on an authentic document, certified by a notary public, a final court order, which is also a genuine document issued by a court, such as in the case of delivery in an action for judgment, the decision in the case of a sharing out a succession or partition of property of the former spouses, an action for recovery of possession and so on, an heir certificate or a document issued by the

[7]Article 56 of Law no.71/2011 published in the official Gazette no.409/10.06.2011, as amended by GEO no.79/2011 approved with amendments by Law no.60/2012, published in the Official Gazette no.255/17.04.2012.
The Civil Code provisions regarding the acquisition of real estate rights by the effect of their registration in the land registry only applies after completion of cadastral works for each administrative - territorial unit and the opening, upon request or ex officio, of the land registers for the respective buildings, in accordance with the Law on Cadastre and the Law on Real Estate Publicity no.7/1996 republished, with subsequent amendments.

administrative authorities, such is the case of the title deed issued under Law no.18/1991 on the real estate, or a document certifying an act of voluntary separation.

The result of the texts' analysis can be that:

- ownership of an immovable property is not relocated to the buyer at the time of signing the sales contract, on the date of delivering the asset, on the date of payment or at other time agreed upon by the parties, but as it is required by law, upon *making the formalities of registration in the land registry*.
- the sales contract is concluded as an authentic document or, if necessary, by a final court decision.[8]

Thus, according to the text on displacement of the ownership for immovable property from the seller to the buyer, although the buyer has signed a sales contract, has paid the price and has received the good, he/she is not the owner of that good until the property acquisition is approved through an administrative procedure provided by Law no.7/1996, that is to say by registration in the land registry, taking into account that the ownership is not relocated in the case of immovable property from the seller to the buyer, but based on the wording specifically prescribed by the law.

There is a question that arises: What do the people who have pieces of land through tenure acquire and why cannot they register this piece of land in the land registry for various reasons?, are they not owners up to the entry in the land registry?, what legal system do they have during this period?

The law for implementing the Civil Code clarifies this situation in the stipulations of article no.71/2011,[9] so that the Civil Code Provisions regarding the acquisition of real property rights by the effect of their registration in the land registry only apply after the completion of cadastral works for each administrative - territorial unit and the opening, upon request or ex officio, of the land registers for the respective buildings, in accordance with the provisions of the Law on Cadastre and on Real Estate Advertising no. 7/1996.[10]

Up to this date, the entry in the land registry of the ownership and of other real rights based on the documents through which they were sent, made up or changed validly is done solely for purposes of enforceability against third parties.

The Civil Code provides in article 885 paragraph 1 of the Civil Code that, subject to certain legal contrary provisions, the real rights over the immovable property comprised in the land registry are acquired, both between the parties and against third parties only by entry in the land registry based on the act or fact which justified the entry.

This rule is not a novelty in the Romanian legislation; it was also regulated by the Decree-Law no.115/1938, which, at least initially, was designed to be applied throughout Romania, together with the Civil Code Carol II of 1940. Thus, in article 17, paragraph 1 of the Legislative Decree-Law no.115/1938 it was stipulated that the real rights on the real estate would be acquired only if between the person giving and the person receiving the

[8] According to article 885 paragraph 4 of the Civil Code, the final court decision or, in the cases provided by the law, the administrative authority act will replace the agreement of will or, according to the case, the holder's consent.

[9] Law no.71/2011 for the implementation of the Law no.287/2009 of the Civil Code, published in the Official Gazette no.409/10.06.2011, GEO no.79/2011 to regulate certain necessary measures to the entry into force of Law no.287/2009 published in the official Gazette no.696/30.09.2011 approved by Law no.60/2012 published in the Official Gazette no.255/17.04.2012.

[10] Law on Cadastre and on Real Estate Publicity no. 7/1996, republished in the Official Gazette no.83/07.02.2013.

right there is an agreement of will on the establishment or relocation, under a cause shown, and the establishment or the relocation has been registered in the land registry.[11]

According to article 856 of the Civil Procedure Code, by the adjudication of the real estate, the contractor becomes the owner. Since this date, the contractor is entitled to fruits and income, he/she owes the interests until the full payment of the price and bears all the duties of the real estate.

Through tabulation, the contractor becomes entitled to dispose of the real estate purchased under the rules of land registry.

From the date of tabulation, the real estate remains free of any mortgages or other charges on the guarantee of the rights to claim, the creditors being able to achieve these rights only from the price obtained. If the adjudication price is paid in instalments, the duties cease upon the payment of the last instalment.

If the real estate was adjudicated with the price paid in instalments, the contractor will not be able to mortgage or alienate it, without the consent of the following creditors before the full payment of the price.

The law requires certain conditions and certain formalities and in the case of sales of certain goods, respectively the transfer of the ownership of these goods, such as the case of weapons and ammunition.[12]

B. The transfer of ownership in the case of sale of specific goods

In the case of selling specific goods including goods from a limited kind, the transfer of ownership from the seller to the buyer is conditioned under the provisions of article 1678 of the Civil Code, by the time at which such goods are individualised upon delivery by counting, weighing, measuring or any other method agreed upon or required by the nature of the good.

Likewise article 1273 of the Civil Code provides that „the real rights are established and transmitted by agreement of will of the parties, even if the goods have not been delivered, if this agreement relates to certain specific assets or by individualising the goods, if the agreement refers to certain specific goods."

In the case of these contracts that have as object specific goods, it is not about a certain type of contract required by law but fulfilling certain formalities on the teaching operations that must be performed by the parties for the transfer of ownership to operate, their failure to fulfil causes legal consequences concerning the termination of the contract and the restoring of the parties to their original state.

[11] Decree no.115/1938 for the unification of the provisions on land registries, published in the Official Gazette no.95/27.04.1938, as amended by the Law no.450/1940, Law no.241/1947 for the implementation in Transylvania of the law for the unification of the provisions on the land registries from April 27, 1938. The Decree no.378/1960 on amending certain provisions in connection with the reorganisation of the State Notary's activity, of Decree no. 40/1953 regarding the notary succession procedure, Decree no. 2142/1930 for the functioning of the central land registries for railways and canals, Decree-Law no. 115/1938 for the unification of the provisions on the land registries, Decree-Law no. 511/1938 for the implementation in Bukovina of the law on the unification of the provisions on land registries, Law no. 163/1946 for the provisional replacement with record land registries of the land registries destroyed, stolen or lost, Law no. 241/1947 for the implementation in Transylvania of the law on the unification of the provisions on the land registries, Law no. 242/1947 for converting the temporary land registries from the Old Kingdom in advertising land registries, the Civil Procedure Code and from other laws, abolished by article 230 letter g of Law no.71/2011.

[12] Law no.295/2004 on the regime of weapons and ammunition, republished in the Official Gazette no. 814/17.11.2011 amended by Law no.288/2011 published in the Official Gazette no.892/2011.

C. The transfer of ownership in the case of sale of future goods

According to article 1658 of the Civil Code, if the object of the sale is a future good, the buyer acquires the property in the moment the good was achieved. Related to constructions, the relevant provisions in terms of land registry are applicable.

In the case of sale of goods from a limited kind that does not exist at the conclusion of the contract, the buyer acquires the property at the time of individualisation by the seller of the goods sold. When the good or, according to the case, the limited kind is not done, the contract produces no effects. However, if the failure is due to the seller's fault, he/she is bound to pay damages.

When the good is realised only partially, the buyer has the choice either to request the abolition of the sale or to claim a corresponding reduction in the price. The same solution applies in the case of specific goods of a limited kind which do not exist at the conclusion of the contract when the limited kind was made only partially and, therefore, the seller cannot individualise the whole quantity of goods specified in the contract. If the partial failure of the good or, according to the case, of the limited kind was caused by the seller's fault, he/she is obliged to pay damages.

When the buyer assumed the risk of not fulfilling the good or the limited kind, if necessary, he/she shall remain liable to pay the price.

The good is considered made on the date on which it becomes capable of being used as intended when the contract was concluded.

D. The transfer of ownership in the case of the sale of the good to another person

According to article 1683 of the Civil Code, on the conclusion of the contract over a determined individual good, it is owned by a third party, the contract is valid and the seller is obliged to ensure the transfer of ownership to the buyer from its holder.

The seller's obligation is deemed to be made either by acquiring the asset by him/her, or by ratification of the sale by the owner, or by any other means, directly or indirectly, which procure the buyer the ownership of the good.

If the law or the will of the parties does not indicate otherwise, the property is relocated to the buyer from the moment of acquiring the good by the seller or of the ratification of the sales contract by the owner.

If the seller does not ensure the transfer of ownership to the buyer, the latter may request the termination of the contract, the reimbursement of the price as well as, if necessary, damages.

When a joint owner sold the joint ownership good and subsequently he/she does not provide the transfer of ownership of the entire good to the buyer, the latter may request, in addition to damages, at his/her choice, either to reduce the price proportionally to the share he/she did not acquire, or to terminate the contract if he/she had not bought if he/she had known that he/she would not acquire ownership of the entire good.

E. The transfer of ownership in the case in which through the intention of the parties it is postponed to a date subsequent to the conclusion of the contract

The moment of transferring the ownership agreed upon by the parties can be determined by applying a suspensive term or of a suspensive condition, whose fulfilment consolidates retroactively the acquisition of the ownership.

In this sense we illustrate the situation of the trial sale which is a sale under a suspensive condition through which the buyer reserves the right to try the good sold in

order to check whether it meets the intended purpose for which it is affected. The testing period must be established by the parties.[13]

According to article 1681 of the Civil Code, the sale is a trial sale when it is concluded under the suspensive condition that, after the testing, the good has to meet the criteria set out at the conclusion of the contract or, in their absence, of the good's destination, according to its nature.

If the duration of the testing has not been agreed upon and if from the usages it does not result otherwise, the condition shall be deemed satisfied if the buyer has not declared that the property is unsatisfactory within 30 days of delivery of the good.

In case through the sales contract the parties have stipulated that the good sold is to be tested, it is assumed that a trial sales has been concluded.

F. The transfer of ownership in the case when through the parties' will it is postponed to a date subsequent to the conclusion of the contract when the sale is with the price paid in instalments and with the reserve of the property.

According to article 1755 of the Civil Code, when, in a sale with the price paid in instalments, the payment obligation is guaranteed with the reservation of ownership, the buyer acquires the ownership on payment of the last instalment of the price; but the risk of the good is transferred to the buyer at the time of its delivery.

The seller retains the ownership of the good which represents its guarantee and which he/she reserves until the full payment of the price by the buyer, the payment obligation is guaranteed with the reservation of the ownership and thus postponing the transfer of ownership at the time when the buyer pays the last instalment in the contract. The risk of losing the good is transferred to the buyer at the time of delivering the good.

The transfer of ownership is affected by a suspensive condition which must be met until a certain deadline set by the contract.[14]

Unless otherwise agreed, the non-payment of a single instalment, which is not more than an eighth of the price, does not give the right to terminate the contract, and the buyer retains the benefit of the period for the successive instalments.

G. The transfer of ownership in the case of sale of certain goods using a sample or a model. Thus, according to article 1680 of the Civil Code, in the case of the sale using a sample or a model, the ownership is relocated to the moment of delivering the good.[15]

In the case of the sale using a sample or a model, the seller warrants that the good has the qualities of the sample or model (article 1715 of the Civil Code).

[13] Fl. Moțiu – Contractele speciale. În noul cod civil (Special contracts. The new civil code). Universul Juridic Publishing House. Bucharest. 2011. p. 96.

[14] Article 1684 of the Civil Code
The stipulation by which the seller reserves the ownership of good until the full payment of the price is valid even if the property has been delivered. This stipulation cannot be opposed to third parties until after fulfilling the publicity formalities required by law, according to the type of good.

[15] Legal-creditor dictionary
Variety of the trial sale involving the examination and acceptance by the buyer – at the conclusion of the contract – of a sample of the product, expecting that all the products that are to be delivered later (usually at several successive terms) to correspond to this sample; if a good supplied does not match the sample, the buyer may require the replacement by another, an appropriate one, or he/she may require the resolution of the contract, with damages under the common law.

Conclusions

These are the main situations in which the transfer of ownership operates at a different time than that required by article 1674 of the Civil Code, which represents the rule, that is to say the property is relocated to the buyer from the moment of clinching the contract, even if the good was not delivered or the price has not been paid yet, except for the cases provided by law or if the parties' will does not indicate otherwise and some of them have been already analysed.

The practical consequence of the translative nature of the real rights as a result of the sales contract is the risk in the translative ownership contract stipulated in article 1274 of the Civil Code, in the absence of a contrary stipulation, as long as the good is not delivered, the contract risk remains the task of the delivery obligation debtor, even if the property was not transferred to the acquirer.

These provisions are suppletive, the parties may derogate from the law provisions related through their agreement of will.

This article establishes the principle according to which the risk of the contract rests with the delivery obligation debtor, even if the property was transferred to the acquirer and the good was not delivered.

From the analysis of the text it results that, as long as the good was not delivered by the seller to the buyer, even if the latter, according to the contract, has already become the owner of the ownership, the transfer of ownership operating at the time of concluding the contract, the one who bears the risk of accidental destruction of the good sold is the seller, in whose possession the good is and which subsists until the delivery of the good to the purchaser.

The only exception to this rule is when the creditor of the delivery obligation (buyer) has been delayed by the debtor of the delivery obligation (seller), because he/she refuses to take the good sold, the risk of accidental perish in this case is fully borne by the buyer.

However, the creditor who is delayed takes the risk of accidental destruction of the good. He/she cannot free himself/herself even if he/she proved that the good would have been destroyed and if the delivery obligation had been executed on time.

In the case of accidental destruction of the good, the delivery obligation debtor loses the right to consideration, and if he/she has received it, he/she is obliged to return it.

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THE LAW GOVERNINGTHE CONDITIONS OF VALIDITY OF MARRIAGE AGREEMENT

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Abstract: *The new civil code in the seventh book entitled "Provisions of Private International Law," Title II Conflict of Laws, Chapter II Family, Section I Marriage, paragraph 1, The contracting of marriage, art.2585-2587 does not define the notion of marriage but according to art.2586 of the new Civil Code the substantive conditions of marriage are governed by the national law of each spouse in accordance with art.2587 of the new Civil Code when the formal requirements of marriage are governed by the law of the State where marriage is contracted. In our previous studies we asked the following question: what primary qualificationo gverning the conditions of validity of marriage agreement? what the law applicable to the substantive conditions of matrimonial agreement?*

Keywords: *matrimonial regime; marriage agreement; conditions of validity of marriage agreement; the law applicable to the substantive conditions of the matrimonial agreement; the Romanian law as the law applicable to the substantive conditions of the matrimonial agreement.*

1. Explaining the meaning of the conflict of rules regarding the notion of „conditions of validity" of matrimonial agreement

In the current Romanian law[1] the substantive conditions for the validity of the contract are:

- the capacity to contract;
- the consent of the parties;
- a specific and lawful object;
- a lawful and moral cause of obligations.

In terms of the formal requirements we specify that a certain form is required for the respective contract, that form must be respected, under the penalty provided by the laws in force. The contract must be concluded in authentic form and the publicity formalities must be performed.

So, since we are dealing with the conditions of validity of the matrimonial agreement both the substantive conditions and the formal conditions specifically provided for this type of contract must be respected.

Article 2593, paragraph 1 letter b of the Civil Code provides that "the law applicable to matrimonial regime" governs:..... the conditions of validity of the marriage agreement, except capacity."

Article 2594 of the Civil Code with the marginal name The law applicable to formal conditions of the matrimonial agreement rules: "The formal conditions as required by law for the conclusion of the matrimonial agreement are those required by the law applicable to matrimonial regime or the ones stipulated by the law of the place where it is concluded."

Analyzing the provisions of Article 2593, paragraph 1 letter b of the Civil Code and art.2594 of the Civil Code we note that art.2593 paragraph 1 letter b of the Civil Code refers to substantive conditions (because as we know the substantive conditions are: the

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[1] N. C. Anitei. *Marriage agreement under the provisions of the Romanian Civil Code,* Ed. Lambert, Germania, p. 34; *N.C. Anitei*. Conventia matrimonială potrivit noului Cod civil (Matrimonial Agreement under the New Civil Code), Hamangiu Publishing House, Bucharest, 2012, p. 34.

capacity to contract, the consent of the parties, a specific and lawful object and a lawful and moral cause of obligations) and not to the conditions of validity as the latter include both the substantive conditions and the formal conditions (the Romanian legislator through art.2594 of the Civil Code devoted a special article to the formal conditions).

We suggest as lex ferenda the amendment of art.2593 paragraph 1 letter b of the Civil Code in the sense of "the law applicable to the matrimonial regime governs: „..... the substantive conditions of the matrimonial agreement, except capacity."

2. The law applicable to the substantive conditions of matrimonial agreement

By studying the provisions of art.2593 paragraph 1 letter b of the Civil Code we note that the law applicable to the matrimonial regime regulates: "... the conditions of validity of the matrimonial agreement, except capacity." So, the law applicable to the matrimonial regime regulates the following substantive conditions of the matrimonial agreement: consent, object and cause.

We suggest as lex ferenda the amendment of art.2593 paragraph 1 letter b of the Civil Code in the sense of "the law applicable to the matrimonial regime regulates: „.....the substantive conditions of the matrimonial agreement, except capacity."

In terms of the capacity we mention that by means of the interpretation of art.2572 paragraph 1 of the Civil Code it shall be governed by the national law of each spouse.

Corroborating the provisions of art.2593 paragraph 1 letter b with those of art.2590 of the new Code we note that in terms of the substantive conditions of matrimonial agreement, the following laws are applied:

• Capacity will be governed by the national law of each spouse;

• The consent, object and cause will be governed according to the choice of the future spouses or spouses of any of the following laws: either the law of the State where one of them has his/her habitual residence at the date of election, or by the law of the state whose citizenship any of them has at the date of election, or by the law of the state where they establish their first common habitual residence after marriage celebration.

Further, by corroborating the provisions of art.2593 paragraph 1 letter b and those of art.2590 of the new Code, we shall answer the following questions:

1. What law applies to the substantive conditions required for the conclusion of the matrimonial agreement when two foreign spouses of the same citizenship have their habitual residence on the territory of Romania?

When the two foreign spouses of the same citizenship (for example the spouses have French citizenship) have their habitual residence in Romania and want to conclude a matrimonial agreement, the substantive conditions of the matrimonial agreement shall be governed as follows:

• the capacity is governed by the common national law, namely by the French law (in our example);

• for the other three substantive conditions, namely: the consent, object and cause the spouses may choose as the law applicable to the matrimonial regime one of the following laws:

1. the law of the State where one of them has his/her habitual residence at the date of election, namely the Romanian law in this case;

2. the law of the state whose citizenship any of them has at the date of election, so in our case, the French law because both have French citizenship;

3. the law of the State where they establish their first common habitual residence after marriage celebration, so in our case: the French law if after marriage celebration they had their first common habitual residence in France, or the Romanian law if after marriage celebration they had their first habitual residence in Romania, or the law of any other state (for example Belgium) if after marriage celebration they had their first common habitual residence in that state (Belgium).

2.What law applies to the substantive conditions required for the conclusion of the matrimonial agreement when two foreign spouses with different citizenships have their habitual residence on the territory of Romania?

When the two foreign spouses with different citizenships (for example one is Spanish and the other one Italian) have their habitual residence in Romania and want to conclude a matrimonial agreement, the substantive conditions of the matrimonial agreement shall be governed as follows:

• the capacity is governed by the national law of each spouse, so in our case, by the Spanish law in case of the Spanish spouse and by the Italian law in case of the Italian spouse;

• for the other three substantive conditions, namely: the consent, object and cause the spouses may choose as the law applicable to the matrimonial regime one of the following laws:

1. the law of the State where one of them has his/her habitual residence at the date of election, namely the Romanian law (in this case);

2. the law of the state whose citizenship any of them has at the date of election, so in our case, either the Spanish law or the Italian law because spouses have different citizenships;

3. the law of the State where they establish their first common habitual residence after marriage celebration, so in our case: the Spanish law or the Italian law if after marriage celebration they had their first common habitual residence either in Spain or in Italy, or the Romanian law if after marriage celebration they had their first habitual residence in Romania, or the law of any other state (for example Belgium) if after marriage celebration they had their first common habitual residence in that state (Belgium).

3. What law applies to the substantive conditions required for the conclusion of the matrimonial agreement when two spouses, one of them, a Romanian citizen and the other a foreign citizen have their habitual residence on the territory of Romania?

When one of the spouses is a Romanian citizen and the other a foreign citizen (Irish) and they have their habitual residence in Romania and want to conclude a matrimonial agreement, the substantive conditions of the matrimonial agreement shall be governed as follows:

• the capacity is governed by the national law of each spouse, so in our case, by the Romanian law in case of the Romanian spouse and by the Irish law in case of the Irish spouse;

• for the other three substantive conditions, namely: the consent, object and cause the spouses may choose as the law applicable to the matrimonial regime one of the following laws:

1. the law of the State where one of them has his/her habitual residence at the date of election, namely the Romanian law (in this case because they have their habitual residence in Romania);

2. the law of the state whose citizenship any of them has at the date of election, so in our case, either the Romanian law or the Irish law;

3. the law of the State where they establish their first common habitual residence after marriage celebration, so in our case: either the Romanian law or the Irish law if after marriage celebration they had their first common habitual residence either in Romania or in Irland, or the law of any other state (for example Belgium) if after marriage celebration they had their first common habitual residence in that state (Belgium).

4. What law applies to the substantive conditions required for the conclusion of the matrimonial agreement when one of the spouses is a Romanian citizen and the other spouse is a foreign citizen and they have their habitual residence on the territory of another state?

When one of the spouses is a Romanian citizen and the other spouse is a foreign citizen (for example Dutch) and they have their habitual residence in another state and want to conclude a matrimonial agreement, the substantive conditions of the matrimonial agreement shall be governed as follows:

• the capacity is governed by the national law of each spouse, so in our case, by the Romanian law in case of the Romanian spouse and by the foreign law (Dutch) in case of the foreign spouse;

• for the other three substantive conditions, namely: the consent, object and cause the spouses may choose as the law applicable to the matrimonial regime one of the following laws:

1. the law of the State where one of them has his/her habitual residence at the date of election (so in our case, there are the following choices: either the Romanian law where one of them has his/her habitual residence on the territory of Romania at the time of election, or the Dutch law if one of them has his/her habitual residence in the Netherlands at the date of election, or the law of any other state where one of them has his/her habitual residence on the territory of that state at the date of election);

2. the law of the state whose citizenship any of them has at the date of election, so in our case, either the Romanian law or the Dutch law;

3. the law of the State where they establish their first common habitual residence after marriage celebration, so in our case: either the Romanian law if after marriage celebration they had their first common habitual residence in Romanian, or the Dutch law if after marriage celebration they had their first common habitual residence in the Netherlands and the law of any other state (for example Belgium) if after marriage celebration they had their first common habitual residence in that state (Belgium).

5. What law applies to the substantive conditions required for the conclusion of the matrimonial agreement when two Romanian spouses have their habitual residence on the territory of another state?

Where two spouses, Romanian citizens have their habitual residence abroad (France) and want to conclude a matrimonial agreement, the substantive conditions of the matrimonial agreement shall be governed as follows:

• the capacity is governed by the national law of each spouse, so in our case, by the Romanian law;

• for the other three substantive conditions, namely: the consent, object and cause the spouses may choose as the law applicable to the matrimonial regime one of the following laws:

1. the law of the State where one of them has his/her habitual residence at the date of election, so in our case, the spouses have the following choices: either the French law if one of them had his/her habitual residence in France at the time of election, or the Romanian law if one of them had his/her habitual residence in Romania at the date of election, or any other law of any on condition that he/she has his/her habitual residence on the territory of that state at the date of election (for example the Spanish law if at the time of election they had their habitual residence in Spain);

2. the law of the state whose citizenship any of them has at the date of election, so in our case,the Romanian law because both have Romanian citizenship;

3. the law of the State where they establish their first common habitual residence after marriage celebration, so in our case: the Romanian law if after marriage celebration they

had their first common habitual residence in Romanian, the French law if after marriage celebration they had their first common habitual residence in France, the law of any other state (for example Spain) if after marriage celebration they had their first common habitual residence in that state (Spain).

6. What law applies to the substantive conditions required for the conclusion of the matrimonial agreement when the spouses have not chosen the law applicable to their matrimonial regime?

If the spouses have not chosen the law applicable to their matrimonial regime and want to conclude a matrimonial agreement, the substantive conditions of the matrimonial agreement shall be governed by the law applicable to the general effects of marriage.

From the provisions of art.2589, paragraph 1 of the new Civil Code we note that the general effects of marriage shall be governed by:

1. the law of the common habitual residence of the spouses, and in its absence by;
2. the law of the common citizenship of spouses and in its absence by;
3. law of the State where the marriage was celebrated.

3. The Romanian law as the law applicable to the substantive conditions of the matrimonial agreement

To clarify the meaning of the conflict of laws set out in art. 2593 paragraph 1 letter b of the Civil Code we need to perform the primary qualification of the „substantive conditions" notion.

In the Romanian law, the substantive conditions are those circumstances that must exist at the conclusion of the matrimonial agreement in order to be valid.

The substantive conditions of the matrimonial agreement are those essential elements required for its existence and validation.

Since for the conclusion of marriage, under law, the following substantive conditions are required: the ability of future spouses (matrimonial age), the consent of the intending spouses and the notification upon the health state, we consider that for a marriage agreement to be valid, it must meet these conditions, to which we add the object and cause of the matrimonial agreement.

However, in relation to these substantive conditions we must make the following distinction:

• if the matrimonial agreement is concluded before marriage, we must take into account the following substantive conditions: sex differentiation, the ability of future spouses (matrimonial age) the consent of the intending spouses, the object and cause of the matrimonial agreement;

• if the matrimonial agreement is concluded during marriage we must take into account the following substantive conditions: the ability of spouses to conclude the matrimonial agreement, the consent of the intending spouses, the object and cause of the marital agreement.

The substantive conditions[2] for the agreement validity are:

Regarding the matrimonial agreement, in terms of the ability to conclude a contract, they apply the rule according to which anyone who can conclude a valid marriage can also conclude a matrimonial agreement (habilis ad nuptias habilis ad pacta nuptialia). Therefore, in principle, no general rules concerning the capacity to contract are applied, but only rules

[2] Anitei Nadia-Cerasela. *Marriage agreement under the provisions of the Romanian Civil Code,* Lambert Publishing House Germany, 2012, pp. 45-66; N.C. Anitei. *Conventia matrimonială potrivit noului Cod civil (Matrimonial Agreement according to the New Civil Code),* Hamangiu Publishing House, Bucharest, 2012, pp. 34-50.

concerning the matrimonial ability (age) on marriage conclusion. We note that marriage age should be met at the conclusion of the matrimonial agreement, and not at the marriage ceremony. The age of marriage is an express nullifying condition. The provisions of art.272 paragraph 1 of the new Civil Code provided that the minimum age for the conclusion of the matrimonial agreement should be 18. In case of the minor, by corroborating paragraph 2 of art.272 of the new Civil Code with the provisions of art.337 paragraph 1 of the new Civil Code we will notice that, exceptionally, for thorough reasons (eg pregnancy) the minor who has attained the age of 16 may conclude or modify a matrimonial agreement only with the consent of his legal protector and with the approval of the guardianship court. A maximum limit up to which the matrimonial agreement may be concluded has not been established, which means that the marital agreement may be concluded up to an old age and even, in extremes, before death. In case of mentally alienated and disabled persons, until that person is placed under interdiction, he/she can validly conclude a matrimonial agreement. However, given that art.276 of the new Civil Code does not allow the contracting of marriage by a mentally alienated or disabled person, without specifying whether or not we refer to a person placed under judicial interdiction, we think that any mentally disabled or alienated person lacks the capacity to conclude a matrimonial agreement. Since the matrimonial agreement is ancillary to marriage, we believe that as regards the matrimonial agreement the mentally alienated and disabled person are unable to conclude a matrimonial agreement.

The consent of the persons called to participate in the conclusion of the matrimonial agreement must meet the general validity conditions for the conclusion of the legal acts.The consent of the intending spouses is an express and nullifying condition. It is governed by the provisions of art.330 paragraph 1 of the new Civil Code which provides: "Under penalty of nullity, the matrimonial agreement is concluded by registered authenticated by notary public with the consent of all parties, expressed in person or by a mandatory with authentic special mandate, having deliberate content." In terms of legal acts in general, the notion of consent has a double meaning, referring both to the manifestation of the will of a person intended to produce legal effects and to the consistent meeting of wills, the agreement of wills to create a legal relationship between them[3]. The existence of the consent at the conclusion of the matrimonial agreement of the future spouses is a fundamental requirement, indispensable to the legal act of the matrimonial agreement, but still not sufficient, for it also needs to be free, that is undisturbed in its manifestation, and current[4]. If the marital agreement is concluded by a representative the agent must have a genuine mandate, including in detail all the clauses of the matrimonial agreement draft. The future spouses or the agent (with authenticated proxy) must be present at the notary public to give their consent at the conclusion of the matrimonial agreement. By this, the conclusion of the matrimonial agreement is different from the conclusion of marriage which involves the personal consent of the intending spouses.In order to be validly expressed, the consent must meet certain conditions[5]: 1. it must be uncorrupted; 2. it must

[3] Gh., Beleiu. *Drept civil* român. *Introducere în dreptul civil şi subiectele dreptului civil, Ediția a v-a revizuită şi adăugită,* Casa de Editură şi Presă „Şansa! S.R.L., Bucureşti, 1998, p. *142.*

[4] E., Florian. *Dreptul familiei (Family Law),* 2nd edition C. H. Beck Publishing House, Bucharest, 2008, p. 23.

[5] For details see: T., Bodoaşcă. *Dreptul familiei (Family Law)*, All Beck Publishing House, Bucharest, 2005, pp. 59-70; A., Bacaci. V., C., Dumitrache. C., C., Hageanu. *Dreptul familiei (Family Law)*, 6th edition, C. H. Beck Publishing House, Bucharest, 2009, pp. 20-22; E., Florian. *Dreptul familiei (Family Law),* 2nd edition C. H. Beck Publishing House, Bucharest, 2008, pp. 23-27; G., C., Frențiu. B. D. Moloman. *Elemente de dreptul familiei şi de procedură civilă (Elements of Family Law and Civil Procedure),* Hamangiu Publishing House, Bucharest, 2008, pp. 53-55P., Filipecu. A., I., Filipescu. *Tratat de dreptul familiei (Family Law Treaty),* 7th edition, All Beck Publishing House, Bucharest, 2002, p.315.

be current; 3. it must be given personally by future spouses or through an agent who has authenticated power of attorney; 4. it must be found directly by the notary public.

Object of the matrimonial agreement. We note that, as it becomes apparent from the provisions of art.332 of the new Civil Code, the object of the matrimonial agreement is the matrimonial regime that spouses choose as an alternative to the legal matrimonial regime, namely the separation of property matrimonial regime or the matrimonial regime of community property. Also, the matrimonial agreement is subject to the laws in terms of the matrimonial regime chosen, except in special cases provided by law. Otherwise, the matrimonial agreement becomes absolutely void.

The matrimonial agreement is driven by a specific legal issue (affectio conjugalis).

By the conclusion of the matrimonial agreement, the parties should bear in mind the intention to affect the economic relations generated by it, to support the marriage tasks and accomplish the appropriate pecuniary framework necessary in order to live a family life, all this in the sense that their agreement must be set up in a patrimonial charter.

If marriage is guided by its own legal and specific cause (animus conjugalis), the matrimonial agreement legally depending upon this institution, it must - by its purpose - not exceed the natural edges imposed by the effects of marriage.

Even if the effects of the matrimonial agreement are patrimonial, they should not depart from the fact that they occur only to the extent that its parties have the civil status of married persons. The common place of the effects of the matrimonial contract is this aspect which should never be missed - only second in the family economy. If this fails to happen, the matrimonial agreement will be diverted from its natural purposes, and the matrimonial agreement may become an example of simulation[6].

In legal literature it has always been admitted that for a cause to be valid, it must meet the following conditions: to be real (namely to exist, not to be false or fictitious), to be lawful and moral (ie not to be prohibited by laws or contrary to public order, to morals or to the rules of social life) [7].

Conclusion

The provisions of art.2589 paragraph 1 of the new Civil Code show that if spouses have not chosen the law applicable to the matrimonial regime but want to conclude a matrimonial agreement, the substantive conditions of the matrimonial agreement shall be governed according to the concrete situation in which the spouses find themselves in terms of their habitual residence or, in the absence of citizenship:

Spouses have the same common habitual residence - in which case the law of their common habitual residence is applied to the substantive conditions of the matrimonial agreement;

Spouses have different habitual residences, but common citizenship - in which case the law of the state of the spouses' common citizenship is applied to the substantive conditions of the matrimonial agreement;

[6] Ibidem.

[7] A., Ionaşcu.M., Mureşan. M., N., Costin. C., Surdu. *Contribuţia practicii judecătoreşti la dezvoltarea principiilor dreptului civil (The Contribution of the Judicial Practice to the Development of Civil Law),* Academia Publishing House, Bucharest, 1973, pp.41-44, M., Mureşan. S., Fildan. *Drept civil. Contracte speciale (Civil Law. Special Contracts),* Cordial lex Publishing House, Cluj-Napoca, 2006, p. 49.

Spouses have both different habitual residences and different citizenships - in which case the law of the State where the marriage was celebrated is applied to the substantive conditions of the matrimonial agreement.

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THE CONTRIBUTION FOR SOCIAL HEALTH INSURANCES ACCORDING TO THE ROMANIAN LEGAL SYSTEM

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Abstract: *Aiming to create a unique legal framework, the Romanian lawmaker has assigned compulsory social contributions to the regulation field of the Fiscal Code, even if they basically have a legal regime which is different from that of taxes; therefore, compulsory social contributions have received a significant space within the Fiscal Code, namely Title IX2 ("Compulsory social contributions"), structured on three distinct chapters, based on the taxpayers categories, article 2962-29632. Being integrated to „compulsory social contributions", the contribution for health social insurances is the object of a double regulation: on the one hand Law No. 95/2006 on healthcare reform, which constitutes a special normative act in this field, and on the other hand the provisions of the Fiscal Code mentioned before, which have priority, according to the provisions of article 1 paragraph 3 of the same Code. The Fiscal Code mainly institutes the common structural elements of the contribution for social health insurances, "making it fiscal" and particularizing, as the case may be, taxpayers, taxation basis and values, tax return and payment terms, analyzed in the present work. The destination of the contribution for social health insurances (various medical services) keeps it instead in the field of (social) contributions stricto sensu, constituting the regulation field of the Law on healthcare reform, which exceeds nonetheless the theme of the current work.*

Keywords: *compulsory fiscal contributions; contribution for social health insurances; taxpayer; taxation basis; legal regime.*

1. General considerations

According to the Fiscal Code, are considered compulsory social contributions the following: the contribution for social insurances; the contribution for social health insurances; the contribution for vacations and allowances for social health insurances, which has to be paid by the employer; the contribution for unemployment; the contribution for the insurance against work accidents and occupational diseases, which has to be paid by the employer; the contribution to the Guarantee Fund for payment of wage claims, which has to be paid by the employer.

Attempting to provide a fiscal character to contributions, the Fiscal Code only provides regulations for taxpayers who have to pay these social contributions, but also regarding the way these contributions are calculated and paid [article 1 paragraph (1), including the procedure for modifying contributions]. First of all, given their nature – „they are no taxes" – compulsory social contributions are attached to social risks which they cover; for that purpose, they are regulated in their specific nature by special distinct normative acts, namely: Law No. 263/2010 on the unitary system of public pensions, articles 27-50; Law No. 95/2006 on the healthcare reform, Title VIII „Health social insurances", articles 208-209, 256-265; G.E.O. No. 158/2005 on contributions and allowances for social health insurances, articles 3-11; Law No. 76/2002 on the unemployment insurance system and employment stimulation, articles 23-33; Law No. 346/2002 on the insurance for work accidents and occupational

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diseases, articles 80-97; Law No. 200/2006 on the establishment and use of a Guarantee Fund for payment of wage claims.

Excepting the contribution for social insurances (for pensions), which is traditional, the other contributions have been instituted in Romania starting with 1991 (the first being the contribution for unemployment), as the social insurances field has been gradually reformed.

The contribution for health social insurances has been instituted by Law No. 95/2006 on the healthcare reform. In order to establish its legal regime[2], as a legal institution and from the perspective of the state budget, the present work will take all the connected normative acts as reference point, attempting to carry out an interdisciplinary approach – in terms of fiscal character, budget and procedures.

2. Definition, legal nature and premises of contribution for social health insurance (CASS)

2.1. Definition

According to common law, contribution means „the compulsory withdrawal of a part from the incomes of natural and legal persons, with or without the possibility to obtain a counter-performance in turn" (Law No. 273/2006 on local public finances, article 2, point 21). The special Law No. 95/2006 does not define CASS. It nonetheless contains an extremely general provision, expressing its destination: accomplishment of social health insurances; CASS represents the main system which finances the protection of population's health, offering access to a package of basic services for the insured persons [article 208 paragraph (1)]**;** the objectives of CASS are synthetically expressed by law.

2.2. Legal nature of CASS

CASS is not a tax. The expression „compulsory withdrawal, with or without the possibility to obtain a counter-performance in turn" integrates it to social risks which it covers (here, the risk of disease), concerning public health.

Social health insurances are compulsory and function as a unitary system. CASS is a legal fiscal obligation, „a compulsory obligation", subject to the Fiscal Code and, from a procedural perspective, to the Fiscal Procedure Code, its budget and management belonging to public law.

CASS has a legal regime which is different from that of voluntary or optional contributions for health, to which Law No. 95/2006 refers; these contributions are hypothetically integrated to private field, are not „governed" and they necessarily involve the conclusion of an insurance contract (for health), having another legal ground and regime.

2.3. Premises of CASS

The legal relation, including that for social contributions, has the following premises: legal norm (law); legal subjects; legal deeds[3].

Law. It constitutes undoubtedly the basic premise of CASS. It concerns first of all the Fiscal Code, the provisions of which prevail upon the other normative acts, according to article 1 paragraph (2); in the Fiscal Code *compulsory* contributions are briefly reminded; these contributions are at the same time provided with a fiscal character, there being

[2] Regarding the legal regime, see Dan Ţop, „Sistemul public al asigurările sociale de sănătate" in *Dreptul muncii - Dreptul securităţii sociale*, Bibliotheca Publ. House, Târgovişte, 2012, pp. 360 - 385.

[3] Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului,* ALL Publ. House, Bucharest, 1993, p. 69; Mihai Grigore, *Teoria generală a dreptului*, PIM Publ. House, Iasi, 2012, p. 169.

instituted their structural elements and manners to collect them, according to the regime of public law. Secondly, another important law is the Law on the healthcare reform which, without being a normative fiscal act, contains relevant provisions on the regime of CASS, related to legal budget. The Fiscal Procedure Code should not be omitted either at this point, its scope concerning also contributions from a procedural perspective.

Legal deeds. The legal relation does not emerge automatically from law[4], the latter constituting its abstract premise. The existence of the legal relation generated by the compulsory health insurance is based on all those legal deeds (circumstances), having in particular the form of legal acts, which generate the incomes subject to CASS, mentioned by the Fiscal Code at articles 296^{4}–296^{32}. These deeds are performed for another purpose than the fiscal one, in various domains of social relations legally regulated, generating nonetheless the concrete obligation to pay CASS, in the conditions restrictively regulated by law; according to the legislation in force, CASS is no longer attached here to the statute of employee or assimilated to it: „it applies to all the persons provided for by law (Fiscal Code), without privilege or discrimination, while the obligation to contribute to the system of social health insurances cannot acquire the meaning of an unjust placement of fiscal duties" (see for that matter the Decision of the Constitutional Court of Romania, No. 775, from May 12th 2009, Official Gazette, No. 459 from July 2nd 2009).

Legal subjects. The first subject of the legal relation is the fiscal institution authorized to collect contributions (ANAF), by means of its regional bodies. The second subject is the taxpayer – the natural person insured, in the case of individual contribution, but also the taxpayer – legal person, in the case of contributions which he has to pay for himself or for the persons under state protection or custody, which will be distinctively analyzed.

3. Fiscal regime of CASS

3.1. Taxpayers

At Title IX^{2} ("Compulsory Social Obligations"), the Fiscal Code, distinguishes between the following categories of taxpayers within the system of social insurances, including the health ones:

a) natural persons obtaining their incomes from salaries and incomes assimilated to salaries, including employers and entities assimilated to employers; persons obtaining incomes from pensions, but also persons under state protection or custody (through: the National Employment Agency, the National Agency for Social Benefits; the National House of Pensions; the Ministry of Justice and so on), according to the conditions of article 296^{2}-296^{20} of the Fiscal Code;

b) persons obtaining their incomes from independent activities, agricultural activities and associations without legal personality, article 296^{21}-296^{26};

c) persons obtaining other incomes and persons who *do not* obtain incomes, according to article 296^{27}. The premise included here by law is represented by incomes generated by: concession of the use of assets; investments; prizes and gains from gambling; the fiduciary operation (according to title III); other sources, like those provided for by article 78. Nonetheless, in order for a person to acquire the taxpayer quality in this respect, he or she is conditioned not to belong to the categories mentioned at a) and b) above. In other words, the criterion is *subsidiary*.

[4] Sofia Popescu, *Teoria generală a dreptului*, Lumina Lex Publ. House, Bucharest, 2000, p. 245.

In brief, the attribution of taxpayer quality is conditioned by obtaining the incomes subject to CASS, according to the limits and distinctions made by the fiscal law. The persons who do not obtain incomes subject to CASS and want to be insured have to pay the monthly individual contribution for social health insurances; the monthly calculation basis of the CASS which has to be paid to the budget of the Single National Fund for Social Health Insurances is based on the value of the minimum gross salary in Romania. Are considered taxpayers first of all the natural persons insured, including also the persons under state protection or custody. The financial support of health by means of CASS also expands to legal persons – employers and persons assimilated to them – assumed to be not insured persons, who have to pay a contribution comparable with that of the natural person insured.

3.2. Taxation basis

Attempting to include as many persons as possible in the system of CASS and, implicitly, to increase the amount of budget incomes, but also not to allow interpretations, the Fiscal Code regulates *expressis verbis* the incomes for which CASS has to be paid, starting from those obtained mostly from dependent activities (see 3.1. above).

Moreover, according to the Fiscal Code, the monthly basis made up of compulsory social contributions does not include incomes with special destination, briefly mentioned at article 296^{15} (for instance funeral grant, amounts of money received by employees to cover their travel and accommodation, but also allowances received during delegation and job relocation, around the country and abroad, for professional interests, amounting to up to 2,5 allowances granted to public institutions employees); all these are generically called „general exceptions".

According to the *specific exceptions* provided for by article 296^{16}, are exempted from the taxation basis also: allowances for health social insurances supported by the employer, according to law; allowances for social health insurances supported by the Single National Fund for Social Health Insurances, according to law; incomes granted for layoff or compensatory payments, supported by the budget of unemployment insurances, according to the normative acts regulating these fields.

The Fiscal Code institutes rules for determining the taxation basis for CASS, on categories of taxpayers, respecting at the same time the particular case of the incomes obtained as presented at point 3.1 above, which are subject to other rules than those applying to taxes; the provisions of the Fiscal Code for that matter are extremely technical and diverse (articles 296^{4}- 296^{32}).

Attempting to create an „equilibrium", law establishes a maximum limit of the taxation basis, in relation to the nature of incomes and insured persons' statute (for the incomes which predominate when it comes to CASS), but also a minimum limit, for the incomes which are „fewer or problematic". Without offering a comprehensive description of them, they are the following: for the individual contributions of employees, the taxation basis cannot be 5 times bigger than the medium gross salary (approved each year with the law on the budget of state social insurances), for each place where the income is obtained; for the contributions which employers or persons assimilated to them have to pay on their own, the calculation basis cannot be higher than the product of the multiplication between the number of the insured persons for whom the employer has to pay the CASS, during the month in which the latter is calculated, and the value corresponding to five times the medium gross salary. Moreover, the calculation basis cannot be less than two minimum gross salaries at a national level, for the persons under state protection or custody. When it

comes to the CASS which has to be paid for incomes resulting from independent or agricultural activities, the taxation basis cannot be either less than 35% of the medium gross salary on which the budget of social insurances is based or more than 5 times higher than the same salary

3.2. Taxation quota

According to article 296^{18} paragraph (3) letter b) of the Fiscal Code, the quotas for the contribution for social health insurances are: a) 5,5% for the individual contribution b) 5,2% for the own contribution which the employer has to pay. The quotas are applied upon the calculation basis, determined according to the conditions of the Fiscal Code. The quotas can be modified each year, with the Law on the budget of social state insurances.

4. Procedural aspects regarding the contribution for health insurances

4.1. Calculation, withdrawal and payment of CASS by the payer of taxable incomes

The obligation to calculate, withhold and pay CASS belongs to employers and other persons assimilated to them, that is, in general, to all the persons obtaining incomes from dependent activities, but also to the entities paying CASS on behalf of the persons under state protection or custody [provided for at article 296^{3} letter f) of the Fiscal Code], together with their own contribution, according to the case. They have the duty to declare the CASS monthly, until the 25th of the month following the one for which contribution has to be paid, together with the income tax and the nominal list of the insured persons.

Only by exception are the statement and payment of CASS quarterly and can be performed until the 25th of the month following the end of each quarter, for those who pay CASS for salary incomes or other incomes assimilated to them [in the conditions of article 58 paragraph (2) of the Fiscal Code].

The statements presume reality, have the nature of debt titles and are nonetheless subject to their ulterior check by the fiscal entities authorized

4.2. Establishing CASS by means of the annual taxation decision

The establishment of CASS by means of the annual taxation decision is regulated by article 296^{25} paragraph (4) and article 296^{28}. Are included here those cases in which CASS does not have the regime of a taxation withheld from the source, particularly incomes from independent and agricultural activities, incomes obtained by associations without legal personality, but also „other incomes", provided for by article 296^{27} of the Fiscal Code.

The taxation decision is based on the taxpayer's statement, which, according to the case, can be the estimated income statement or the actual income statement, when the taxation is made in real system.

On the basis of the taxation decision, taxpayers make *anticipated payments* during the year, which have the title of social contributions; these payments are made on a quarterly basis, in 4 equal installments, until the 25th (included) of the last month of each quarter, or they are made on semesters [for the hypothesis presented at article 296^{21} paragraph (1) letter g)], the accruals being made on the following fiscal year.

In the case of „other incomes" provided for by article 296^{27}, the contribution for social health insurances is calculated in the following year, by applying the individual contribution share upon the calculation bases. The amounts of money which result constitute the annual obligations to pay the contribution for health social insurances,

established with the annual taxation decision, and must be paid at most within 60 days from the notification of the decision.

4.3. Indefeasible CASS

For the cases mentioned at article 52 paragraph (1) letters a)-c) of the Fiscal Code, the CASS which is calculated, withheld and paid by the taxpayer is indefeasible and qualified as „final obligation", without making the object of the taxpayer's statement or of any taxation decision. Are included here the incomes from copyrights and those resulting from accounting, technical, legal and extralegal expertise activities.

4.4. Collecting CASS

Starting with July 1st 2012, CASS is being collected by the units of the State Treasury within the fiscal bodies dealing with the taxpayers of CASS. The subordinated fiscal bodies of ANAF have this competence for all taxpayers, including for those who are physical persons, mentioned at Chapter II and III of Title[2] of the Fiscal Code, and for all the incomes which are subject to CASS, as the territorial pension houses no longer have these prerogatives.

The collecting of CASS is based on the procedures provided for by the Fiscal Procedure Code, in their entire diversity[5]. The records of social contributions which have to be paid by employers and other persons assimilated to them are based on the taxpayer identification number, whereas the records for individual social contributions are based on the personal identification number.

In brief, the structural elements analyzed, absorbed by the fiscal legislation (the Fiscal Code) point out a rapid and substantial evolution of the Fiscal Code; these elements, together with the procedural aspects discussed, deferred to the Fiscal Procedure Code, reaffirm the need provide a ground and a unitary legal regime to taxes, including contributions, in order to finally provide a fiscal character to contributions[6]. The quantification and collecting of CASS, unlike its destination and management, place the taxpayer (insured physical person/legal person presumed not to be insured) in a typically fiscal relation, subject to the Fiscal Code, as substantial law, and to the Fiscal Procedure Code, from a procedural perspective.

5. Management and destination of CASS

CASS constitutes the main resource of the budget of the National Fund for Social Health Insurances, which is a special fund, approved by the law on the state budget, as an annex of the state budget. The management of such budget is done under the legal conditions, through the National Social Insurance House (CNAS), through the regional and Bucharest social health insurance houses and, through the Defense, Public Order, National Security and Judicial Authority Health Insurance House.

CASS has the role of financing public healthcare, mainly the public health assistance: medical assistance (preventive and curative); recovery, emergency and blood transfusion assistance; preventive assistance (among collectivities of children, pupils and students); pharmaceutical assistance, under the forms and conditions provide for by law.

At the same time, the natural persons who are insured can also benefit from medical vacations and social health insurance allowances. The latter have been outsourced from the

[5] For more details, see: Rada Postolache, *Drept financiar*, Ed. C.H. Beck, Bucureşti, 2009, pp. 211-236; Nadia-Cerasela Aniței, *Drept financiar*, Universul Juridic Publ. House, Bucharest, 2011, pp. 120-145.
[6] Ionuț Dobrinescu, "Fiscalizarea contribuțiilor sociale", in *Curierul fiscal,* nr. 1/2012.

budget of social state insurances and are not subject either to the law on the healthcare reform. They have a distinct legal regime, provided for by the G.E.O. No. 158/2005, which is a special regulation.

In terms of the destination of CASS, the normative acts within the field point out the following aspects: a) the Single National Fund for Social Health Insurances does not always cover completely the performances for social health insurances; for the financial support of the public healthcare system it has been instituted the already controversial "co-payment"[7] - the amount of money paid by the insured person, under the conditions of Law No. 96/2005.; b) unlike it happens with taxes, where the potential beneficiary is the entire society, in this case the quality of beneficiary of the performances for health insurances is concretely determined, for each person insured, in relation to the actual situation (the payment of the due amounts of money) and the social risk which must be covered, according to the legal norms related, other than the fiscal ones; this time, the person insured – beneficiary, who was initially the subject of the fiscal contribution relation, becomes the subject of another special legal relation – that of compulsory health insurance, subject to other regulations than the fiscal ones. Although it has a fiscal character, the potential counter-performance provides to CASS a distinct legal regime in relation to taxes.

6. Jurisdiction of CASS

Given the fiscal character provided to them and the nature of obligation/fiscal debt of the amounts of money collected by the Budget of the National Fund for Social Health Insurances as CASS, these amounts of money will be subject, in terms of their jurisdiction, to the provisions of the Fiscal Procedure Code. Consequently, irrespective of the way these amounts of money are collected as CASS (by direct payment, withdrawal at the source or anticipated payment) and irrespective of the taxpayer statute – natural or legal persons – the competence for settling the appeals against fiscal-administrative acts, by means of which contributions are established, belongs to the fiscal bodies within ANAF.

According to the G.E.O. No. 125/2011, the fiscal bodies within ANAF enjoy the same competence also for the CASS established before June 1st 2012 by the health insurance houses, which are not older than 5 years, and also for the CASS established after fiscal inspections.

The appealing methods have the regime instituted by the Fiscal Procedure Code and by the Administrative Litigation Law No. 544/2004.

[7] The amount of money paid by the person insured, according to the obligation provided for by article 219 letter g) of Law No. 96/2005, in order to benefit from the medical services within the basic services package, inside the system of social health insurances; the value of this amount of money, but also the conditions in which is paid are established by the framework contract containing the conditions for granting medical assistance inside the system of social health insurances, according to article 217 paragraph (3) letter k; the rest of the amount of money is supported by the Single National Fund for Social Health Insurances.

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PROCEDURAL ASPECTS REGARDING THE DIVORCE WITH THE PARTIES' AGREEMENT IN FRONT OF A NOTARY PUBLIC

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Abstract: *Divorce pronounced by another authority than a court of law used to be a farfetched desire of any subject of the law that had to face the busy atmosphere of a court of law, dull procedures and delays in settling divorce cases for sometimes unavoidable and hostile reasons contrary to the intentions of both parties to the trial. The adaptation of the institution of divorce to the social needs, natural and sensible intentions of a failed couple in their attempt to regain their balance and also a simplified procedure that should consider first of all the will of such a couple was initially reflected in Law no. 202/2010 and later on by completing and extending the normative act with the provisions of the new Civil Code, which are currently the fundamental basis of this matter and which requires to be scrutinized not only from the point of view of the plain text of the fundamental Law, but also from the point of view of the procedures regulated under special normative acts, such as the ones that are part of the notarial matter, which have instated special procedures aiming at a successful settlement of the divorce procedures.*

Keywords: *divorce, underage child, parties' agreement, notarial procedures, social investigation*

The divorce procedure in light of the new Civil Code has put forth not only new visions on the manifestations of will of at least one of the spouses of invoking an impossibility to continue the rapports derived from marriage, but also new competencies in the field of ending marriages attributed to the public authority that has concluded the marriage document, but also to the notary public invested by law with the procedure of the non-judicial divorce.

The new elements are of interest not only to the sensitivity of the legal marriage rapport and of the extremely delicate, personal and private reasons that can break the balance of such a rapport, but also to the environment in which this specific issue can be exposed in order to rapidly and optimally identify the settlement by the competencies allocated in this respect to the notary public. This solution is all the more praiseworthy as, besides the reasons mentioned above, it also relieves the courts of law from this tragic procedure regarding family life.

The regulations in the field start from the provisions of art. 373 of the Civil Code, which, enlarging upon the reasons for divorce, points out that divorce can be pronounced, - according to letter a) by the spouses agreement, at the request of both spouses or of one of the spouses, accepted by the other spouse, or according to letters b), c) and d), for reasons of guilt, resulted either from serious violations of the marriage rapports, or from the dissolution of the moral or sentimental grounds of the marriage, triggered by a separation in fact for more than two years or by the behaviour of one of the spouses, which makes it impossible for the marriage to continue.

Mention must be made that the divorce by the agreement of the parties is undoubtedly encouraged by the lawmaker for the various benefits both to the citizen involved and to the

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rule of law. It is a fast and symmetrical way of terminating a marriage. It is less traumatizing than the jurisdictional procedure, it relieves the courts of law from a significant number of divorce cases and, in most cases, from files concerning the exit from the indivisible rights pertaining to the settlement of a divorce and, last but not least, it is less expensive for the citizen and, therefore, more accessible in the practical realm of the access to justice.

Corroborating these modern legal needs with social reality, the provisions of art. 375 and the following of the Civil Code regulate the notarial, non-contentious procedure of terminating a marriage by the spouses' agreement.

Non-judicial divorce in front of a notary public involves the meeting of certain conditions of merits, indispensable to filing for a divorce on the roll of a notary public office. First of all, the existence of a valid marriage, as, obviously, what does not exist cannot be undone.

Secondly, a divorce ascertained by a notary public, involves the agreement of will of both spouses, both in filing for a divorce and, subsequently, upon ascertaining the divorce by the notary public. Mention must be made that, as different from the divorce under administrative procedure, symmetrically to the form of concluding a marriage in front of a civil servant, when divorce is not possible unless there are no underage natural or adopted children resulted from the marriage, under the notarial procedure, it is possible and admissible to pronounce the divorce of a couple that has children resulted from the marriage. In such a case, the parties' agreement accessory to the divorce in respect of the effects of the divorce on the rapports between the parents and their underage children, with the agreement of custody authority, is to be recorded by the notary public in legal documents fully enforceable to the parties and the state authorities involved in this matter.

Therefore, in order to be admissible, a filing for a divorce involving underage children, the spouses' agreement is an essential and sine qua non element. With regards to the consent of each of the spouses, there are relevant the rules of the common law regarding the validity of the consent, in the sense that it must be express, this being enforced by the presence of the spouse in front of the notary public and by their signing the petition for the divorce, it must be free and not harmed by the classic flaws of consent (mala fide, error and violence) and must come from an individual able to express its valid consent (therefore, being unacceptable an amiable divorce from a spouse under interdiction, lacking discernment, the lack of capacity being a cause for annulment of the divorce by consent).

In the case of the divorce involving underage children, the spouses' agreement is not sufficient to exist and be expressed in the divorce petition, it must also meet all the requirements of paragraph 2 of art. 375, in the sense that the spouses must agree on the family name the children will have after the divorce, on the exertion of the parental authority over the underage child/children by both parents, on establishing the dwelling of the children after the divorce, on the way of maintaining the personal relations with the separate parent and each of the children, as well as on establishing the contribution of the parents to the expenses incurred with upgrading, education, training and professional formation of the children. Mention must be made that all these agreements by the spouses must be validated and confirmed by the report of social inquiry, which can deny the solutions jointly confirmed by the spouses. If the solutions proposed by them are not to the best interest of the child/children and if the parents' arrangement cannot be adapted to the imperative provisions of the social inquiry report, the parties are to be directed to a court of law by a decision rejecting the petition filed for divorce.

With regards to the procedure of the notarial divorce, the lawmaker maintains a term of reflection for the spouses before the termination of marriage, pointing out that the notary public receiving the petition for divorce filed by both spouses, or the petition filed by one of the spouses present in person and by the other represented by a special power of attorney (which should meet all the requirements of paragraph 2 of art. 375 of the Civil Code), shall set a term (which cannot be shorter than 30 days), upon the expiration of which the spouses are the appear in front of the notary in person, without exception, to represent that they still want the divorce, term upon the expiration of which the notary public shall have to verify their free and not harmed consent, after which the notary public issues the divorce certificate without making any mention regarding the guilt of the spouses.

There are no jurisdictional ways of attack against the actions taken by the notary in the procedure of divorce, however, the parties can resort to a civil court or to another notary public with a new petition for divorce, if the first notary public refuses to ascertain the divorce.

With regards to the competence of resolving the divorce petition by the notary public, mention must be made that in this matter the exclusive competence bears with the notary public of the place of marriage (the locality where there is the city hall or civil status office where the marriage was officiated – which is proven with the marriage certificate attached to the petition) or, alternatively, the last common dwelling of the spouses (the evidence regarding the last dwelling is made, as the case may be, with the ID if it was the domicile of at least one spouse, or by the document proving the ownership or holding the right of use and, in the absence of such documents, by the authenticated statement by both spouses made on own account and recorded both in the divorce petition and the admission decision), thus, corroborated with the territorial competence of the notaries public appointed under order of the ministry of justice to operate in the jurisdiction of the courthouse, divorce can be pronounced by any of the notaries public located under the scope of competence of the courthouse pertaining to the last common dwelling of the spouses or the place of marriage.

Once the divorce is ascertained by the notary public, the latter is obligated by the law to submit a certified copy to the city hall of the place where the marriage was concluded, in order to make the relevant mention in the marriage document.

Between the parties, the marriage is terminated as of the date of issuing the divorce certificate and against third parties on the date of meeting the conditions of legal enforceability related to making the relevant mentions in the civil status registries.

Also, mention must be made that in case of accessory petitions regarding the effects of the divorce of the spouses in rapport to their underage children, although the provisions of art. 403 indicate that the custody authority can change the measures regarding the rights and obligations of the divorced parents to their underage children, we appreciate that to an equal extent the notary public as wel, with the parents' consent and also with the assistance by a report prepared by the custody authority confirming the will to amend of the parents, can order the change of the accessory measures instated under the divorce certificate.

A sign that society, prepared for such changes, had waited and received with open arms this new procedural option, is the practical positive impact, which shows that in Romania, in a period of 5 months, between 01.01.2012 and 31.05.2012, thee were terminated about 3700 marriages, which proves that, although divorce is not a positive phenomenon, desirable by society, the notary is an option trustworthily chosen by the citizens for a remedial, amiable, less traumatizing civilized and also private divorce which protects the dignity and status of the beneficiary.

With regards to the procedural conditions, the provisions of the Civil Code are complete with the instructions regarding the performance of the divorce procedure by the notaries public, as approved under the decision of the Executive Bureau no. 15/26.01.2011 of UNNPR (National Union of Notaries Public of Romania), and also with the newly amended provisions of Law 36/1995 in this field, which indicate in the provisions of art. 137 that, before verifying the territorial competence, the notary public, who has received a petition for divorce from the relevant parties, shall verify whether the law applicable to the divorce for the marriage requested to be terminated in the Romanian law.

Also, the law points out that the notary public has two solutions in respect of the parties' petition for divorce. The first solution is to allow the divorce petition, a case where the notary public issues in two counterparties the decision of allowing the divorce petition (decision which is not communicated to the parties and is not notarized for them) and issues the public certificate of divorce (in rinciple, in 6 counterparties, of which 2 for the archive of the notary's office in order to be archived as per the National Regulation of Archives, one counterparty each for the personal archive of the parties and the other two counterparties to be communicated to the authority that had concluded the marriage and to the General Directorate of Computer Records of Persons to allow the relevant mentions to be made.

The second possibility available to the notary public according to the law is the rejection of the divorce petition, a case where the notary shall issue the decision of rejecting the divorce petition, decision which cannot be challenged by the parties, unless with a view to receive payment of damages triggered by the rejection of the petition (this being an expression of the delinquent civil liability, which must meet the conditions required by the law for admissibility, namely the existence of an illicit act committed with guilt as provided for by the law, the existence of a prejudice and, last but not least, the existence of a causal relation between these two elements of merits). Although the refusal of the notary public to ascertain the termination of the marriage and also the admittance of the divorce petition cannot be challenged, but only be subject to request for damages, we cannot but reflect on the possibility of invoking the possibility of annulling the divorce for reasons having to do with any flaw of consent, a case where the parties, by admissibility of the petition, theoretically would be placed in the previous positions, which would have particular consequences in case one of the former spouses remarry.

If the spouses do not meet the conditions required by the law in respect of the submission of the divorce petition by both spouses, petition accompanied by the original marriage certificate and photocopies of the birth certificates of the spouses, children and their IDs, the notary public shall return the submitted petition together with all the documents attached (this case is similar with the one where the documents are complete but are submitted to a notary public that does not have the jurisdictional competence to register it in the divorce registry).

If, however, the spouses insist on the registration of the petition, the notary public shall register it only if the spouses have paid the fee, after which the notary shall issue a decision of rejection, grounded and unchallengeable. Once completed and registered with the divorces registry, the petition shall receive the same number as the related decision of allowing/rejecting the divorce petition and the divorce file in the divorces registry kept by each notary public. If a certificate is registered by a registry, the divorce petition on the roll of the notary's office, the notary public shall subsequently register it with the divorces registry, mentioning in the registry also the term set for the spouses of at least 30 days for

the pronunciation of the divorce. The parties have a term to be informed and in case of a failure to show the divorce petition shall be rejected.

In case of an impossibility for the notary public to attend for justified reasons to the resolution of the divorce petition, at request, another notary public can be delegated through the Notaries Public Chamber, invested with the designation role in case of delegation. Upon the term fixed after the completion of the decision to allow, the notary shall request through RNECD the number of the divorce certificate from the Sole Registry of Divorce Certificates (RUCD) kept by the Directorate for the Records of Persons and Administration of Databases with the Ministry of the Interior.

The editing and signing of the final decision by all the parties, obtaining the divorce certificate from RUCD and editing and issuing the divorce certificate take place on the same day, respectively upon the term set for the termination of the marriage.

The evidence of having communicated the divorce certificate to the city hall where the marriage had been officiated or where the marriage certificate had been registered and to the County of Municipal Directorate for the Records of Persons shall be attached to the divorce file. Divorce files cannot be transferred between notary office either ex officio or at the requests of the spouses.

LABOUR JURISDICTION FROM THE PERSPECTIVE OF THE NEW CIVIL PROCEDURE CODE

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Abstract: *Objectives The existence of two degrees of jurisdiction, the use of a single way of attack, the recourse, and the suppressing of the attack path of the appeal in the matter of labour conflicts, does not constitute unconstitutional dispositions. They have as finality only the assurance of the rapidity in solving such conflicts, without breaching the constitutional disposition according to which no law can restrict access to justice. Prior Work. I've tried to fiind the new regulation in this domain very important for those who practice labour law. Results In the Romanian legislation, the enforcement of the court decisions in the matter of labour conflicts is viewed by the lawmaker with great care, in certain cases the non-execution of a court decision being considered a felony. Value. We think this article is a small step in the disclosure of the problem eraised by the labour jurisdiction.*

Keywords: *work litigation, mediation, employees, enforcement*

1. General procedural aspects

According to art. 269, para. (1) of the Labour Code, corroborated with art. 208 and 209 of Law no. 62/2011, the judging of the labour conflicts is of the competence of the courts established according to the Civil Procedure Code.

A**.** *Under material aspect***,** the court competent for judging labour conflicts in first instance is the *tribunal,* except for the cases established by law in the competence of other courts [art. 208 of Law no. 62/2011]. In this sense, it is established the fact that within the tribunals there are sections or panels specialized for cases regarding labour and social security conflicts.

Exceptionally, there are certain litigations which target labour relations and which are tried in the first court at the level of the judicature or the Appeals Court.

The decisions rendered on the case matter are rightfully final and enforceable (according to art. 274 Labour Code) or only final (art. 214 of Law no. 62/2011) and can be challenged only with appeal before the Appeals Court (art. 201 of Law no. 62/2011)

a. The judicature is, according to art. 94 of the Civil Procedure Code, the one settling in the first instance a series of petitions whose object can or, as the case may be, cannot be assessed in money. In the field of the labour relations, the competence of the judicature represents an exception, thus, without talking about a labour conflict, the judicature settles the following problems:

- petitions for gaining the legal personality for the trade unions [art. 14 para. (1) of Law no. 62/2011], as well as those targeting the establishment of the fulfillment of the representativeness conditions;
- petitions for gaining the legal personality for the owners' organizations [art. 58 para. (3)];

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- petitions regarding the authorizing of functioning of the mutual aid houses of employees, as well as their registration [art. 4 para. (2) of Law no. 122/1996 regarding the legal regime of mutual aid houses of employees][2];
- petitions regarding the trial expenses, when they are requested, subsequent to the labour litigations;
- complaints against the minute for establishing a misdemeanor, in case of not observing the written form for the individual employment contract [art. 32 para. (2) of Government Ordinance no. 2/2001];
- litigations between day labourers and the beneficiaries (art. 14 of Law no. 52/2011 regarding the exercising of activities with occasional character performed by day labourers)[3].

b. The tribunal is the one settling, as court of first instance, the labour litigations. It is competent in the following situations:

- in case of individual labour conflicts regulated by art. 1, letter p and art. 211 of Law no. 62/2011;
- in case of labour conflicts indicated in art. 268 of the Labour Code;
- settlement of the cases having as object the establishment of the unemployment aid (art. 119 of Law no. 76/2002);
- settlement of petitions for gaining legal personality for territorial trade federations, confederations and unions (art. 42 and 43 of Law no. 62/2011), as well as the establishment of their fulfillment of the representativeness conditions [art. 51 para. (2)];
- settlement of the petitions for gaining legal personality for territorial owners' federations, confederations and unions [art. 55 para. (4) of Law no. 62/2011], as well as the establishment of their fulfillment of the representativeness conditions [art. 72 para. (2)];
- settlement of the petitions regarding the cease of strike (art. 198 of Law no. 62/2011).

c. The Appeals Courts represent the appeal courts in the matter of labour conflicts. Within the appeals courts there are organized sections or panels specialized for cases regarding labour and social security conflicts. The Appeals Court settles:

- petitions against sentences rendered by the tribunal in the matter of individual labour conflicts;
- petitions against sentences rendered by the tribunal in the matter of collective labour conflicts [art. 201 para. (1) of Law no. 62/2011];
- petitions against the refusal to register and cancel the registration the collective employment contracts by the Ministry of Labour, Family and Social Protection.

d. The High Court of Cassation and Justice represents the highest authority within the judicial system. Its role is to guide the other courts of law, having available the institution of recourse, but, especially, of the recourse in the interest of the law[4]. In social matters, the High Court settles:

- recourses against sentences rendered by the courts of appeals in cases regarding the labour relations of public servants within the central public authorities and institutions;

[2] Republished in the Official Gazette no. 261 of April 22nd, 2009.
[3] Published in the Official Gazette no. 270 of April 20th, 2011.
[4] See Alex Țiclea, *Labour Law Treaty,2012,p.954;*

- recourses against decisions of the sections within the Superiour Council of Magistracy through which was settled the disciplinary action regarding sanctioned judges or prosecutors;
- complaints against the decisions rendered following the challenges formulated by judges, prosecutors and other categories of staff within the judicial system, with respect to the manner of establishing the salary rights.

Through the institution of the recourse in the interest of the law, the High Court of Cassation and Justice renders decisions that target the unification of the judicial practice in what concerns the application of the labour legislation. Thus, through Decision no. 6/2011[5] it was established the fact that the mentioning within the dismissal decision of the list of all jobs available in the unit [established by art. 76 para. (1) letter d) of the Labour Code] does not apply in case the dismissal takes place for reasons that do not pertain to the person of the employee (according to art. 65 of the Labour Code).

B**.** *Under territorial aspect*, according to art. 269 para. (2) of the Labour Code, the petitions regarding the labour conflicts are addressed to the court in whose circumscription is the domicile or residence or, as the case may be, the headquarters of the plaintiff. This text must be corroborated with that of Law no. 62/2011 which mentions that the „petitions regarding the settlement of individual labour conflicts are addressed to the competent court of law in whose circumscription is the domicile or work place of the plaintiff" (art. 210). Thus, from the analysis of the two texts it is derived the fact that the lawmaker understood to allow the person having the quality of plaintiff (usually, the employee) to notify either the domicile court, or the competent court with respect to its work place. In case the quality of plaintiff is held by the employer, it can notify only the competent court with respect to its headquarters.

In the situation in which a territorial or material incompetence exception is invoked, this can be done by either interested party, on the first day of court, but no later than the beginning of the debates on the case matter. The incompetence exception is that procedural means through which the court of law can be requested to de-apprise itself and to send the case for trial to the competent court. Territorial incompetence must be put in discussion by the parties and if this did happen, it must be raised by the court because the non-observance of the norms regarding competence brings forth the absolute nullity of the court decisions rendered. The incompetence exception, once stated, is tried by the court that was notified with respect to the main petition, with priority, before any other possible exceptions that may rise. On the exception, the court pronounces its decision through a closing; in case it rejects the exception as ungrounded and will proceed with the case trial on the matter, the party dissatisfied may challenge the closing with recourse, after the rendering of the decision on the case matter. If the court declares itself incompetent, the decision is not subjected to any challenging means and the file is sent to the court designated as being competent[6].

[5] Published in the Official Gazette no. 444 of June 24th, 2011.
[6] See Al. Țiclea, *op. cit.*, p. 967.

2. Settling labour conflicts from the perspective of the new Civil Procedure Code

It occurs through a petition called *contestation*, which is formulated by the interested party (plaintiff). The Civil Procedure Code establishes in art.148 para.1: „any petition addressed to the courts of law must be made in writing and must comprise the indication of the court, the surname and first name, the domicile or residence of the parties or, as the case may be, their name and headquarters, the surname and first name, the domicile or residence of their representatives, if the case, the object of the petition and the signature. Also, the petition will comprise, if the case, the electronic address or the coordinates which were provided by the parties for this purpose, such as the telephone number, the fax number or others similar."

Moreover, according to art. 270 of the Labour Code, all labour litigations are exempt from the stamp fee.

The panel for settling in first instance the cases regarding labour and social security conflicts is composed of one judge and two judicial assistants. The judicial assistants, although they participate in the debates, do not have the right to vote, but their opinion is registered in the decision, and the separate opinion is motivated.

The European Courte of Human Rights indicated that the „participation of persons specialized in different fields of activity, together with the professional magistrates, in settling certain categories of litigations, does not contradict the principle of independence and impartiality of the court, established by art. 6 of the Convention for the protection of human rights and fundamental freedoms".

The institution of the judicial assistant is regulated by Law no. 304/2004 regarding the judicial organization, as well as by Government Decision no. 616/2005 regarding the conditions, the procedure for the selection and proposal by the Economic and Social Council of the candidates to be appointed as judicial assistants by the minister of justice[7]. The judicial assistants are appointed to office for a period of 5 years. In order to be appointed, they must cumulatively fulfill a series of conditions, respectively:

- to have Romanian citizenship, their domicile in Romania and full exercise capacity;
- to hold a degree in law;
- to have seniority on the job of at least 5 years;
- to not have a criminal record, to not have a fiscal record and to enjoy a good reputation;
- to know the Romanian language;
- to be apt from the medical and psychological point of view for exercising the position (art. 110 of Law no. 304/2004).

At the same time, the judicial assistants enjoy stability [art. 111 para. (1)] and their statute is similar to that of the magistrates [art. 111 para. (2)].

Because of their consultative role, in the specialty doctrine there was also expressed the opinion according to which the judicial assistants should not exist anymore[8]. We agree with the opinion outlines in the doctrine[9] and we feel that giving up on the tripartism, on the judicial assistants in settling labour litigations could be an error that, on the one hand, would breach the international recommendations in the matter, and, on the other hand,

[7] Published in the Official Gazette no. 583 of July 6th, 2005.
[8] See, broadly, Ş. Beligrădeanu, *Considerații critice asupra diversității nejustificate a reglementării legale privind competența materială a instanțelor judecătoreşti în domeniul soluționării conflictelor de muncă,* in Dreptul no. 10/2009, p. 102.
[9] See I.T. Ştefănescu, *Treaty of Labour Law, Universul Juridic, 2012, p.881*; Al. Țiclea, *op. cit.*, p. 969.

would be contrary to the positive experi3nce gained in this matter by several states of the European Union (France, Germany, Great Britain, Belgium or Switzerland).

The deadlines for notifying the court are regulated by art. 268 of the Labour Code, as well as by art. 211 of the Law of social dialogue no. 62/2011.

Thus, according to art. 268 of the Labour Code, the petitions can be formulated:

a) within 30 calendar days from the date on which the unilateral decision of the employer regarding the conclusion, execution, modification, suspension or termination of the individual employment contract was communicated;

b) within 30 calendar days from the date on which the decision of disciplinary sanctioning was communicated;

c) within 3 years since the date of rising of the right to action, in the situation in which the object of the individual employment conflict consists in the payment of salary rights not granted or of compensations to the employee, as well as in the case of the employees' patrimonial liability towards the employer;

d) throughout the contract term, in case it is requested the establishment of the nullity of an individual or collective employment contract or of clauses thereof;

e) within 6 months from the date of rising of the right to action, in case of non-execution of the collective employment contract or of clauses thereof;

f) in all situations, other than those mentioned, the deadline is 3 years since the date of rising of the right.

According to art. 211 of Law no. 62/2011, the petitions can be formulated by those whose rights have been breached, as follows:

a) the unilateral measures of executing, modifying, suspending or terminating of the individual employment contract, including the payment commitments regarding amounts of money, can be challenged within 45 calendar days since the date on which the interested party became aware of the measure ordered;

b) the establishment of the nullity of an individual employment contract can b requested by the parties for the entire period during which the respective contract is applied;

c) the payment of compensations for damages caused and the refund of amounts that made the object of payments not due can be requested within 3 years since the date of the damage occurrence.

From the analysis of the two legal texts there can be seen a series of non-correlations and disparities, which we shall emphasize hereinafter. Thus:

a) firstly, while art. 268 para. (1) letter a) of the Labour Code also targets conflicts derived from the conclusion of the individual employment contract, art. 211 letter a) of Law no. 62/2011 does not specify this category of conflicts;

b) the text in art. 211 of Law no. 62/2011 also targets „payment commitments regarding amounts of money", thus expanding the regulation sphere, and the text in art. 268 of the Labour Code makes no reference in this sense; the lawmaker targeted, through this regulation, the situation of the militaries, established in Government Ordinance no. 121/1998 regarding the material liability of militaries[10]. Thus, the deadline indicated in art. 30[11] of Government Ordinance no. 121/1998, which regulated the possibility to challenge

[10] Published in the Official Gazette no. 328 din 29 august 1998.

[11] Art. 30 para. (1) of Government Ordinance no. 121/98 – „the person considering that the imputation or withholding was done without grounds or with the breaching of the law, as well as the one who, after signing a *payment commitment*, notices that, in reality, does not owe, partially or in whole, the amount claimed by the unit, can submit a *contestation,* within, at most, 30 days from the date when the imputation decision was communicated under signature, or *since the date of signing the payment commitment*".

the payment commitment within 30 days since the signing date, was replaced with the term regulated by art. 211 letter a) of Law no. 62/2011, respectively within 45 days. We do not agree with the opinion formulated in the doctrine[12], according to which „the payment commitments regarding amounts of money" also refer to „the notes for establishing and assessing the damage", its recovery „through the parties' agreement", possibility regulated by art. 253 para. (3) of the Labour Code;

c) the deadlines for notifying the court differ: 30 calendar days [according to art. 268 para. (1) letters a) and b) and art. 252 para. (5) Labour Code] and 45 calendar days [according to art. 211 letter a) of Law no. 62/2011]. Relatively to these two regulations which initiated controversy, we consider that general applicability must have the term of *45 days for all hypotheses established by law* (including referring to the conclusion of the individual employment contract), while in case of *challenging the decisions of disciplinary sanctioning* the term of *30 days* (term especially regulated by law)[13] should be observed;

d) in what concerns the term of 3 years in case of the patrimonial liability, we can notice the fact that: in the Labour Code, it starts running from *„the date of giving rise to the right"* [art. 268 para. (1) letter c) and para. (2)], while in Law no. 62/2011 it runs from *„the date of the damage occurrence"* [art. 211 letter c)]. We agree with the opinion formulated in the specialty doctrine[14] and we believe that, given the fact that the text of Law no. 62/2011 is the most recent and has a character obviously favourable to the employees, it is the one that is applied;

e) according to art. 211 letter b) of Law no. 62/2011 the nullity causes persisting throughout the entire duration of the existence of the individual employment contract, since they have not been covered in the meantime [according to art. 57 para. (3) of the Labour Code], justify the invoking of nullity at any time, by either party; this disposition is completed with the one established by art. 268 para. (1) letter d) of the Labour Code, which also refers to „the establishment of the nullity of a collective employment contract or of clauses thereof". Moreover, it was established that the dispositions of art. 268 para. (1) letter d) of the Labour Code „are grounded on the principle according to which the establishment of the nullity or the annulment of existing acts can be requested. In the situation in which an individual or collective employment contract is no longer in existence, its clauses are not in existence, either, and the petition to establish nullity has no object. However, it is possible that the legal effects of certain contractual clauses to continue or to be produced after the cease of the existence of the contracts. In such situations, the respective legal effects can be challenged in court, if they are contrary to the rights, liberties or legitimate interests of the person"[15];

f) regarding the term of 6 months established by art. 268 para. (1) letter e) of the Labour Code, it is noticed the fact that it targets the non-execution of the collective employment contract or of clauses thereof, regardless of their nature. In this context, for this problematic, there can be two diametrically opposed (but correct, in our opinion) interpretations, as follows:

[12] See Al. Țiclea, *op. cit.*, p. 971.
[13] See I.T. Ştefănescu, *Răspunsuri la provocări ale practicii,* in RRDM no. 8/2011, pp. 30 and 31.
[14] See Al. Țiclea, *op. cit.*, p. 971.
[15] See, broadly, Al. Țiclea, *op. cit.*, pp. 972 and 973; Dec. no. 3285/R/2006, in RRDM no. 4/2008, pp. 124-126.

- on the one hand, we can consider in the sense in which to the clauses regarding salary rights (for example, bonuses) exclusively established in the collective employment contract is applied the term of 6 months (and not that of 3 years, applicable in matters of salary rights derived from the individual employment contract)[16];

- and on the other hand, one can interpret also in the sense in which, in this case, is applied the text of art. 211 of Law no. 62/2011, which implicitly abrogates art. 268 para. (1) letter e), such as, even in the situation when one is speaking of salary rights exclusively regulated through the collective employment contract, the term is that of 3 years;

g) according to art. 268 para. (2) of the Labour Code, in situations other than those previously debated, „the term is of 3 years since the rise of the right". In this sense, we can exemplify with the employer's patrimonial liability for the damages caused to the victims of labour accidents[17].

According to art. 271 para. (1) of the Labour Code corroborated with art. 212 of Law no. 62/2011, the petitions regarding the settlement of labour conflicts are tried expeditiously.

The trial terms cannot be longer than 10 days [art. 212 para. (2) of Law no. 62/2011], while the term for handing the subpoenas was established minimum 5 days prior to the case trial date (art. 213 of Law no. 62/2011).

The court of law has the obligation to inform the parties „with respect to the possibility and advantages of using mediation and guides them to resort to this method in order to solve the conflicts between them" (art. 6 of Law no. 192/2006 regarding mediation and the organizing of the profession of mediator). In the situation in which the parties resort to mediation, the trial is suspended for a period of maximum 3 months.

In the situation in which mediation is refused, the employer will have to submit its defenses until the first court date (art. 272 of the Labour Code). It is noticed that in case of the labour conflicts the burden of proof is reversed; it is not due to the plaintiff (employee), but to the employer[18].

Art. 273 of the Labour Code establishes that „the administration of evidence is done with the observance of the expeditious proceedings regime, the court being entitled to lapse from the benefit of the evidence admitted the party that causelessly delays its administration". The lapse from the benefit of the evidence can be done from case to case, by the court of law, considering both the complexity of the case and the possibilities the parties have to procure and administer the evidence[19].

With respect to the dispositions of art. 271-274 of the Labour Code, the Constitutional Court also stated that „the respective provisions are norms which establish a special, derogatory procedure regarding the trial dates and the manner of administering evidence in case of trying petitions regarding labour conflicts. The procedure rules established by these dispositions equitably apply both the employers and employees, without favouring one or another category".

The counter-claim is admitted in labour conflicts, if fulfills the condition of the indissoluble connection to the main claim (art. 209 of the Civil Procedure Code), and it is submitted, at the latest, on the first trial date.

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[16] See Al. Țiclea, *op. cit.*, p. 973.
[17] *Ibidem*, p. 974.
[18] In the hypothesis in which the position if plaintiff belongs to the successor of the employee, in order for art. 272 of the Labour Code to be applied, he/she must prove the pre-existence of the labour relations between his/her author and the employer. (Dec. no. 2323/R/CM/2009 in RRDM no. 5/2009, pp. 95-98).
[19] See Al. Țiclea, *op. cit.*, p. 976.

The court of law may decide, even if there are no express provisions in this sense in the labour legislation, to separate or join cases, on the basis of the common law provisions[20]. Thus, according to art. 139 para. 5 of the Civil Procedure Code, relatively to separation: „at any stage of the trial the joint trials can be separated and tried separately, if only one of them is on trial condition"; and according to art. 139 para. 1 of the Civil Procedure Code, relatively to the joining: „in order to ensure better judgment, in first instance it is possible to join several trials in which there are the same parties or even together with other parties and whose object and cause have a close connection between them. " This exception can be invoked by the parties or ex officio, at the latest on the first trial date before the court notified subsequently. In this case, the closing can be challenged only together with the case matter.

Given the expeditious character of the settling of the labour conflicts, the sentence must be rendered on the day on which the debates ended and, exceptionally, in special situations, the rendering can be postponed by at most two days.

According to art. 426 of the Civil Procedure Code, the decision order is drafted as soon as the panel is assembled and it is signed by the judges and the clerk. If either judge is prevented from signing the decision, it will be signed, in his/her place, by the panel president, and if he/she or the single judge is in such a situation, the decision will be signed by the court president. When the prevention relates to the clerk, the decision will be signed by the chief-clerk. In all cases, on the decision will be mentioned the cause which led to the impossibility to sign for a certain person.

In what concerns the character of the decisions of the first court, there is the following difference between the dispositions of the Labour Code and of Law no. 62/2011. Thus, according to art. 274 of the Labour Code, the decisions „*are rightfully final and enforceable*", while according to art. 214 of Law no. 62/2011, „*the decisions of the first court are final*". Certainly, through the text of art. 214 of Law no. 62/2011, the lawmaker wanted to abrogate the provision of art. 274 of the Labour Code, such as the final decisions to not be also rightfully enforceable. Even if it were so, the decisions given by the first court continue to be rightfully final and enforceable in this matter because art. 448 of the Civil Procedure Code (which represents common law in the matter and which completes the special provision) establishes the fact that: „*the decisions of the first court are rightfully enforceable when they have as object: 2. the payment of salaries or of other rights derived from the labour legal relations, as well as of the amounts due, according to the law, to unemployed persons; 3. compensations for labour accidents*".

It is obvious that this solution targets the interest of the employees to be able to enforce a final decision, although there is a risk that the employee will be ordered to return everything he/she obtained in the first court, after the trying of the recourse. That is why, in order to avoid such situations, in practice, there will be applied the dispositions of art. 450 corroborated with art. 718 of the Civil Procedure Code and it will be requested (by the employer) the suspension of the enforcing of the decision of the first court, for grounded reasons, until the trying of the appeal, in exchange for the payment of a bail (by the employer), calculated at the value of the challenge object.

[20] See Ş. Beligrădeanu, *Considerații referitoare la coparticiparea procesuală şi la conexarea cauzelor în conflictele individuale de muncă,* in Dreptul, no. 2/2009, pp. 23-25.

The computation of the appeal term is done on free days, without taking into account the first day when the term started to run and the day when the term ended [art. 181 para. (2) of the Civil Procedure Code].

The motivation of the appeal must take place also within the same term of 10 days. In the contrary case, the court will reject the appeal as being formulated or motivated late, except for the case when a reason beyond the appellant's will occurred.

Considering the fact that in the labour litigations (conflicts) where is a single challenge way, the appeal, the court will be able to uphold the decision challenged, situation in which, as the case may be, will reject, will cancel or will establish the superannuation of the appeal (art.480 of the Civil Procedure Code). In case of admission of the appeal, the court can cancel or, as the case may be, change in full or in part the decision appealed.

According to art. 470 of the Civil Procedure Code, the appeal petition must comprise, under the sanction of nullity, the following elements:

- surname, first name, personal number, domicile or residence of the parties or, for legal persons, their name and headquarters, as well as, as the case may be, the single registration code or the fiscal registration code, the registration number to the trade register or to the register of legal entities and the bank account. If the appellant leaves abroad, he/she will also indicate the chosen domicile in Romania, where all communications regarding the trial will be made;
- indication of the decision being challenged;
- de facto and de jure reasons on which the appeal is grounded;
- evidence invoked in supporting the appeal;
- signature.

There must be mentioned the fact that the indication of another decision cannot constitute a mere material error, but the non-observance of a compulsory legal disposition which brings forth the nullity of the appeal[21].

Finally, the claim must be signed by its author. Exceptionally, in case it is not signed, according to art. 196 para. (2) of the Civil Procedure Code, „the absence of the signature can, still, be covered before the first. If the absence of the signature is invoked, the plaintiff absent on that trial date will have to sign the petition at the latest on the first following trial date, being notified regarding this by subpoena. In case the plaintiff is present in court, he will sign even the meeting during which the nullity was invoked".

In case we are talking about a legal person – employer, the petition must be signed by its legal representative.

In all cases, the attorney who assisted or represented the party may perform, even without a warrant, any kind of acts for the preservation of the rights subjected to a deadline and which would be lost by not exercising them in time [art. 87 para. (2) of the Civil Procedure Code].

The court will try the appeal according to the rules established by the Civil Procedure Code, such as it will be able to admit, to reject, to annul or to establish the superannuation of the appeal [art. 480 of the Civil Procedure Code]. Thus:

- „in case of admission of the appeal, the court can annul, or, as the case may be, change the decision appealed, in full or in part" (para.2);

[21] See Al. Țiclea, *op. cit.*, p. 980.

- „in case it is established that, wrongfully, the first court settled the trial without entering the trial of the case matter or the trial was judged in the absence of the party that was not legally subpoenaed, the court of appeal will annul the decision challenged and will send the case for retrial to the first court or to another court equal as degree with it, from the same circumscription, in case the parties have expressly requested the taking of this measure through the appeal petition or through the counter-claim; the sending for re-trail can be ordered only once during the trial; the solution given to the law issues by the court of appeal, as well as the need to administer evidence are mandatory for the first court" (para.3);

- „if the court of appeal establishes that the first court was incompetent and the incompetence was invoked in the conditions of the law, will annul the decision challenged and will send the case for re-trial to the competent court or to another competent organ with jurisdictional activity or, as the case may be, will reject the claim as inadmissible"(para.4);

-"in case the court of appeals establishes that it has the competence to try as a first court, will annul the susceptible decision of, as the case may be, appeal or recourse" (para.5);

-"when it is established that there is another reason for nullity than the one indicated in para. 5 and the first court tried the case matter, the appeal court, annulling in full or in part the procedure followed before the first court and the decision challenged, will withhold the case for trial, rendering a decision susceptible of recourse, if necessary" (para.6).

3. Conclusions

At the same time, in his/her own challenge way, the appellant cannot be put in a worse situation than that in the decision challenged, except for the situations in which he/she expressly consents or in certain cases expressly indicated by law.

In the situation in which the case matter sentence is abated in the appeal and it had been enforced, the execution will be reversed[22].

According to art. 722 para. 1 of the Civil Procedure Code, „in cases in which the enforcement title or the forced execution are abated, the interested party is entitled to the reversal of the enforcement, by re-establishing the situation prior to it. The execution expenses for the acts performed are the creditor's burden"; and art. 723 establishes that „in case the court of law abated the enforcement title or the forced execution, at the request of the interested party, it will order, through the same decision, the re-establishment of the situation prior to the enforcement".

Neither the Labour Code nor Law no. 62/2011 refer to the possibility of the parties to a labour conflict to resort to an extraordinary challenge way. Therefore, in the matter are applicable, as common law, the dispositions of the Civil Procedure Code. Thus, the court orders rendered in settling labour conflicts will be possible to be challenged, if the legal conditions are fulfilled, through:

- contestation for annulment (art. 503-508 of the Civil Procedure Code)[23];
- review of decisions (art. 509-513 of the Civil Procedure Code).

[22] See Al. Țiclea, *op. cit.*, p. 983.
[23] See Al. Țiclea, *Contestația în anulare – cale de atac iluzorie. Necesitatea reevaluării acesteia,* in RRDM no. 8/2010, pp. 63-70.

The enforcement of the court orders is an integral part of what represents, according to art. 6 para. (1) of the European Convention of Human Rights, „the right to a fair trial", right which would be an illusion if the final and/or irrevocable court decision could not be enforced. Thus, in the Romanian legislation, the enforcement of the court orders in the matter of labour conflicts is viewed very carefully by the lawmaker, in certain cases the non-enforcement of a court order being considered a felony, respectively:

- the non-enforcement of a final court order regarding the payment of salaries within 15 days since the execution petition addressed to the employer by the interested party is sanctioned with a prison term between 3 and 6 months or a fine (art. 261 of the Labour Code)[24];

- the non-enforcement of a final court order regarding the re-employment of an employee is sanctioned with a prison term between 6 months and one year or a fine (art. 262 of the Labour Code)[25].

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[24] According to Law no. 187/2012 for the application of Law no. 286/2009, the Criminal Code, starting with the date of **February 1st, 2014**, this text will be found in the Criminal Code at art. 287 para.1 letter e, with the following modifications: the non-enforcement of a final court order regarding the payment of salaries within 15 days since the execution petition addressed to the employer by the interested party is sanctioned with a **prison term between 3 months and 2 years or a fine;**

[25] According to Law no. 187/2012 for the application of Law no. 286/2009, the Criminal Code, starting with the date of **February 1st, 2014**, this text will be found in the Criminal Code at art. 287 para. 1 letter d, with the following modifications: the non-enforcement of a final court order through which was ordered the re-employment of an employee is sanctioned with a **prison term between 3 months and 2 years or a fine.**

NEW TRENDS IN GENDER POLICY OF EUROPEAN POLITICAL PARTIES

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Abstract: *The article deals with the problems of women equality in Russia; it provides comparative analysis of the participation of women in the political life in Russia and in European countries.*

Keywords: *election, equality, women, gender*

In modern European countries, there has been a tendency to conceptual understanding of the social reality, dissatisfaction with the approaches to the solution of women issues, social position of women. These countries are trying to move from understanding to specific, coordinated, long-term measures to turn in life gender equality in politics.

It is indicative that in the countries with a multi-party system large-scale work among women is put forward as a special task. Winning women to a party can bring it a victory. The study of policy papers of most European socialist, social-democratic parties concerning women, the process of their involvement into political activities and administration institutions of the countries shows that nowadays parties are flexibly changing their tactics. In the new environment, many political parties have reviewed the system of their relations with the female part of the population on which electoral outcome depends heavily especially under certain demographic conditions.

An important element of the involvement of women in political activities, along with a system of organizational measures is the social policy aimed at alleviating the living conditions and upbringing of children, promoting real women's equality.

The French Socialist Party has a 20% quota for women in elections to the top echelon of the party, a 30% quota for nominating candidates to local authorities. The Italian Communist Party with 38% of women includes in their list of parliamentary candidates on average, 30% of women. Thus, the left-wing parties are becoming one of the main channels through which women get into politics.

The Norwegian Labour Party and the Social Democratic Party of Denmark use a quota system, according to which 40% of the party's candidate in the elections must be women. In the late 80's at the initiative of the government, the Storting (Parliament) of Norway approved the law, which was reckoned to impose the duty on political parties to have not less than 40% of women[1].

It is typical that European parties and governments persistently implement the policy of promoting women, coordinating the policy at the intergovernmental level. Thus, at the European Ministerial Conference (1986) there was adopted the resolution "Policy and strategies to achieve equality for women in political life, their participation in the process of decision-making."

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[1] Положение женщин в современном обществе. М., 1990. p. 10.

The representation of women in power in our country and the world in general is as follows. There are more than 3 billion women in the world; in Russia, according to the Federal State Statistics Service there are more than 77 million, nearly 10 million more women than men. On average women comprise half or a little more than a half of population of any country. In most countries women got the right to vote later than men. For example, in the U.S. men got the right to vote in 1870 and women got it in 1920, in Japan men has had the right to vote since 1925 and women since 1945. The representation of women in national parliaments in Russia and foreign countries (data of IPU (Inter-Parliamentary-Union)) is shown in the Table.

Representation of women in national parliaments (%)

1.	Sweden	47	-
2.	Norway	36,1	-
3.	Denmark	38	-
4.	Finland	41.5	-
5.	Belgium	35.3	38
6.	Germany	31.6	21.7
7.	Austria	32.8	24.6
8.	Spain	36.6	23.2
9.	Poland	20.4	8
10.	France	18.2	18.2
11.	Italy	17.3	14
12.	Russia	14	4.7
13.	Canada	21.3	34.4
14.	USA	16.8	16
15.	Japan	9.4	18.2

The data show that some countries managed to increase a number of women in their parliaments up to 1/3 and more of the total number of deputies. For the second half of the XX century the percentage of women in the legislative bodies in countries with parliaments has quadrupled. According to statistics from IPU, Russia shares the 84th place with Guinea-Bissau, Cameroon ranks 85. In terms of the participation of women at the highest levels of representative government bodies Russia has been left far behind by not only the European countries of the CIS, but also Tajikistan (17.5%), Uzbekistan (17.5%), Turkmenistan (16%), Kazakhstan (15.9%)[2].

Concern for the political role of women in society in the USSR was manifested in the system of quotas for women in representative bodies. In 1980-1985 the percentage of women in the Supreme Council of the Russian Federation was 35%, in the Supreme Soviet of the USSR 32.8%, in the Supreme Council of the Union republics 36.2, in the Supreme Councils of the autonomous republics 40.3%.

[2] Никовская Л. Женщины в политике// Новая политика. Интернет журнал: URL: http://www.novopol.ru/-jenschinyi-v-politike-text63324.html (25.04.11)

Those quotas didn't reflect the true position of women in the political life of the country; although it must be admitted that at the local levels, women were very active, and their representation in local government was rather high.

The first elections without quotas in 1989 and 1990 demolished the myth of the solution of the woman question in the Soviet Union and the political role of women in society. Women lost the vote. This happened primarily due to the low level of their political activity and organization, but also showed the attitude of the society towards women-politicians. In 1990, women made up only 3% of the People's Deputies of Russia, and among the members of the Supreme Council they made up 8.9%.

Nowadays the situation has changed for the better a little. According to the data of the Inter-Parliamentary Union as on December 31, 2010, the Russian Federation is the 82nd of 188 countries according to the representation of women in parliament. There were 65 women in the 5th State Duma. Compared with the 4th State Duma the number of women members has increased by 20 and is 14% of the total number of deputies, which is still below 30 – 40% recommended by the international instruments.

Women are represented in each of the four formed in the State Duma faction. In the faction United Russia there are 46 women (14.0% is the average percentage for the Duma), in the Communist Party and Liberal Democratic Party there are 4 women (7.0 and 10.0%, respectively). The highest proportion of women is in the faction Just Russia - 11 women (almost 29%).

In the 1st Kursk Regional Duma there was one woman, in the 2nd Duma there were two women, in the third – four, in the fifth - three. Two of them (in the 5th Duma) are in the faction of United Russia; one is in the faction of the Communist Party. In the Kursk government there are two women representing the party United Russia, one of them is the deputy chairman of the Kursk City Council.

Women in Russia are members of various social movements and political parties. The proportion of women members of the political party Just Russia, for example, is about 59%. In Yabloko this figure is just over 50%, United Russia - 38%.

In the Kursk branch of the party United Russia 62% of members are women, in the Kursk branch of the Communist Party they are 38%. The woman is the secretary of the political council of the party United Russia in the Kursk region.

However, in the programs of most political parties problems of women as a social group are considered mainly through the lense of family and motherhood. Despite the proclaimed by the Federal Law "On Political Parties" principle of creating for men and women who are members of a political party, equal opportunities for representation in the governing bodies of political parties, in the lists of candidates and other elective offices in the bodies of state power and local self-government, examples of women in the leadership of senior party officials are rare. In the lists of candidates for elected bodies the number of women is significantly lower than the number of male candidates; female candidates are placed usually at the bottom of the list, which a priori reduces the likelihood of their election to the appropriate authorities.

According to the Central Election Commission of the Russian Federation, the share of women in the list of registered candidates for the 5th State Duma was 21.6% (983 women of 4558 of the registered candidates); during the election of deputies of the legislative (representative) bodies of state power of the Russian Federation was 18.9% (4453 of

23,581)[3]. 14 women took part in the elections of deputies of the Kursk Regional Duma in March 2011.

The parties don't take into account the recommendations of the PACE 1899 (2010) "The electoral system as a tool to increase the representation of women in political life" in terms of "the introduction of mandatory quotas, providing not only a high percentage of candidates - women (ideally, at least 40%) and strict rotation between men and women in the list of candidates."

On March 17th the State Duma held a round-table meeting on the following topic "Increasing the representation of women in the Federal Assembly of the Russian Federation: Law and Practice".

The participants of the round table, the deputies of the State Duma, the Federation Council, the representatives of registered political parties, Russian Ministry of Justice, the federal bodies of executive power, the Central Election Commission of the Russian Federation, the Commissioner for Human Rights in the Russian Federation, the legislative (representative) and executive bodies of state power of the constituent entities of the Russian Federation, international organizations, academic institutions, public representatives, human rights ombudsmen in the Russian Federation discussed the practical implementation of the constitutional principle of equality of political rights for men and women, the relevant international obligations of the Russian Federation, ways of improvement of legislation on gender equality and encouraged the political parties of the Russian Federation to take the following steps:

- to consider the inclusion of the problem of gender equality into their programs, and other documents that define the party policy;
- to provide implementation of the provisions of Article 8 of the Federal Law "On Political Parties" regarding the creation of equal opportunities for men and women who are members of a political party to be represented in the governing bodies of political parties; to provide all Russian citizens regardless sex equal opportunities to be presented in the lists of parliamentary candidates and other elective offices of the state authorities and local self-government;
- to consider the question of inclusion of at least 30-40 percent of the members of one sex in the lists of candidates for elections for the 6th State Duma, and the ovservances of the rotation of the order of men and women in the list of candidates[4].

The evaluation of the activities of the major political parties in developed countries permits to identify the trend common for the last two decades to many of them, that is an increased attention to the engagement of women in politics. It is not only declared, but is also supported by the creation of a special mechanism to promote women in decision-making structures. Such an effective tool for these parties is a system of quotas used now as a special temporary measure.

[3] Об увеличении представительства женщин в Федеральном Собрании Российской Федерации: законодательство и практика: URL: http://www.gensovet.com/ 2010-09-06-20-05-27/2010-09-06-20-07-50/151-2011-03-22-14-28-16 (25.04.11)

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Increased participation of women in political processes in developed countries is a significant sign of the time. Quotas for women in parties and parliaments in the West European countries are not considered to be a sign of infringement of democracy. A democratic society cannot be democratic if women are excluded from participating in making decisions concerning their interests; political parties are aware of the necessity to have a strategy and tactics for promoting women. In the future, the election will be won by a party that will most closely, socially attractively formulate its policy to which the electorate, where women predominate, will give their votes.

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MARKERS OF THE INFORMATION AND COMMUNICATION TECHNOLOGIES' INSERTION IN THE FRENCH LEGAL DISCOURSE

Elise TERNYNCK

Abstract: *As new means to store and transmit memory, the emergence of ICT turn upside down the law. Several markers in the legal discourse prove this phenomenon. A transformation of norm's struture and substance, followed by the apparition of legal models or new legal definitions, are the most noteworthy event the jurists have seen. Througt the prisme of trial's theory, ICT question the law, which must find some answers to these problematics.*

Keywords: *ICT – transformations – legal discourse – dematerialization – models.*

Information and Ccommunication Technologies (ICT) is defined as the technicals used in the processing, modification and transmission of informations. Their semantic category is vague but it is admitted that they mainly include computers, Internet and telecommunications. Therefore they are technical objects, created by the initiative of network engineers. Because of their scientific and non-legal nature, they appear at first to be inappropriate in French legal system. It would exist a kind of « no-bridge between law and science » because each of the two subjects belong to different and separate worlds.

The presence of close links between science and law at present isn't discussed in the doctrine anymore. Legal researchers recognize the existence of a real "couple Law and Technology." In French law, the new communicational technicals were employed as soon as they appear as modern instruments in the service of law. They are considered as vectors of law because they allow the dematerialization of information and legal proceedings. Thus, their use causes the formal transformation of Law.

Under the influence of ICT, there is a change in the structure of law and the form of the norm. For example, our legislator is trying to impose, under penalty, electronic communication. All the complains are going to be dematerialized. This phase of incitement to use ICT began in 2011 with the compulsory use of the electronic way for the statements of appeal. After all, the technology becomes the vector of the spreading of law and functional cooperation between science and Law becomes a reality by the dematerialization of different texts and procedures. This relationship is characterized by the establishment of a "Law by the technology." Consequently, the use of technology is a real factor of legislative quality, it offers to the judges' decisions consistent and rigorous motivation, and provides an equal access to the law and justice for all.

Therefore, the formal transformation of Law under the influence of ICT is certain. In France, lawyers don't hesitate in a concern of speed, to use the procedures of the "electronic-bar" and the "electronic-Clerk's Office" (called „e-court"too) that were set up by the Tribunal of grand Instance (TGI) of Paris in 2003. It allows them to communicate by electronic way with the Clerk's Office for emergency proceedings in order to fix the dates of audience, consult the calendar of the Clerk's Office or to make requests of summons.

But, ICT are not only the vectors of the norm, they can also be the objects of the norm. Some authors wrote that they are „not only agents of law, but also patients of law". The question that remains is consequently: how does the ICT modify the substance of Law?

Considering their quality of new legal object, do they cause a conceptual or abstract modification of Law?

Therefore, it shoud be noted linguistic, technical and legal markers which can be find in the legal speech, to infer a transformation of the substance of law that could involved ICT. It will help to understand how law deals with ICT and how the science is seized by the judicial area.

In France, it is collectively admitted that Information and Communication Technologies gradually induce a transformation of the contemporary concept of Knowledge. This transformation reveals a deep mutation of all the domains of knowledge. Their notions and principles change, but their tools and mechanisms too. Biology, neuropsychology, mathematics as well as Human Sciences are subjects to an important evolution. For example, researchers in psychology had proved that ICT's use creates lots of brain transformations: we don't read as same as yesterday.

French and Anglo-Saxon researchers became aware of upheavals made by ICT in all these knowledges. French law, as a system of rules and guidelines, doesn't escape in this proceeding, which is observable at a double level. Two landmarks in the legal speech prove it. On one hand, we observe that under the impact of ICT, the texture of law evolves. The texts writen by the French legislator about ICT aren't numerous, while the texts belonging to the category of "soft law", that is to say, devoid of coercive force, are many. (I.). On the other hand, the substance and the content of law know a significant development under the influence of ICT (II.).

- **The transformation of „the texture of law"**

The speed of spreadind and evolution of the technological processes would come into a confrontation with the conservative side of law. This science, would be too static and wouldn't be able to succeed in containing a technical category so unstable as ICT. That's why a specific law has appeared, stands on non univocal rules and called « soft law ».

This kind of law hasn't coercive value but it cause a real effect on the french judiciairy system. In this group you find a lot of rules, such as the recommendations of the Council of Europe and the justificatory notions of ethics or loyalty.

These notions hold a part of vagueness with which the judge can play. Most of these texts are difficult to qualify and don't belong to the legislative and statutory corpus. However, they have a very real impact in the legal system where they have an indiretly normative effect.

They influence the judge's behavior and curt rulings. Besides, they are often followed by the justiciable. For these reasons, they have any legitimacy to integrate the catégory of sources of Law. As a result, the variation of the textures of Law shows itself because of ICT. Even better, the indeterminate and flexible concepts of " soft law " find their place there.

Two kinds of textures of Law can be counted in the presence of ICT. First, rules can be soft, that is to say, not hard and not compulsory for the subject to trial who are free to follow them or not. Second, law contains also flexible rules which have an indistinct and variable contents depending of the circumstances.

- **The sofness of rules**

The first rules applicable to Information and Communication Technologies have the particularity to have both no constraining force and to be strongly influenced by the International Law. They group together under the shape of an " recommandatory Law",

including statements, recommendations, directives, notices, Charters, Code of conduct, guidelines, the green book, the white book of the European Commission, etc.

These legal tools guide the judge, inform him, even "force" him to make a decision when he's in front of an technological object. In other words, these rules are defined as the " Instruments of guidance " of the judge's reasoning.

The role of recommendations is significative. For instance, the principles of proportionality and information of the employees by the employer about the intallation of a surveillance system were established first of all in the European level, by the recommendation about the protection of personal data in 1989. Moreover, The Recommendation of 2003 about the archiving of electronic documents in the legal sector has advised membre states to archive electronic documents in order to preserve their integrity, their authentication, their reliability and their confidentiality.

In the same way, reports made by the National Commission of Information technology and Liberties (CNIL) are essential tools for the judge. The CNIL is an independent administrative authority created to ensure respect for human rights during the collection and during the implementation of the treatment of personal data. To do this, the CNIL has the power of labeling, investigation, and advising users of the computer. It performs a norrowly-spécialized studies on the technical risks incurred by workers under the impact of ICT. In addition, it can express technical opinions. It has plaid this role on February 5th 2002 by recommanding to employees a reasonable use of the email, in a familial setting. Taking back this point of view, the judges of the Court of Cassation set up the concept of reasonable use of technology at work.

- **The flexibility of rules**

The second legal rules which concern the new technologies can be identified by the flexibility of their contents. They are called „executives-notions" and contain chiefly the notion of loyalty of electronic proof. Their contents are not fixed but varies according to the circumstances and to legal object in cause. The proliferation of the proof on electronic support makes essential the requirement of loyalty. Besides, we can notice that the use of the loyalty is increased tenfold since the appearance of Information and Communication Technologies. This notion is defined as *" a way of being in the research for the proofs, in compliance with the respect for the rights of the individual and with the dignity of the justice"*. The judges control conscientiously the loyalty of the proof. In a recent case happened the 23rd may 2007, the Court of Cassation described a SMS as an admissile evidence and said expressly that it doesn't represent an dishonest process. In this case, an employe had used a SMS to prove a sexual harassment. In 2013, they also said that the voical message left on a mobile phone is a loyal process of evidence. However, the recording of talks during a phone conversation without its author agrees is considered as disloyal since a curt ruling dated on 2004.

Since this decisions, it is very common that litiguants produce SMS or email to prove their allegations.

The texture of law adopted different forms with the apparition of ICT. This observation shows the adaptability of law. It's not as static and conservativ as people think. Its polymorphism is found again when we observe the substance of law.

- **The enrichment of the substance of Law**

The second legal marker which proves the insertion of the ICT in the legal discourse is the enrichment of the substance of Law. It is materialized by two additional stages in the legal discourse. At first, the legislator tries to put in the service of the legal actors a " minimalist toolbox " in order to understand and master the new technologies. Then, the judge is going to complete this set by new legal techniques.

In fact, the roles of the French legislator and the French judge are complementary: first one puts grounworks and principles of a new speech concerning a precise legal object; other one completes it in practice. They work together to include the ICT in the judciairy system as new legal object. But, the question which remains is however to know if the intervention of both legal actors is proportionated and is concluding with the construction of a complete and understandable discourse about ICT. Nothing is less on, many signs in the judicial discourse shows that the judge is the only legal actor who can give some answers to the insertion of ICT in French legal system.

- **The legal framework build by the legislator**

The legal framework that the legislator build to inser ICT into French law is mainly composed by the law of March 13th, 2000 " carrying adaptation of the Law of the proof to ICT and relative to the electronic signature " and by the law of June 21st, 2004 " for the trust in the numerical economy ". According to the parliementary work, he had for objective to set up "a clear and safe legal framework, appropriate to promote the trust in the electronic transactions". Only the questions of the proof, the electronic signature and the way to promote the e-commerce are resolved. On the contrary, the questions of the protection of liberty and intimacy's respect are evaded.

How does the legislator proceed to write in the law the essential bases of the cooperation between Law and science? What typical markers in the legal discourse can be identified?

The effort of the legislator to give a legal framework to the category of ICT is notable for the new contents he gives to the law. In the article 1316-1 of the civil code, he puts as a principle that the proof on electronic support is identical to the proof on paper and engraves in the law the validity of the electronic contract. In the article 1316-4 of the Civil code, the reasons of the utility of the electronic signature are detailed as well as its mechanism. Thanks to this process judiciable can make certain the proof of an authentic act.

The mechanism used by the legislator to place the electronic proof in the same category as the literal proof is original. In French Law it's called the „legal fiction". Instead of creating a new legal category, legislator has simply extended the article 1316 of the civil code.

The legal fiction was previously considered as an outmoded legal process. Since the advent of Information and Communication Technologies, it knows an incomparable development. Its first function is to legitimize the modern processes of e-contract while integrating them into the Civil code. The particularity of the legal fiction is its functional utility because it avoids the legislator to create a system of the modern proof. Thereby, its presence is a sign of the will of the legislator not to shake too hard the well-established Law. And so, he offers to the judge an important power of creation and interprétation.

Other articles concerning ICT are inserted into the French special Law. For example, we find in Labor Law the article L 1221-12-1, wich obliges an employer to make electronic declarations to the social services when he hire an employee.

Also, the election of the members of a trade-union movement or of all the workers' representatives can take place by electronic vote if a collective agreement is concluded, according to the article L2314-21 of Labour Legislation.

The legal discourse shows that the legislator wants really to seize on the question of ICT. Nevertheless, he acts only with parcimony, that is to say he puts a general framework but he doesn't get into all the details, leaving the field open for the judge's interpretation.

- **The complementary role of the judge**

The computerization results in an increasing normalization. Indeed, new legal objects of judge's decision appear. It's given to the judge a very important function. To avoid the denial of justice, he has to take a stand on all legal problems and solve questions which were not resolved by the legislator.

An important contentious about the use of ICT is heard by the judge. In labor legislation we cout many lawsuits about this subject. For example, the ruling of March 18th, 2009 in which the judges considered that a grave error has justified the dismissal of an employee; he had used the Internet connection of the firm, in not professional purposes, for a total duration of forty-one hours a month.

We can find another example of the new judge's work in the ruling of the Social Chamber of the Court of Cassation dating back to October 18th, 2011. This Lawsuit was about an employer who had placed a computer at his employee's disposal to work but he used it to realize acts of illicit business.

In addition, new legal object, wich are linked with ICT, appear and make judges doubtful. In contract law, the question of the validity of the electronic registered letter is debated. In practice, there is no objection to its admission, she would notice, by the electronic way, the convocation at the first phase of dismissal. However, the Court of appeal of Paris on December 12th, 2006 has desapproved openly this kind of method. In the same way, the judges have to decide on the validity of the electronic contract of employment.

About proof, they also have to decide on the admissible evidence on electronic support as the Short Message Service (SMS), the screenshot of a „Facebook page", or of a Tweet, etc. They are all reconized as admissible evidence since the turn of the 21th century.

To succeed in this function, judge create new legal techniques and new legal definitions. We had seen the emergence of new legal standards or models. For instance, the model of the typical user of the new technologies had been created in order to be put into prctice in all the judgements. Some symptomatic markers prove the presence of a kind of „modelization" of the judicial reasoning.

It's a fact that the judges are uncertain. It can be noticed by the various rulings concerning ICT. We can observe that for one thing, judges refuse to consider the recording of a conversation as a admissible evidence in 2004, for another they accept to consider the SMS as an admissible evidence in 2007, as same as the vocal message left on an answering machine of a mobile phone in 2013. In order to bring its anwers into line the Court of Cassation always uses the same vocabulary and the same syntax of the sentence.

Conclusion

The textures of law know a realy evolution with the apparition of ICT in the judiciary microcosm. This observation reveals that the characteristics of a new legal object influence law, change the judge's missions and improve the judiciary answer. Througt the prism of trial's theory, we can notice that the form and the substance of law are changing as it's happening in the others domains of Knowledge. As a result, French legislator ans Doctrine woudn't save a global reflexion about the impact of the ICT on law. This mutation could even be advantageous for law in terms of quality and organization. Its could promote legal certainty. Some French philosophers think that thenophobia is absurd and that it is better to master the new technologies in order to develop a new kind of humanism they call „difficult humanism".

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COMPARATIVE ANALYSIS OF THE LEASE: ALBANIAN LEGISLATION, ITALIAN AND FRENCH

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Abstract: *In this article we will discuss the lease, which is one of the oldest contracts in civil circulation, and is recognized as such, by all the legislations around the world. It can also be considered as one of the contracts more applicable to everyday life. The Civil Code of Albania has made an adjustment not extended to the lease and, in some provisions there is no wider understanding. To get a clearer picture on the lease and its main characteristics, it is considered necessary to make a comparative view of some legislation leader in Europe, just like the drafters of the Albanian Civil Code, have referred to this legislations in its design. Through this comparative analysis we will try to bring out the similarities and differences between other regulations, Italian and French, and to obtain a clear understanding of the rules governing the lease. Albanian civil legislation specifically regulates the lease by giving him an important place. The position today of the lease is quite clear from his analysis, special reports arising between the parties, because of its length and shape. We also think that in the future we may make changes and additions to the rules governing lease, so that its implementation is wider and people are safer in such a legal relationship.*

Keywords: *lease, legislation, provision, civil code*

1. Introduction

History of the lease began more than four thousand years ago. It's rich and various like the history of mankind. However, to our surprise, the bases of the lease of those years have much in common with what at first glance seems innovative today. We represent a short overview of the evolution in the sphere of relations and the most important steps in its development. Scientists have found evidence that between 400 and 450 BC to the south-east of Babylon, the first known in the history of mankind rental campaign was run by the Murashu family in the ancient city Nippur The Murashu was an outstanding leader in the market of rental services in the Persian Empire. They specialized in land leasing, but also offered a number of the other services such as rent of cattle, agricultural equipment and seeds for sale in installments.

In the nineteenth century there was a significant increase in leasing activity, mainly due to the increasing diversity of rented items used by the community. Lease became more important because of the rapid development of technology in agriculture, manufacturing and transport. For example, the transport companies, which were building railways, gave other companies, that had driven the trains, to use their rails for rent. And these companies offered trains to the transport companies on lease.

Leasing date of birth is considered to be 1954, when the usual rent received an additional special feature. Then it gave a huge increase in this sector in well-developed Western countries. We meant the possibility of using accelerated depreciation of leased property for tax purposes. Actually, the whole history of the leasing industry in the West

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illustrates that the accelerated depreciation for tax purposes is one of the main features which differ rent from the lease. Rent combined with accelerated depreciation allows leasing companies to "pass" the benefit of accelerated depreciation to the tenants. As a result we have a reduction in the cost of the lease.

In most cases rent included the obligation or right of the lessee to purchase the rented item at the end of the contract. On the one hand, the accelerated depreciation allowed lessee to optimize taxation in the duration of the contract. On the other hand, there was no additional taxation on the transfer of property in the ownership of the lessee, as equipment has been almost completely amortized. The institution of accelerated depreciation was the basis of leasing birth. Also it made leasing competitive compared to a conventional lease or a loan.[1]

2. The lease, the current Albanian legislation

The new civil legislation, specifically regulates the lease contract, giving it an important place, in heading of Part VI of its special. [2]Realistically, our Civil Code, defines a certain number of typical contracts, in his particular part. But it simultaneously recognizes and protects the contracts that we have not expressly defined in that code, with condition to don't oppose the general principles of the right and do not infringe the interest among parties[3] and in that way to justify the non defined contracts and the atypical ones as well. This attitude has been kept in the Albanian doctrine on contracts: "Peoples... might make contracts not expressly defined in the law, they are valid in case that they don't oppose the general principles of law and the interests of the parties.[4] " Foresightedness and the very prudent arrangements of a contract, as typical / specific and not as an atypical arrangement, shows an important evaluation that is been made to respective contract by our legislation, due to the importance that has its normative regulation in stability of the legal reports among the parties.

The position of lease in fund of the contract, envisaged and regulated in this legislation, seems to be logic and systematic. The lease is placed between a enfiteose contract and venture

(subordinated undertaking). Because of its wide self expansion and importance related to juridical relationship of the market, the rent contract literally occupying a wide volume on the chapter in the Special Part of the Civil Code, being extended on 49 articles, thus constituting one of the most volumetric arranged by our Civil Code. Legal relationship of rent, in its general context is a civil legal relationship, which is not established by law. The law provides only the circumstances of creation, modification and extinction, but these circumstances (legal arguments) are independent of it. Rent contract is defined by Article 801[5] of the Civil Code as related contracts between two parties, under which each party is obligated to give the other party a certain object, in the temporary possession in exchange of an certain reward. Lease is a contract through which one party (the lessor) binds himself to give the other party (the lessee) determined thing, for temporary enjoyment towards a determined compensation. This contract is bilateral when both parties have reciprocal obligations toward each other.

[1] http://www.mikro-leasing.by/en/leasing_history, clicked on 15.04.2013.
[2] Albanian Civil Code, approved by Law no. 7850 date 29.07.1994.
[3] Albanian Civil Code art.660-663
[4] Mariana. Tutulani -Semini *E Drejta e Detyrimeve dhe e Kontratave. Pjesa e Pergjithshme*, Skanderbeg book, Tirane 2006, p. 38.
[5] Ardian Nuni *Hyrje ne te drejten civile* Botimet Morava, Tirane 2006, p. 80.

Leases are regulated by the Albanian Civil Code, which only provides a few general rules on the lease of real estate premises for different purposes. Generally, there are no distinct legal stipulations for residential leases or for commercial leases.

Due to the lack of legal provisions, the contractual parties are advised to stipulate their respective rights and obligations in the lease agreement. The most important issues to be regulated by the lease agreement are the parties' obligations, the lease and termination periods of the lease, provisions on subleasing, rent, etc.

The law does not prescribe a special form for the lease agreement, apart from lease agreements for agricultural land, which must be concluded in the form of a notary act. However, in practice, real estate lease agreements are generally executed by a notary act or at least signed in the presence of a notary. Another legislative requirement concerning the formality of a lease agreement is its registration with the real estate register if the duration of the lease agreement is nine years or longer. If the lessee fails to fulfill this requirement, the lease agreement has no effect towards third parties.

Leases can be entered into through an agreement for a definite or indefinite period. However, according to the mandatory provisions of the Albanian Civil Code, a fixed term lease may not exceed a duration of 30 years. If the lease is entered into for a longer period of time or without a definite term, the agreement shall only be valid for 30 years. After expiration of this term, the lease agreement will be terminated. However the parties are free to conclude a subsequent lease agreement.

A lease agreement normally terminates upon the expiration of the agreed-upon period. The parties generally regulate the terms of termination for lease agreements with a definite term in the agreement itself. However, the parties may enter into a lease agreement for an indefinite period of time. In such case, the lease agreement may be terminated at any time by notifying the other party (in compliance with a certain notice period as agreed upon by the parties). Under Albanian law, a lease agreement may also be terminated by an aggrieved party in cases of serious breaches. The law does not provide exhaustive circumstances of what is to be deemed as a serious breach, therefore, such grounds are customarily regulated in the lease agreement itself.

The lease is a contract among the oldest in the civil movement, and is recognized as such by all the legislations of the world. Also, it can be considered as one of the applicable contracts in everyday life. Albanian Civil Code. (From art. 801 to 849), has made an adjustment that is not expanded and in the there is not clear a meaning. We will make a comparative view at some major European legislation, because the makers of our Civil Code, have been referred to these legislations.

Through this comparative overview will pursue to highlight the similarities and differences between the other legislation, in order to achieve a clearly understand of contract's provision that regulate the lease.

Also, in the future we think that there should be some additional changes made to lease's provisions, so that its implementation will be more extensive and the people will be more secure in adopting such a legal action.

3. The lease in Italian legislation

Italian Civil Code has made a detailed regulation of the lease in relation to our Civil Code. The lease provided the Italian Civil Code, Title III (individual contracts), in Chapter

VI, Article 1571 to 1652 (about 82 articles in total). What we notice that at a first glance and in its content, the Italian Civil Code and our code are almost the same, so we can safely assume that our drafters of the Civil Code mostly are referred to Italian Code.

According to Italian legislation the lease is defined as a contract through which one party is obligated to allow the other party the possession of a movable object or the real estate for a specified period of time, towards a determined fee. Article 801 of our Civil Code which explains the definition of rent, is almost identical to Article 1571[6] of the Italian Civil Code, changing only ranked words. The object of the lease can be any object movable or immovable and this determination is been made by the provision that defines a lease, and our code does not make such a determination, it appears as a interpretation of the purposes of the lease.

Related to the terms of the lease, our Civil Code has no changes with provisions that arranges the term of a lease. Also, the Italian Civil Code has determined as a maximum term of the lease contract,a period of 30 years (the maximal deadline will be depended by the content of the contract.), Beyond that the contract will not be effective.

Regarding the form of the lease Italian Civil Code, it does not require a particular form, in the terms of the lease of movable as well as immovable properties. However, the written form is required for lease contract of immovable objects over nine years period, which must be registered, otherwise it will be declared invalid. Our Civil Code foresights the lease contracts registration of immovable properties for a period above nine years. In that aspect, our Civil Code in many cases has accepted the application of contractual freedom.

Italian Civil Code on Article 1577 foresights obligations that are essential to the landlord;

i. To submit the object to tenants in good usable condition.

ii. To be able to maintain the object in usable and decent condition conform agreement.

III. To ensure the peaceful use and possession (of the object by the tenant) in rent.

About what is said above, we detect a great similarity between the provisions of the Italian Civil Code, Article 802 and the Code Albanian civil.

Regarding the landlord responsibilities related to defects of the objects or objects that occur when handing the property there no difference between our Civil Code and Italian Civil Code. In the Italian Civil Code this regulation was corrected by section 1578 to his 1581. In terms of the obligation that landlord has to maintain the objects or the object during the lease, the Italian Civil Code foresights landlords obligation to don't make renovations in the object that reduce the possibility of tenants to use it.

The article 1587 of Italian Civil Code provides that the lessee is obligated to:

1) take delivery of the thing, and observe the diligence of a good father of a family, for use stated in the contract or for any use that may be assumed by the circumstances;

2) give consideration within the agreed time;

The tenant is responsible for the loss and damage of property that occur during the lease, caused by the fire. He is not responsible, if he proves that the damage and losses have occurred for reasons that not attribute to him.[7]*If the thing is destroyed or damaged by fire had been secured by the lessor or for the account of this, the responsibility of the conductor to the lessor is limited to the difference between the compensation paid by the insurer and the actual damage.*[8]

[6] Italian Civil Code, art.1571, The Cardozo Electronic Law Bulletin.
[7] Art.1588 Italian Civil code.
[8] Art.1589 Italian Civil code.

The articles 1592 and 1593 of the Italian Civil Code regulate the rights and obligations of the contracting parties when we upgrade the object or its supplements. A similar arrangement has made our Civil Code in Articles 816 and 817.

Also there are differences between the Italian Civil Code and Albanian Civil Code regarding the right of tenants to give the things to sublease. Article 1597 of Italian Civil Code provides for the possibility of silence renewal of the lease. *The new lease is governed by the same conditions as previously, but its duration is established for leases indefinitely*

Renewal silence of the lease is provided by Albanian Civil Code, article 821, but unlike the Italian Code provides only the possibility of renewing the lease with a fixed term and not indefinite duration.

4. The lease in French legislation.

French law makes a special treatment of the lease, it is regulated by the French Civil Code (Article 1708 to Article 1831).

In article 1708 of the French Civil Code is provided that: "There are two types of lease contracts":

- the lease for things,
- the lease for work.

The hiring of things is a contract by which one of the parties binds himself to have the other enjoy a thing during a certain time, and at a charge of a certain price which the latter binds himself to pay him.[9]

In article 1714 of the French Civil Code is provided for contractual freedom of the parties regarding the form. *One may lease either in writing or verbally, except, as regards rural property, for the application of the rules particular to agricultural leases and sharecropping.*

A lease ceases by operation of law at the expiry of the term fixed, where it has been made in writing, without it being necessary to give notice to quit

The main duties of the lessor under article 1719 of the French Civil Code, are:

A lessor is bound, by the nature of the contract, and without need of any particular stipulation:

1. To deliver the thing leased to the lessee „and, where the main dwelling of the latter is concerned, a decent lodging" (Act no 2000-1208 of 13Dec. 2000);
2. To maintain that thing in order so that it can serve the use for which it has been let;
3. To secure to the lessee a peaceful enjoyment for the duration of the lease;
4. To secure also the permanence and quality of plantings.

The rights and obligations of the parties provided in the French Civil Code, are almost identical to those provided by Albanian Civil Code.

French Civil Code provides a special arrangement, in the event that the lease has to do with the objects that serve to effectively spouses resides.

The contract is concluded by both spouses, even if only one of them has signed the contract. In case of divorce, the court, at the request of one of the spouses [10]may decide to leave the apartment one of the spouse, knowing the needs of each of them.

I think that Albanian Civil Code should have made such a determination, because would enable more fulfillment of contractual obligations, the both spouses are tenants.

[9] Art.1709, French Civil Code Version Légifrance – Version en vigueur au 5 mars 2010.
[10] Idem, Art.1752.

The court will solve the issue of allowing the spouses living in the apartment when the apartment is rented. In this case only one of the spouses will continue to be a tenant, while the other spouse leaves the apartment and resign the contract.

In our country there is no judicial practice on this fact, but I think that such prediction would avoid errors in interpretation on this case, based on the provisions of the Family Code.

Conclusions

Despite the fact that the lease contract has its individuality, it differs significantly from other contracts provided for in the Special Part of the Civil Code. Contract rent is systematically placed in the group of contracts that have as target the object and the subject, with purpose passing on the rights upon it. In this aspect on the first sight the lease contract seems to approximate but it significantly differs from contracts aimed over the ownership of an object as: sales contracts, exchange and donation ones.

In comparison to the French Civil Code, our Civil Code, in terms of the lease contract,and might say there are many similar provisions, but also many provisions are not predicted by our Civil Code, which foresight a thorough arrangement of the lease contract. We can say that the French Civil Code provides a more detailed regulation of lease contract rather than the Italian Civil Code. Although the French Civil Code of 1904 (with many latter changes), makes a better regulation of the lease.

I think that our legislators should be referred to that code and to that practice of this country for necessary improvements and innovations being adopted as soon as possible by Albanian Civil Code.

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CONSIDERATIONS ON DISSOLUTION OF MARRIAGE AS REGULATED BY THE NEW CIVIL CODE AND THE NEW CODE OF CIVIL PROCEDURE

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Abstract: *After the entry into force of the Civil Code (Law no.287/2009,* republished) on the 1st of October 2011, that has repealed the Family Code, the appropriate amendment of the Law no. 119/1996 regarding the documents for the civil status, republished, and the entry into force of the Law no. *134/2010 regarding the Code of Civil Procedure, republished, in this paper we will analyze the regulations that have novelty character in the field of the dissolution of marriage. In respect of the divorce in front of a court of law, the Civil Code regulates the divorce for the separation de facto of the spouses, which lasted at least two years. It is also regulated the dissolution of the marriage as being the exclusive fault of the claimant, if the defendant has filed a counterclaim. By way of exception, the court will be able to admit the marriage as being the exclusive fault of the claimant, even if the defendant has not filed a counterclaim, if the conditions for rendering the divorce for the separation de facto of the spouses of not less than 2 years are accomplished. From a procedural point of view, for the determination of the competent court, the new Code of Civil Procedure has replaced the concept of domicile with dwelling, more so as the old provisions considered to be in fact the dwelling of the spouses, not the address included in their identity cards. As the regulation of novelty, the Civil Code, provides the right to damages and compensatory benefit. Thus, the innocent spouse who suffers an injury through the dissolution of the marriage, may require from the faulty spouse to compensate him/her, separated from the right to compensatory benefit. When the divorce is pronounced as being the exclusive fault of the defendant, the claimant is entitled to a benefit to offset, as much as possible, a significant imbalance that the divorce would determine under the living conditions of the one that requires it. In respect to the relations between parents and children, the rule is that after divorce, the parental authority rests jointly with both parents, unless the court decides otherwise, if there are reasonable grounds for considering the best interests of the child.*

Keywords: *judicial divorce, administrative divorce, notarial divorce, date of mariage dissolution*

New Code of Civil Procedure (hereinafter „the NCCP")[1] and the Civil Code settle two views on divorce: *(i)* divorce-remedy – in the case of divorce by spouses' mutual consent and of divorce for health reasons, *(ii)* divorce-sanction – in the case of divorce due to the fault of either spouse or both spouses and divorce for long separation de facto.

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[1] Republished in the Official Gazette, Part I, no. 545 of August 3, 2012 following the adoption of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, published in the Official Gazette, Part I, no. 365 of May 30, 2012. By Government Emergency Ordinance (hereinafter "the GEO") no. 44/2012 on the amendment of article 81 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, published in Official Gazette of Romania, Part I, no. 606 of August 23, 2012, this article was amended so that "*Law. 134/2010 on the Code of Civil Procedure, published in Official Gazette of Romania, Part I, no. 485 of July 15, 2010, becomes effective on February 1, 2013*", and then by the GEO no. 4/2013 on the amendment of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, and for the amendment of some related acts, published in the Official Gazette, Part I, no. 68 of January 31, 2013, article 81 has been amended so that "*Law. 134/2010 on the Code of Civil Procedure, republished in the Official Gazette of Romania, Part I, no. 545 of August 3, 2012 with subsequent amendments, shall enter into force on February 15, 2013.*"

Civil Code settles three ways of marriage dissolution:

a) judicial divorce, whether by the spouses' mutual consent, or fault-based, or for actual separation or for health reasons;
b) administrative divorce only by the spouses' mutual consent;
c) notarial divorce only by the spouses' mutual consent.

In addition to these three ways of marriage dissolution, we refer to the provisions of article 293 paragraph (2) Civil Code in matters of marriage nullity, stating that the first marriage is considered dissolved on conclusion of the new marriage, if the spouse of a person declared dead remarried and later this declaratory judgment of death is canceled, the new marriage remains valid if the husband of the person declared dead was in good faith.

1. Judicial divorce

Under the provisions of article 373 Civil Code, marriage can be dissolved by divorce in one of the following cases:

1.1. by the spouses' mutual consent, at the request of both or just one of them and accepted by the other spouse;
1.2. where, for reasonable grounds, the relations between spouses are seriously injured and continuation of marriage is no longer possible;
1.3. by request of either spouse after a separation de facto which lasted at least 2 years;
1.4. by request of whichever spouse whose health condition makes it impossible to continue the marriage.

Book VI. Special Proceedings Title I. NCCP Divorce Proceedings settles in Chapter II. Divorce remedy, respectively divorce by the spouses' mutual consent and divorce for health reasons, and in Chapter III. Divorce due to the fault of spouses, divorce for reasonable grounds and divorce for separation de facto for at least 2 years as divorce due to the fault of spouses.

1.1. Divorce by the spouses' mutual consent

According to article 373 letter a) Civil Code divorce by the spouses' mutual consent may be requested either by both spouses or just one of them but this claim must be accepted by the other spouse.

Unlike the previous regulation, the Civil Code expressly excluded the conditions for certain duration of marriage and absence of children from the marriage.[2]

Thus the conditions of article 374 Civil Code for pronouncing divorce by the spouses' mutual consent are:

a) spouses have full legal capacity. The possibility of divorce pronouncement if one of the spouses is under prohibition, is excluded.[3]
b) free and uncorrupted consent of each spouse in the dissolution of their marriage exist.

As provided by article 373 letter a) Civil Code consent may be expressed simultaneously by spouses, by claim submitted and signed by them both, or successively, when the plaintiff's claim is then accepted by the defendant spouse by expressing his/her consent either in writing or verbally before the court.[4]

Where the divorce claim is grounded on the defendant spouse's fault, and he/she acknowledges the facts that led to the breakdown of conjugal life, the court, if the plaintiff

[2] Article 374 paragraph (1) Civil Code.
[3] Article 374 paragraph (2) Civil Code.
[4] Article 374 paragraph (3) Civil Code. See 1st District Court of Bucharest, civil resolution no. 4451/12.03.2012, unpublished.

agrees, shall pronounce divorce without verifying the validity of the grounds for divorce, and without mentioning the fault for dissolution of marriage.[5]

Otherwise, if the plaintiff does not agree with the divorce pronouncement without researching the solidity of the grounds for divorce and without mentioning the fault for dissolution of marriage, divorce claim shall be resolved according to the rules applicable to fault-based divorce, settled by article 933 NCCP.

Divorce proceedings by the spouses' mutual consent in court are provided by articles 929-931 NCCP, which do not apply when spouses opt for administrative divorce or notarial divorce according to the Civil Code.[6]

According to article 929 paragraph (1) NCCP when the divorce claim is based on the agreement between the parties, it will be signed by both spouses or by a joint empowered person with original sworn power of attorney. If the empowered person is an attorney at law, he/she will certify the signature of spouses under the law.

By the divorce claim, spouses may determine also the ways in which they agreed the divorce related claims be settled.[7]

Upon receipt of the divorce claim grounded on the spouses' mutual consent, the court will check the consent of the spouses, after which it will fix a date for the settlement of the claim in the council chamber.

At the hearing, the court will check if the spouses continue in the dissolution of their marriage by their agreement and, if so, will pronounce divorce without making any mention of spouses' fault.[8] If spouses come to an agreement, by the same judgment, the court will ascertain the spouses' mutual consent on related claims. Judgment so rendered is final.[9]

When spouses do not agree on divorce-related claims, the court will administer the evidence provided by law for rendering a resolution and, at the request of the parties, will render a judgment on divorce under the consent of the spouses, addressing also the claims on the name each spouse will have after marriage dissolution and, where appropriate, on the exercise of parental authority and parental contribution to the costs of raising and educating children[10]. Such judgment is final only regarding divorce, unless otherwise provided by the law.

Also, the court will take note of the agreement of the spouses on other divorce-related claims.

If appropriate, regarding other divorce-related claims, the court will continue the trial, rendering a judgment subject to appeal under the law.

These procedural provisions also apply in the case of claim accepted by the defendant. Otherwise, as we have provided, if the plaintiff does not agree with the pronouncement of divorce based on the acknowledgment by the defendant of the facts that led to the dissolution of conjugal life, the claim will be dealt with according to legal proceedings regulated for fault-based divorce.[11]

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[5] Article 931 paragraph (1) NCCP.
[6] Article 928 NCCP.
[7] Article 929 paragraph (2) NCCP.
[8] Article 930 paragraph (1) NCCP.
[9] Unlike the old Code of Civil Procedure, which provides that such a judgment is final and irrevocable, we must regard the provisions of article 222 of Law no. 71/2011 for the implementation of Law no. 287/2009 of the Civil Code [as amended by paragraph (22) section 26 of Law no. 60/2012 approving GEO no. 79/2011 regarding the settlement of some measures for the entry into force of Law no. 287/2009 on the Civil Code] according to which, until the entry into force of Law no. 134/2010 on the Code of Civil Procedure, the reference in the Civil Code and Law. 71/2011 to the final judgment will be deemed as being done at the irrevocable judgment.
[10] Article 930 paragraph (2) NCCP.
[11] Article 931 paragraph (3) NCCP.

1.2. Fault-based divorce

Although article 373 letter b) Civil Code provides that in case of reasonable grounds, when relations between spouses are seriously injured and continuation of the marriage is no longer possible, the court may pronounce divorce, "reasonable grounds" phrase is not define. Moreover, an exhaustive enumeration of grounds for divorce would be impossible. Therefore, the court vested with the settlement of such claims will assess the solidity of the grounds claimed by the factual situation and the rules of evidence.

However, in the practice of the courts up to repeal of the Family Code the following were considered grounds for divorce: *(i)* violence, *(ii)* excessive alcohol consumption, *(iii)* infidelity, *(iv)* leaving the marital dwelling, *(v)* sexual incompatibility, *(vi)* differences in conceptions, education or ideals, *(vii)* lack of affection between the spouses etc.

Article 933 paragraph (1) NCCP also provides that „*the court will pronounce divorce given the fault of defendant spouse when, due to reasonable grounds attributable to him/her, relations between spouses are seriously injured and continuation of marriage is no longer possible*."

When, given the evidence, it results that both spouses are in fault for dissolution of marriage, even if only one of them filed the claim, the court may pronounce divorce due to the fault of both spouses.[12]

If the defendant has not filed a counterclaim, and from the evidence given it results that only the plaintiff is in fault for dissolution of marriage, his/her claim will be rejected as unfounded, unless the conditions provided in the case of divorce for separation de facto for at least 2 years regarding the pronouncement of divorce due to the exclusive fault of the plaintiff, are fulfilled.[13]

From the legal regulation of this method of divorce it results that the court must ascertain that the following conditions are cumulatively met:

a) reasonable grounds;
b) serious harm to relations between spouses;
c) impossibility of continuing the marriage;
d) the fault of either or both spouses. The court may determine either exclusive fault of the defendant or of the plaintiff (if the conditions set out in the case of divorce for separation de facto for at least 2 years, are fulfilled), either of both spouses.

1.3. Divorce for separation de facto

In order that this divorce be pronounced according to article 373 letter c) Civil Code in conjunction with article 934 paragraph (1) NCCP, the court must ascertain that the following conditions are cumulatively met:

a) de facto separation of the spouses for at least 2 years exist;
b) any of the spouses take responsibility for the failure of the marriage, submitting divorce claim.

The solutions the court may render are:

- to ascertain as fulfilled the foregoing conditions and pronounce divorce due to the exclusive fault of the plaintiff;

[12] Article 933 paragraph (2) NCCP.
[13] Article 933 paragraph (3) NCCP.

- to pronounce divorce without making any mention of spouses' fault, when defendant spouse agrees to the divorce. In this case the judgment shall be final regarding divorce.

1.4. Divorce for health reasons

The ability of either spouse to claim for dissolution of marriage through divorce when his/her health condition makes it impossible the continuation of the marriage is established by article 373 letter d) Civil Code.

Article 932 NCCP provides that, when divorce is required for the health of a spouse makes it impossible to continue the marriage, the court will take evidence on the existence of disease and health condition of ill spouse and pronounce divorce, according to the Civil Code without making mention of fault for dissolution of marriage.[14]

2. Procedural provisions

In addition to the procedural provisions provided by the Civil Code, articles 914-934 of Title I - Divorce proceedings, of Book VI of the New Code of Civil Procedure, entitled Special Proceedings, settle the procedural rules governing divorce.

In this paper, we will focus only on the provisions of the competent court.[15]

In terms of jurisdiction, for the judgment at first instance, jurisdiction lies with the *local court*. According to article 94 section 1 letter a) NCCP local courts settle in the first instance the claims given by Civil Code in the jurisdiction of the family court except where the law expressly provides otherwise.

According to article 914 NCCP[16] following courts may have jurisdiction:

a) the divorce claim is in the jurisdiction of the local court in whose circumscription the last shared dwelling of spouses is located;
b) if the spouses did not have shared dwelling or if none of the spouses lives in the circumscription of the local court in which the latter shared domicile is located, the competent court is that in whose circumscription the defendant has his/her dwelling;
c) when the defendant has no dwelling in the country and Romanian courts have international jurisdiction, the local court in whose circumscription the plaintiff has his/her dwelling, has jurisdiction;[17]
d) if neither the plaintiff nor the defendant have their dwelling in the country, the parties may agree to submit the divorce claim in any court of Romania, and in the absence of such agreement, the divorce claim is in the jurisdiction of 5th District Local Court of Bucharest.

Unlike the previous regulation for determining the competent court, the new Code of Civil Procedure has replaced the notion of *domicile*, with *dwelling*, the more so as in the old regulation domicile was the actual dwelling of the spouses.[18]

[14] Article 381 Civil Code.
[15] See *G.C. Frențiu*, Competent court must take measures on family relations in the light of the rules of the new Civil Code and new Code of Civil Procedure, in Dreptul no. 12/2012, pp. 98-112.
[16] Article 607 of the old Code of Civil Procedure. Unlike the old code, NCCP no longer requires also the condition that at least one of them lives in said court circumscription.
[17] See High Court of Cassation and Justice, Civil and Intellectual Property Department, civil decision no. 6414/2011.
[18] *C.C. Dinu*, Theoretical and practical aspects of divorce proceedings in the new Code of Civil Procedure, in Revista română de drept privat no. 2/2012, pp. 70-71.

By *shared dwelling* it will be taken into account, as already stated in the practice of courts, actual shared dwelling of the spouses, and not the address included in their identity card.

Article 914 NCCP does not establish an alternative territorial jurisdiction, giving the plaintiff an opportunity to choose between several equally competent courts, but he/she shall be required to comply with the binding order settled by the text of law.

3. Administrative divorce

According to article 375 paragraph (1) Civil Code when the spouses agree to divorce and have no children, born during the marriage, out of the marriage or adopted, civil officer of the place of marriage or the last shared dwelling of spouses may ascertain the dissolution of marriage by the spouses' mutual consent, releasing them a certificate of divorce.

Territorial jurisdiction of the settlement of administrative divorce claim is an alternative, being left to the choice of the spouses. Thus, the civil officer either of the place of marriage or of the last shared dwelling of spouses is competent.

For the purposes of article 375 Civil Code, in the case of marriages concluded abroad, place of marriage means the locality in whose civil status register the marriage certificate was transcribed.

4. Notarial divorce

According to article 375 paragraph (1) Civil Code, if the spouses agree to divorce and have no children born during the marriage, out of marriage or adopted, the notary public at the place of the marriage or of the last shared dwelling of the spouses may ascertain the dissolution of the marriage by the spouses' mutual consent, releasing them a certificate of divorce.

Unlike divorce by administrative procedure, divorce by the spouses' mutual consent can be ascertained by a notary public also where there are children born during marriage, out of marriage or adopted, if the spouses agree on all aspects of family name to have after divorce, exercise of parental authority by both parents, establishing child's dwelling after divorce, ways to preserve personal ties between separated parent and each child and determining the parents' contribution to the costs of growth, education, teaching and training of children.[19]

Territorial jurisdiction of settlement of notarial divorce claim is an alternative, being left to the choice of the spouses. Thus, public notary either of the place of marriage or of the last shared dwelling of spouses is competent.

Last shared dwelling means the dwelling where the spouses lived together. Last shared dwelling proof is done, where appropriate, with the identity documents of spouses out of which their shared domicile or shared residence results, or, if no proof can be made in this way, by sworn affidavit of each spouse, providing which was their last shared dwelling. The affidavit shall be included in the divorce claim and in the minute of acceptance of divorce claim.[20]

[19] Article 375 paragraph (2) Civil Code.

[20] Article 871 paragraph (6) of Order no. 81/2011 on completion of the Regulation for the implementation of the Law on notaries public and notarial activity no. 36/1995, adopted by the Order no. 710/C/1995 of Minister of Justice.

5. Date of the marriage dissolution

The rule is that a marriage is dissolved on the day when the decision pronouncing the divorce became final.[21]

Exceptionally, if the divorce claim is continued by the heirs of the plaintiff spouse the marriage is considered dissolved on the date the divorce claim was filed.

De lege ferenda, amendment must be made to article 382 paragraph (2) Civil Code which states that when the divorce claim is continued by the heirs of the plaintiff spouse, date of marriage dissolution is the date of death, in accordance with the meaning of article 925 paragraph (4) NCCP, respectively the date of marriage dissolution be the date the divorce claim was filed.[22]

In the case of administrative divorce or notarial divorce, date of issue of divorce certificate is the date the marriage is dissolved.

6. Some new aspects regarding the effects of marriage dissolution

6.1. Right to compensation

According to article 388 Civil Code, the innocent spouse who suffers damage by the dissolution of divorce, may require the faulty spouse to indemnify, separately from the entitlement to compensatory benefit. Given that these provisions do not distinguish between pecuniary, moral or professional damage, we consider that the spouse who is not in fault for the dissolution of the marriage may claim compensations for any damage, which will be proved by him/her.

As stated in the doctrine[23] article 388, the Civil Code settles a form of specific tort liability of the relations between spouses in case of divorce. Thus, the innocent spouse applicant for such compensation will have to prove that the conditions of this form of liability are fulfilled.

The court settles the claim for compensation by divorce judgment. We consider that if this claim should be filed later, separately, forming another file, it should be enclosed to the divorce file, because only in this way the court may rule on such claim by divorce judgment, as provided by law text.[24]

6.2. Compensatory benefit[25]

When the divorce is pronounced due to the exclusive fault of defendant spouse, the plaintiff spouse may receive a benefit to compensate as much as possible, a significant imbalance that divorce would cause in the living conditions of the spouse who claims it.

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[21] Article 382 paragraph (1) Civil Code.

[22] Article 925 paragraph (4) NCCP introduced by article 13 section 283 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure. Since article 382 paragraph (2) Civil Code states that in this case the marriage dissolution date is the date of death and the provisions of article 83 letter k) of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure according to which "*on the date the Code of Civil Procedure entered into force, any other provision to the contrary, even if contained in special laws, are abrogated*", we consider that the marriage dissolution date will be the date the divorce claim is filed.

[23] *Fl.A. Baias*, Comment (to article 388) in *Fl.A. Baias*, *R. Constantinovici*, *E. Chelaru*, *I. Macovei* (coordinators), New Civil Code. Comment on articles, C. H. Beck Publishing House, Bucharest, 2012, p. 421.

[24] For the contrary view according to which "*compensations may be required, however, also separately, of course in the general limitation period of three years which shall begin on the date on which the innocent spouse knew the damage that was caused by the other spouse*," see *Fl.A. Baias*, Comment (to article 388) in *Fl.A. Baias*, *R. Constantinovici, E. Chelaru, I. Macovei*, works cited, p. 422.

[25] Article 390 Civil Code.

Compensatory benefit may be granted only if the marriage lasted at least 20 years.

Spouse seeking compensatory benefit can not ask his/her former spouse for alimony also. Thus, compensatory benefit does not add to the alimony between former spouses.

Compensatory benefit can not be claimed for except with the dissolution of marriage.[26] Consequently, a claim for a compensatory benefit may not be filed after the marriage dissolution or during marriage.

Cumulative conditions that must be met for granting compensation benefits are:

a) Benefit requesting spouse must not be in fault for divorce pronouncement. Compensatory benefit will not be paid if both spouses are guilty of dissolution of marriage or in case of divorce by agreement or divorce for health reasons.
b) Benefit requesting spouse suffers a significant imbalance that divorce determined in his/her living conditions, within the meaning of the significant change in his/her standard of living.
c) Marriage lasted at least 20 years. To calculate this duration we will have to consider not the date the divorce claim was filed, respectively the date the claim for this benefit was filed, but the date of marriage dissolution.
d) Benefit requesting spouse has not also requested alimony from the spouse in fault.

In determining compensation benefit the court will take into account the following criteria:[27]

a) the resources of requesting spouse;
b) other spouse's means at the time of divorce;
c) the effects the matrimonial condition liquidation will have, and
d) any other circumstances predictable by nature to be changed, such as the age and health of the spouses, contribution in raising the children that each spouse had and will have, training, the opportunity to conduct an income-producing activity and the like.

Compensatory benefit may be determined by the court either as *money*, lump sum or perpetuity, whether *in kind*, in the form of usufruct of movable or immovable property belonging to the debtor.[28]

Although the law does not specify how to determine the compensatory benefit that may be granted, the court will have to consider excluding the significant imbalance the divorce would cause in the living conditions of the spouse who so requests.

If compensatory benefit consists of a sum of money, it is indexed by law, quarterly, depending on inflation rate.[29]

The annuity can be established on a percentage rate of debtor's income or in a determined sum of money.

Regarding the duration, annuity and usufruct may be established during the lifetime of the one seeking compensatory benefit or for a shorter period, which is determined by the divorce judgment.

Article 393 Civil Code provides that the court, at the request of creditor spouse, may compel the debtor spouse to establish a pledge or give security to ensure annuity execution.

As other authors[30] we consider that although these guarantees are established due to the provisions of the court, they are generated through a contract of guarantee. If the debtor

[26] Article 391paragraph (1) Civil Code.
[27] Article 391 paragraph (2) Civil Code.
[28] Article 392 paragraph (1) Civil Code.
[29] Article 394 paragraph (2) Civil Code.
[30] *E. Florian*, Comment (to article 393), in *Fl.A. Baias, R. Constantinovici, E. Chelaru, I. Macovei*, works cited, p. 429.

refuses to conclude the contract of guarantee, the creditor has at hand the procedure for enforcement of the obligation to do.

It results from the law text that the court may impose a guarantee only if admitting the claim for compensatory benefit in the form of an annuity. Thus, the obligation to establish a security may be imposed by the court if it accepts the claim for compensatory benefit in the form of lump sum or usufruct.

When the means of debtor and resources of creditor significantly change, the court may increase or decrease the compensatory benefit.[31]

Compensatory benefit ceases in one of the following cases:[32]

a) the death of a spouse either of the creditor or the debtor of the benefit;

b) remarriage of the creditor spouse, and

c) where the creditor spouse obtains resources such as to ensure living conditions similar to those during the marriage.

6.3. The exercise of parental authority by both parents

The rule is that after divorce, parental authority lies with both parents jointly, unless the court decides otherwise.[33]

Jointly exercise of parental authority requires both parents to consult each other on important decisions for raising and educating children. However, even when parental authority is exercised by both parents, current decisions regarding child care and education are taken by the parent with whom the child lives, the other parent being consulted on important decisions, such as the school the child should attend, medical interventions to which the child will be subjected etc.[34]

Exceptionally, if there is good reason, given the best interests of the child, the court decides that parental authority be exercised only by a parent.[35]

According to article 507 Civil Code exercise of parental authority by a single parent can be determined by the court if one parent is deceased, declared dead by court order, banned, deprived of the exercise of parental rights or if, for any reason, he/she is not able to express his/her will, the other parent exercising parental authority alone.

Besides these reasons, there may be other reasons, in which the court decides the exercise of parental authority by a single parent, always considering the best interests of the child.

However, when the court ruled that parental authority be exercised only by one parent, the other parent retains the right to watch over how the child is raised and educated, and the right to consent to its adoption.

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[31] Article 394 paragraph (1) Civil Code.

[32] Article 395 Civil Code.

[33] Article 397 Civil Code. See 1st District Court Bucharest civil resolution no. 2154/08.02.2012 and civil resolution no. 4076/07.03.2012, unpublished.

[34] *D. Lupaşcu, C.M. Crăciunescu*, works cited, p. 246.

[35] Article 398 paragraph (1) Civil Code. See 1st District Court Bucharest civil sentence no. 4573/13.03.2012, unpublished by which the court upheld the divorce claim and decided the dissolution of marriage by the spouses' mutual consent, and regarding parental authority over the child born on 21.04.2008, required that it be exercised only the mother, settling also the child's dwelling at the mother's. To decide this, the court held that: "*In regard to the fact that the parties have agreed on the exercise of parental authority over their son after the dissolution of the marriage, meaning that parental authority be exercised only by the mother and finding that there is no evidence proving that this would be contrary to the interest of the child, the court will decide - according to agreement between the parties - that after divorce, parental authority on the child be exercised by the claimant, following that, under article 400 paragraph (1) Civil Code, ascertaining the agreement of the parties in this respect, establish child's dwelling at the mother's.*"

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A SHORT ANALYSIS OF CHILDREN'S RIGHT TO A CITIZENSHIP AS A CONSTITUTIVE ELEMENT OF THEIR IDENTITY

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Abstract: *At present, the law grants children a legal status of special protection due to their lack of maturity and specific needs. At a national level, Law nr. 272/2004 states the obligation of public authorities, private authorized bodies as well as responsible legal entities and natural persons to protect the child, to respect, promote and guarantee the „rights of the child as set by the Constitution and the law, in conformity with the stipulations of the UN Convention on the Rights of the Child and other international documents existing in this field, of which Romania is a signatory." However, to benefit from these rights is impossible unless the child has a legally established identity, which includes: the right of the child to a name, a citizenship, to know his/her parents and to be cared for, raised and educated by them. Among these rights, the matter of children's citizenship appears particularly difficult, if we take into account the fact that nations see the issue of citizenship and their sovereignty as a particularly sensitive one. Therefore, in order to provide children with the protection they require, we consider that particular attention must be drawn to the right of each child to obtain a citizenship so as to prevent situations in which they are grated less protection by society and the state because they do not belong to any state.*

Keywords: *children's rights, child's right to an identity, citizenship.*

1. Introductory considerations

The legal status of children is different because of their lack of maturity and specific need. The law grants them special protection allowing them to avoid certain consequences of their actions in virtue of the fact that they do not have the capacity of judging their actions given their incomplete physical, mental and moral development.

These incapacities which are stipulated in the legislation are actually privileges granted children, instituted by the lawmaker in order to protect them from subsequent consequences they cause themselves or damage to their property or to protect them from being abused by other individuals[1].

Throughout time, the legal situation of children has greatly differed. As opposed to current laws, in which any human being is endowed with the capacity to take part in legal activities, Roman law, for example, does not acknowledge this ability to all members of society. The Roman father had the right of life and death over his children, since it was considered his natural right. In ancient Greece, the child of slaves was only used for toiling in the field or in mines[2]. In both societies, children were seen as small adults, without any particular characteristic in mind. It is only at the beginning of the twentieth century were children beginning to be considered differently to adults. This is a different vision of

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[1] A. Drăghici, D. Iancu, *Quelques aspects concernant l'enfant comme sujet de droit*, în Universitatis Apulensis, Series Jurisprudentia no. 11/2008, pp. 92-100.
[2] D. Iancu, C. Gălăţeanu, *Drept roman*, Editura Univerităţii din Piteşti, Piteşti, 2010, pp. 93-96.

children's rights, the origin of which is to be found in international documents e.g. Declaration of the Right of the Child (1959) and especially the Convention on the Rights of the Child (1989), which was ratified by Romania and came into force in 1990. In these documents there is no mention of the legal situation of children but rather their rights. The perspective is totally different, because there is no mention of which laws apply to children, but rather which rights society must grant them and acknowledge[3].

At present in our country, Law nr. 272/2004 sanctions the obligation of public authorities, authorized private bodies, natural persons and legal entities responsible for child protection to respect, promote and guarantee „the rights of children set in the Constitution and the law, in accordance with the stipulations of the UN Convention on the Rights of the Child and of other international documents in this field, to which Romania is a co-signatory" and the „principle best interest of the child".

In accordance with the UN Convention, national laws manage to cover a great part of categories of rights. They classify the rights of children in four main categories, i.e. civil rights and freedoms, rights concerning the family environment and alternative care, rights concerning the wellbeing and education of children and the rights to cultural and recreational activities. Also, the four distinct main chapters of the law tackle child protection in different situations, i.e. children deprived of parental protection, child refugees, the protection of children in a war zone, the protection of children having committed felonies but that have avoided prosecution, the protection of children against economic exploitation and the protection of children from kidnapping and other forms of trafficking.

The category of civil rights and liberties begins with the child's right to be registered after birth, to be given a name, a citizenship and within reason the right to know and to be raised by the parents, in short the child's right to an identity. This right is sanctioned by article 7 from the Convention of the Rights of the Child, and on a national scale by article 8 from Law 274/2004.

The stipulations of article 8 from Law 274/2004 as well as those of article 7 of the UNICEF Convention sanction the individual importance of the children and of their legal status through regulating the obligation to have their birth registered and the right to have an identity, i.e. the right to a name, a citizenship, to know their parents and to be raised, cared for and educated by them.

The differences between the values of families living in an urban environment as opposed to those of rural families, between those of complete and incomplete families, the level of education of both parents and children alike, the social and economic conditions in which they live can all have positive and negative effects on the development of the personality of the minor[4].

2. The Notion and Regulation of the Child's Right to a Citizenship

Citizenship designates the most general framework for the regulation of a person's identity through the reflection of their belonging to a certain state and in correlation, of rights and obligations of a person, by virtue of belonging[5] or, as Hegel remarked quite astonishingly, „the individual (the citizen) does not have objectivity, truth or ethics unless

[3] A. Drăghici, *Protecția copilului şi a altor categorii de persoane*, Editura Universității din Piteşti, Piteşti, 2010, p. 34.
[4] Elena-Ana Nechita, *Criminalistica. Tehnica şi tactică criminalistică*, ediția a II-a, revăzută şi adăugită, Editura PRO Universitaria, Bucureşti, 2009, p.154.
[5] D. Balahur, *Protecția drepturilor copilului ca principiu al asistenței sociale*, Editura All Beck, Bucureşti, 2001, p. 128.

as a member of the state"[6]. In the current legal constitutional doctrine, citizenship is analysed as a rule under two aspects, one as a juridical institution, meaning a group of laws and the other as a juridical condition or status that those persons have as citizens. However, the general definition accepted says that citizenship represents „that quality of a physical person expressing the permanent social-economic, political and juridical relations between the natural person and the state, proving their Romanian citizenship and granting to the physical person the possibility to hold all rights and obligations set in the Constitution and in Romanian laws"[7].

Citizenship expresses the relation between the individual and the state, with the state granting the citizen the possibility of holding certain rights and obligations created by the legal system. However, understanding the fact that only citizens enjoy all these rights must be connected to the fact that the limits of the dependency of the quality of a citizen on rights and liberties, limits which spring from the universality of human rights. Therefore, it has been correctly said that „citizenship is a political notion, first and foremost, and afterwards a juridical one, because the rights are of a person. By subscribing to the universality of human rights means that humans come before citizens with respect to fundamental rights and freedoms. If the state can look on a person as part of itself, as a holder of certain abilities, it cannot see a human in the same way. Therefore, citizenship may come into effect when the „rights" granted through it are in actuality abilities pertaining to the political connection between individual and state, but no with respect to fundamental rights and liberties, which are unrelated to the exercise of such abilities. According to the principle of universality, citizens have rights and abilities, humans have rights alone. If the citizen can have abilities forced upon him, the human cannot"[8].

At the same time, however, the principles of democracy, liberalism and wellbeing are based on the logic of equality and non-discrimination. The progress of European legislations throughout history shows us that national tendencies concerning civil rights and access to wellbeing have not gone any further than the country's own citizens. However, principles such as the equality of rights have gone beyond the framework of national law, imposing themselves as fundamental principles forming part of national constitutions and judicial practices as well as European and international conventions[9].

In international law, the right of the child to have a citizenship is regulated both in article 24 paragraph 3 from the International Covenant on Civil and Political Rights as well as article 7 from the Convention on the Rights of the Child. The UN Human Rights Committee has stressed the fact that „in the context of providing children with the necessary protection, special efforts must be made so that every child obtain a citizenship, in accordance with the stipulations of article 24, paragraph 2 from the Covenant. Although the goal of these stipulations is to prevent situations in which children are given less protection by society and the state, because of their statelessness, it does not follow that states are obliged to grant citizenship to each child born on their territory. However, it is requested that states adopt proper measures, both internally and internationally, in order to ensure that each child gain citizenship upon birth. Consequently, there should be not

[6] G.W.F. Hegel, *Principiile filosofiei dreptului sau elemente de drept natural şi ştiinţă a statului*, Editura Academiei, Bucureşti, 1969, p. 278.
[7] M. Andreescu, A. N. Puran, *Drept constituțional*, Ed. Sitech, Craiova, 2012, pp. 297-299; Gh. Iancu, *Drept constituțional şi instituții politice*, Editura C.H. Beck, Bucureşti, 2010, pp. 131-133.
[8] D. C. Dănişor, *Drept constituțional şi instituții politice. Vol I, Teoria generală*, Ed. C. H. Beck, Bucureşti, 2007, pp. 192-193.
[9] Nicolaie Iancu, Elena-Ana Nechita, *Debates and Controversies on European Migration Policies* în Law Review, Nr.4/2012, pp.5, http://www.internationallawreview.eu/article/debates-and-controversies-on-european-migration-policies

distinction or discrimination in the national legislation when it comes to granting citizenship to children born in or out of wedlock, children born to stateless parents or based on the citizenship of one or both parents"[10].

In the International Covenant on Civil and Political Rights, the matter of children's citizenship appears as particularly difficult, taking into account national sensibilities concerning sovereignty and citizenship, the various legal and religious precepts for obtaining a citizenship and the increasing desire of wealthier nations to exclude or refuse citizenship to poor people from other nations[11].

At an internal level, the right of children to have a citizenship is expressly sanctioned in article 8 paragraph 2 from Law concerning the Protection and promotion of Children's Rights. Article 3 from this law clearly states that its stipulations apply to all children on national territory, whether Romanian, stateless, refugee or foreign citizens in emergency situations, such as Romanian children abroad. The protection of the Romanian state extends beyond the national boarders only for children of Romanian citizenship.

3. Ways of Obtaining Romanian citizenship sanctioned by Law nr. 21/1991

All the details concerning the right of children to a citizenship, as the link between them and the Romanian state are regulated by Law on Romanian Citizenship nr. 21/1991. As such, Romanian law adopted a system for obtaining citizenship based on the principle of *jus sanguinis*, which is the most appropriate system, given that it reflects the link between parents and children and is the expression of continuity on the national territory. Law nr. 21/1991 establishes four ways of obtaining citizenship, i.e. birth, adoption, upon request and re-obtaining it. As a rule, Romanian citizenship is obtained upon birth. Therefore, the child born of Romanian parents is a Romanian citizen, as is any child born of a Romanian parent and a foreign national or stateless person. In all these cases, the territory on which the child is born or one or both parents live does not change the citizenship of the child in any way, since any child born of one or both Romanian parents in a foreign country is still a Romanian citizen. According to article 24, paragraph 2 from Law nr. 21/1991, Romanian citizenship obtained through birth may not be nullified. However, upon request, any Romanian citizen may renounce their citizenship if they are over 18 and have obtained or requested another citizenship which they will surely be granted.

According to Law nr 21/1991 article 6, Romanian citizenship is granted to a foreign or stateless child through adoption if at least one of the adoptive parents is a Romanian citizen or if there is only one adoptive parent, he/she must be Romanian. If one of the adopters is a Romanian national, the citizenship of the adoptee will be decided by both adopters together. In case the two adopters cannot agree on the citizenship of the adopted child, a competent court that granted the adoption will decide, taking into consideration the best interest of the child. In case the child is 14, his/her consent will be necessary also, and if the child has reached the age of 10, his/her opinion must be considered as well, as stated in Law 272/2004, article 24.

International adoptions may lead to changes in children's citizenship. According to article 29 from Law nr. 21/1991, „a child who is a Romanian citizen and adopted by a foreign national, loses Romanian citizenship, upon the request of the adopter or adopters, if the child obtains their adopter's nationality within the conditions stipulated by foreign law. Any minor

[10] UN Human Rights Committee, General Comment No. 7, 1989, HRI/GEN/ 1/Rev.5, p. 134.
[11] Rachel Hodgkin, Peter Newell, *Manual pentru implementarea Convenției cu privire la drepturile copilului*, Ed. Vanemonde, Bucureşti, 2004, pp. 136-137.

of 14 years of age must give his/her consent. The date when the child loses his/her Romanian citizenship coincides with that of obtaining the foreign one. In case the adoption is null of annulled, the adoptee of 18 years does not lose his/her Romanian citizenship".

The solutions proposed by the Law on Romanian Citizenship are justified by the fact that an adoption aims to integrated as easily and as quickly as possible the adoptee into his/her new family. In case the adoptee can not obtain the citizenship of their adopter, he/she would feel as a stranger, with possible issues of inferiority or emotional instability appearing.

Law nr. 21/1991 regulates also the case of the child found on Romanian territory. If the identity of either parent is unknown, the child will be granted Romanian citizenship. This solution proposed by the legislator is based on the principle of *jus sanguinis*, given the assumption that at least one of the parents must be Romanian. At the same time, it expresses the interest of ensuring a legal situation equal to any other citizen to the child found on Romanian territory. In case the filiation of the child is established before he/she turns 18 and the parents are determined to be of foreign citizenship, then the child loses the Romanian citizenship. It is also lost in case the filiation is established for only one parent who turns out to be foreign, with the citizenship of the other parents remaining unknown.

According to the stipulations of articles 8 and 9, paragraph 1-3 and article 10 from the Law on Romanian Citizenship, any child born of foreign or stateless parents and of 18 years of age is granted or obtains Romanian citizenship once the parents do. In case that one of the parents is granted Romanian citizenship, the parents will decide together the citizenship of the child, and if parents cannot come to an agreement, the courts will decide for them. If the minor is 14 years of age, his/her consent must be given in an authentic manner and he/she will be granted citizenship the same day as the parent.

Last but not least, we specify that in accordance with Law 21/1991 article 28, if the parents request to renounce their citizenship, this does not affect the minor's status at all. However, in case that both parents have renounced their citizenship and the child is lives with them abroad or leaves the country with them, he/she will lose Romanian citizenship at the same time as the parents. If they have lost their citizenship on different dates, then the child will lose his/her on the last of these. Concerning the minor who leave the country in order to live with his/her parents, who have lost their Romanian citizenship, he/ she will lose their citizenship as well upon leaving the country.

Once the child is granted Romanian citizenship, he/she also becomes a European citizen. The Treaty of Maastricht of 1992[12] defined European citizenship as the possibility offered any individual from a member state of being considered a citizen of the European Union. By introducing this, the co-signatories of the Treaty on the European Union wished among other things to promote and consolidate the European identity, thus involving the citizens in the process of European integration[13]. Article 17 of the Treaty establishing the European Economic Community[14] stipulates that all citizen of a member state is a European citizen. Subsequently, the Treaty of Lisbon has re-launched the notion of European nationality through article 8, stating that „Every national of a Member State shall be a

[12] Articles 17-22, second part of the Treaty on the European Union (TEU – signed on 7 February 1992 and come into force on 1 November 1993), as modified by the Treaty of Amsterdam, signed 2 October 1997 and come into force on 1 May 1999 (formerly article 8, second part from the Treaty of Maastricht).

[13] A. Fuerea, *Drept comunitar al afacerilor*, second edition, Editura Universul Juridic, Bucureşti, 2006, p. 44.

[14] It concerns the Treaty establishing the European Economic Community, Community which in 1993 (when the Treaty of Maastricht came into force) and changes its name to European Community, becoming "The Treaty establishing the European Community".

citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it".

European citizenship is thus additional to the national citizenship, it overlaps it, to be more precise without substituting the national identity. It therefore makes it possible to exercise certain rights as a citizen of the Union on the territory where that person resides. Therefore, it is necessary that every person have the citizenship of a member state in order to be granted European citizenship[15]. By imitating the notion of national citizenship, the European citizenship also grants its holders the rights traditionally given to the nationals before the law. European citizenship differs from national citizenship, which according to the Treaty of Amsterdam, „completes […] and does not replace it", and therefore cannot be mistaken for the national citizenship or exclude it as the literature has shown[16].

Even though a part of the rights granted through European citizenship may not be directly exercised by the child, he/she still benefits fro the additional protection of their interest, especially since the Treaty of Lisbon guarantees the principles and liberties set in the Charter of Fundamental Rights of the European Union. Moreover, it is important that every child become aware of their European membership and citizenship which completes their identity.

Conclusions

As we have shown, in contemporary society, the rights of the children are the object of several universal or regional documents, which state the rules and standards that the states must respect. Nonetheless, a simple juridical sanctioning if the protection of children is not enough. Protecting children requires the means and concrete guarantees for the exercise of legally established rights and liberties. There still are states which grant a limited form of access to citizenship to certain groups of children whose parents are not citizens of the respective state, which represents a form of discrimination. One such case is Kuwait, where citizenship can be granted only to a child whose father is Kuwaiti. In national legislation such discriminations should not be allowed especially in the case of granting citizenship to children born in or out of wedlock of parents with or without citizenship. The issues of child citizenship remain difficult to tackle, given the national sensibilities on granting citizenship and the reticence of wealthier states to grant citizenship to poor people from other nations.

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[15] Please see L. Olah, R. Duminică, *Justiție europeană*, Ed. Paralela 45, Piteşti, 2008, pp. 51-53.
[16] E. N. Vâlcu, *Introducere în dreptul comunitar material*, Ed. Sitech, Craiova 2010, p.13; A. Dascălu (Puran), D. Iancu, *National and european citizenship*, in Agora International Journal of Juridical Sciences no II/2010 pp. 94-100.

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THE ISSUE ON FREEDOM OF MOVEMENT FOR WORKERS AND THE LIMITATION OF FREE ACCESS FOR ROMANIAN WORKERS WITHIN THE LABOR MARKET OF EU MEMBER STATES

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Abstract: *Freedom of movement is a fundamental right of workers and their families. According to the Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, the mobility of the labor force within the Union must be one of the means that guarantee for workers the possibility to improve their life and work conditions and to climb the social scale, subject to limitations justified by reasons of public order and safety and public health. The non-discrimination principle between the Union's workers entails for all Member State's nationals the same priorities as those enjoyed by workers who are Member States' nationals, regarding their employment, remuneration and other labor conditions. Nevertheless, by Decision 2011/503/EU the European Commission authorized Spain to limit free access for Romanian workers on the Spanish labor market until 31 December 2012, under certain conditions. The Decision was enforced on 12 August 2011. Following a new request from Spain on 13 December 2012 the Commission approved for Romanian workers the extension of the suspension until 31 December 2013, according to Art 1-6 of the Regulation (EU) No 492/2011. We however believe that the restrictions for the labor market are derogative from a fundamental principle stated by the Treaty on the Functioning of the European Union, namely freedom of movement for workers and in accordance with the jurisprudence of the Court of Justice of the European Union, such measures should be restrictively interpreted and applied.*
Keywords: *nationals, workers, remuneration, limitation of access on the labor market*

1. Introduction

One of the main four freedoms for the European citizens is the free movement of workers. It involves the right of the workers to free movement and residing, the right to enter and to reside for the workers' families, as well as the right to work in another Member State. Nevertheless, the rights are accompanied by restrictions, especially regarding the right to enter and to reside, the right to work in public administration, as well as regarding some new Member States

According to the CJEU, the concept of worker is specific for the European Union[1], being independently defined by Member States' legislation, based on a labor relation which must mandatory generate real and effective activities.

The *worker* is defined by the CJEU as the person hired in his state, the person searching for a job, the unemployed fit for work and who was previously hired, the person incapable of working because of a disease or an accident suffered during his employment in the host state, the person who has the age for retirement during his activity in the host state.

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[1] C.A. Moarcas Costea, *Drepturile sociale ale lucratorilor migranti*, C.H.Beck Publishing House, Bucuresti, 2011, p.17

The notion of worker aims, on one hand the employed persons who have free access to all jobs and, on the other hand, independent workers performing activities with a permanent feature and who are circumcised to freedom of establishment or independent workers performing occasional activities in exchange for a remuneration.

Regarding the applicability of professional freedom, the TEC states 3 freedoms, namely:

a) *Freedom of movement and free access to remunerated activities* shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment (Art 39 Para 2-3 TEC);
b) *Freedom of establishment*[2] shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms under the conditions laid down for its own nationals by the law of the country where such establishment is effected;

Free movement of workers is distinguished by the freedom of establishment because the first one includes a remunerated activity, while the last one assumes the performance of a permanent freelance profession[3] [3]. The establishment shall be achieved:

- permanent, if the interested person creates in the host state or transfers from his origin state to the host state a determined activity;
- secondary, by creating a branch, subsidiary or an agency

c) *Free performance of services*. TEC defines the term „services" as being activities performed for remuneration by independent economic agents[4] [4]. Therefore, performing services can be an independent, but temporary, activity involving the shift of the performer (for instance the lawyer traveling from a state to another) or of the beneficiary (for instance, sick person traveling in another Member State for medical care) unlike the freedom of establishment which involves also an independent, but permanent, activity.

2. Free movement of workers within the Union according to Regulation (EU) No 492/2011[5]

The present Regulation states that any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State, enjoying the same priority as the nationals of that State regarding access to available jobs.

A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment, access in schools and re-qualification centers.

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[2] A. Fuerea, *Drept comunitar al afacerilor*, 2nd Edition revised and added, Universal Juridic Publishing-House, Bucharest, pp.135 and following
[3] M. Voicu, *Introducere in dreptul european*, Universul Juridic Publishing-House, Bucharest, 2007, pp. 173-174
[4] M. Voicu, *Introducere in dreptul european*, Universul Juridic Publishing-House, Bucharest, 2007, p.174
[5] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union

The regulation states that the worker who is a national of a Member State and is employed in the territory of another Member State enjoys all the rights and advantages offered to national workers such as:

- put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities, including the right to be the owner of the house in which he is living;
- the worker shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union;
- the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory;

Regarding the link and compensation between offers and demands for employment all Member States have the obligation in creating specialized services coordinated by the *European Bureau of Coordination between offers and requests for employment*. The Bureau, coordinated by the Commission, shall have as mission the creation of a link between the contact and compensation of offers and requests for employment.

The specialized service of each Member State shall periodically communicate to the services in the other Member States, as well as to the European Bureau:

a) the offers for employment susceptible of being occupied by other Member State's nationals;
b) the offers for employment addressed to third-country nationals;
c) the requests for employment submitted by persons who formally declared their intention to work in another Member State;
d) information, structured on regions and branches of activity regarding the solicitants who have declared their clear intention for employment in another state;

In order to fulfill the obligations stated by the Regulation (EU) No 492/2011, the Commission, together with Member States, has established a European network of services for employment, called EURES[6], and formed by:

I. the European Bureau of Coordination between offers and requests for employment;

II. members of EURES, represented by specialized services named by Member States in accordance with the Regulation (EU) 492/2011 (named „national bureaus of coordination");

III. EURES partners, named by the EURES members, including public or private services providers who perform their activity in the area of employment, such as unions and employers' associations;

IV. EURES associate partners who offer limited services under the supervision and responsibility of an EURES member or of the European Bureau of Coordination.

Regarding its established objectives, EURES shall promote, in cooperation as appropriate with other European services or networks:

[6] Commission Implementing Decision of 26 November 2012 implementing Regulation (EU) No 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES – Decision No 2012/733/EU [notified under document C(2012) 8548]

a) the development of the European labor market open and accessible for all, fully respecting applicable labor standards and legal requirements;

b) the clearance and placement at the transnational, interregional and cross-border level through the exchange of vacancies and applications for employment, and participation in targeted mobility activities at EU level;

c) transparency and information exchange on the European labor markets, including on living and working conditions and on the opportunities for acquisition of skills;

d) the development of measures to encourage and facilitate mobility of young workers

e) the exchange of information on traineeships and apprenticeships in the sense of Regulation (EU) No 492/2011 and, as appropriate, the placement of trainees and apprentices;

We consider that the role of EURES is to promote a better functioning of labor markets and the satisfaction of economic necessities by facilitating transnational and cross-border geographic mobility of the workers, in the same time insuring the mobility in conditions of equity and compliance with the applicable labor standards. This should offer a greater transparency of labor markets, insuring the trade and processing offers and demands and requests for workplaces (namely, „compensation" or „correlation" in the meaning of this Regulation) and the activities for support in the areas of recruitment, counseling and orientation at a national and cross-border level, thus contributing in the achievements of the objectives of the 2020 Europe Strategy.

Within the „Pact for economic growth and workplaces", the European Council has requested the exploration of the possibility to extend EURES in order to include apprenticeship and internships. In order to insure the synergies and to allow EURES to fully support the objectives of the 2020 Europe Strategy, especially regarding the growth of the occupancy of labor force to 75% until 2020, by respecting in the same time the area of application of the regulation, EURES should be able to cover the apprenticeship and internship programs, with the condition that the persons involve should be considered workers in the meaning of this regulation and to have at least 18 years, as soon as it considers possible the verification of this information in accordance with the proper standards.

3. Limitation of free access for Romanian workers on the labor market according to Decision No 2012/831/EU[7]

Regarding the restrictions on the free movement of the citizens of new Member States, during a transitional period of up to 7 years since the adhesion of 10 Member States to the EU on 1 May 2004 (Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovakia) and of 2 Member States on 1 January 2007 (Bulgaria and Romania), can be applied certain conditions limiting the free movement of workers from and between these states. Restrictions refer only to the free movement for the purpose of finding a workplace and may differ from state to state.

Three stages of the transitional period allow for the 15 old EU Member States to open the labor market for workers coming from the previous mentioned states. For the new 10 Member States of the EU: after the first stage, since 1 May 2004 until 30 April 2006, the

[7] Commission Decision of 20 December 2012 authorizing Spain to extend the temporary suspension of the application of Articles 1 to 6 of Regulation (EU) No 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union with regard to Romanian workers (Decision No 2012/831/EU)

Commission has published a report regarding the transitional provisions (February 2006) and concluded that national restrictions have a minor impact over the control of migration and depend on various factors associated with the conditions of offer and request. The 15 EU Member States had to inform regarding their intentions for the second stage (1 May 2006 – 30 April 2009), with the possibility of extending for the next two years (1 May 2009 – 30 April 2011), but only in the situation in which one Member State is facing serious perturbations on the labor market.

The calendar for Bulgaria and Romania is different because of the beginning of the first stage since 1 January 2007 and the concluding of the third stage on 31 December 2013.

In particular, regarding Romania, starting on 1 January 2009, Spain implemented, regarding Romanian workers, Art 1-6 of the Council Regulation (EEC) 1612/68[8]. On 22 June 2011, regarding a serious imbalance on the Spanish labor market, Spain, in accordance with paragraph 7 third subparagraph of Annex VII Part 1 of the Treaty of Accession of Romania and Bulgaria and with the amendments of the Treaties founding the European Union (called Act of Accession 2005) informed the Commission about its decision, that starting from that day, to restore the restrictions on the free access for Romanian workers on the labor market. Council Regulation (EEC) No 1612/68 was codified and replaced by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, enforced on 16 June 2011.

Replying to a Spanish demand for the Commission on 28 June 2011, based on paragraph 7 third subparagraph of Annex VII Part 1 to the 2005 Act of Accession requesting that Art 1-6 of the Regulation (EU) No 492/2011 be temporarily suspended regarding Romanian workers within the Spanish territory and in all labor areas, the Commission authorized Spain by Decision 2011/503/EU to limit the freedom of movement for Romanian workers within Spanish labor market until 31 December 2012. The Decision was enforced on 12 August 2012.

Spain requested the Commission by a letter sent on 13 December 2012 to prolong for Romanian workers the temporarily suspension of Art 1-6 of the Regulation (EU) No 492/2011 until 31 December 2013. Therefore, by Decision 2012/831/EU, Spain was authorized by the European Commission to suspend, for Romanian workers, Art 1-6 of the Regulation (EU) No 492/2011 until 31 December 2013.

With all its rigors, Art 2 of the Commission Decision stated that this Decision shall not affect the Romanian nationals and their family members who were employed in Spain on 12 August 2011, or who were registered as jobseekers by the Public Employment Services in Spain on 12 August 2011.

Also, the principles governing the restrictions on the labor market, as established by paragraph 7 third subparagraph of Annex VII Part 1 to the 2005 Act of Accession, such as the „standstill" clause and the principle of preference for Union's citizens stated by Art 14 Annex VII Part 1 shall be mandatory respected.

The 2011 Commission analysis on the economic data grounding Commission Decision No 2011/503/EU emphasized the fact that Spain is facing a serious imbalance on the labor market, characterized by the highest rate of unemployment of the EU (monthly data of Eurostat indicate a rate of unemployment of 21% in comparison with the EU 9.4% average and the 9.9% average of the Euro zone in June 2011). The same analysis established that

[8] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community was replaced by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, which entered into force on 16 June 2011

more than 30% of the Romanian nationals inhabiting in Spain were serious affected by unemployment (source: Eurostat data from the investigation of the labor market in the first trimester of 2011). The flows of Romanian nationals arriving in Spain, despite a certain decrease caused by the economic recession, were still substantial, even though Spanish labor demand was very low.

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ROMANIAN CRIMINAL LEGISLATION AND THE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

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Abstract: *A special importance in combating violence against women, the Convention on Preventing and Combating Violence against Women and Domestic Violence is the first compulsory European document applicable to all members of the Council of Europe, so almost on the whole continent, being also opened for signing and ratification to states on other continents such as Japan, Mexico, Canada, USA, Vatican or even EU. As we shall see in this material, the Convention, which was signed in Istanbul on 11 May 2011, is a judicial document approaching in an integer manner the issue of violence against women, and not only, by enlarging the framework of application for all kind of victims and referring to all forms of domestic violence most prevalent until then. In the end of our study we have conducted a prospective analysis of this Convention from the perspective of the present and future Romanian criminal legislation, noting that, at least legislatively, Romania is ready to sign and ratify this document, even if there are still some lacks, easy to remedy or, on the contrary, some superior aspects of the Romanian regulation in comparison with the Convention.*

Keywords: *violence against women, domestic violence, Istanbul Convention*

1. Introduction. 2011 proved to be the year of great steps in combating violence against women. Adopting the Convention on preventing and combating violence against women and domestic violence by the Council of Europe in May represented a significant progress in building a consensus between Member States in their fight against this type of violence, even if just a small number of them have yet ratified it. This first step was closely followed by interesting debates in the Parliamentary Assembly concluded with the adoption of two resolutions, one regarding the prenatal sex selection and one regarding psychical violence.

Regarding the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)[1], it was adopted on 11 May 2011 in Istanbul, until now being ratified by only 4 states[2], and signed by other 26 of the Member States of the Council of Europe[3]; unfortunately, Romania is not among them **yet**. The Convention is applicable both against violence against women, as well as against general domestic violence, its provisions being applicable for all victims, regardless if it is peace or war[4]. By its close study, this document synthetizes all progresses made until 2011 regarding violence against women and domestic violence, both at the level of the Council of Europe, as well as to the level of the UN, encompassing the most important recommendations made by this organisms regarding the object of the Convention. But, even so, the Convention cannot harm the international documents which were or shall be adopted by the signatory states,

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[1] For details on the Convention (full text, ratification documents, reservations etc.) see http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=210&CM=8&DF=09/02/2013&CL=ENG

[2] The states that have ratified the Convention until 9 February 2013 are: Albania (04.02.2013), Montenegro (22.04.2013), Portugal (05.02.2013) and Turkey (14.03.2013).

[3] These states are: Austria, Belgium, Bosnia and Herzegovina, Croatia, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Malta, Monaco, Montenegro, Holland, Norway, Poland, Serbia, Slovenia, Slovakia, Spain, Sweden, Former Yugoslav Republic of Macedonia, Ukraine, United Kingdom of Great Britain and Northern Ireland

[4] Art 2 of the Istanbul Convention

and cannot prevent the parties from concluding bi or multilateral agreements, which will ease the application of the Convention or in order to consolidate or complete its provisions[5].

2. Premises. Before starting the analysis of the most important provisions of the Convention, we must notice the provisions from which the creation of the Convention started, regarding violence against women. These premises are genuine conclusions and observations, resulted after a rich analysis over few decades. Here, in short, they are:

- The need to achieve a complete *de jure* equality, but especially, *de facto*, between women and men, as a key premise in the prevention of violence against women, without considering that a special protection for women is a discriminatory measure (Art 4 Para 4);
- Violence against women is a historical manifestation of the inequalities between men and women;
- Violence against women is structural;
- For the first time violence against women is seen as a gender-based violence;
- Violence against woman represents a violation of her rights;
- For the first time it is explicitly shown in an official Council of Europe document that women are favorite victims of domestic violence;
- It is recognized the fact that also men may be victims of domestic violence, expressing its bipolarity;
- Not least, violence against women also has collateral victims, identified in most cases with children.

3. The purposes of the Convention established by the participating states are to protect women against all forms of violence, including by legal actions; contribute to the elimination of all forms of discrimination against women; design comprehensive measures against domestic violence, including by involving governmental agencies with attributions in this area; promote international co-operation with a view to eliminating violence against women and domestic violence[6].

4. Framework of application. As shown right from the start, this Convention is applicable to all forms of domestic violence, to which most victims are women, but victims may also be other persons, such as men. Outside this broad analysis framework, by defining specific terms, the Convention is very helpful in understanding its application area. From the definition of domestic violence we see that it refers to violence between family members, even if they share or not a household. It firstly aims former or present spouses, partners (not ex-concubines) and, due to the fact that Art 3 Let e) states that *victim* shall mean any natural person, it results that domestic violence can manifest against other family members. On the other hand, by violence the Convention understands physical, psychical or psychological, sexual and economic violence, excluding for instance spiritual violence, as defined by Art 4 Let g) of the Romanian Law No 217/2003 modified. In this case, for Romania the Romanian law more favorable for the victims will prevail[7]. Also, domestic violence defines violence within the family or „domestic unit", as the Convention names it. From our perspective, domestic violence implies the manifestation of all four forms of violence regardless of the victims' position as family members, while violence within the

[5] Art 71 of the Istanbul Convention
[6] Art 1 of the Istanbul Convention
[7] Art 73 of the Istanbul Convention

domestic unit is circumscribed to the place where the family or couple inhabits, family home or domestic unit.

On the other hand, violence aiming only women is more widely defined, referring to the all the *sufferance* that comes with the four forms of violence previously mentioned, *threats* to use these forms of violence, to which is added the *deprivation of freedom*, seen as a special form of violence. In the absence of such specification, in our opinion, it can be seen as a form of physical violence, because it mainly affects the freedom to movement of the person (representing a physical constraint), but, we also cannot ignore the *psychical sufferance* inherently supported by the victim and, should not be overlooked the fact that, in many cases, deprivation of freedom has as main purpose trafficking in human beings, thus involving sexual violence. Also connected with violence against women, Art 3 Let a) of the Convention refers to specific actions, but also to the probability of certain actions, so it refers to an *indirect violence* or to *an attempt to one of the offences* which includes one or more of the four forms of violence.

For the first time an official act defines the notion of „*gender*" as being „*the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men*", in this context, *gender-based violence* being that violence, in each of its forms, manifested against women, *for the simple fact of being a woman*. The term „woman" used by the Convention also includes girls under the age of 18.

5. Measures which may be disposed in order to end violence against women and domestic violence. The first part of the measures recommended by the Convention to be implemented by Member States have a general and complex feature, assuming a genuine mobilization of social forces which should be directed from a governmental level by a collaboration, in our opinion, between the Ministry of Education, Ministry of Youth, Ministry of Justice, Ministry of Administration, Ministry of Home Affairs and Ministry of Health, both in Romania, as well as in Spain[8], involving the national Parliament in the verification of the implemented measures[9]. In the content of the general measures we have identified:

- Parties shall establish a body responsible for the coordination and combating all forms of violence covered by this Convention, which could collaborate with a similar structure established in the other state parties and which will coordinate the collection of data, aiming that on their basis to draft a strategy against domestic violence and violence against women, by disseminating information (Art 10 and 11 of the Convention);
- The need to support research in the field of all forms of violence covered by the scope of this Convention in order to study its root causes and effects, incidences and conviction rates, as well as the efficacy of measures taken to implement this Convention (Art 11 Para 1 Let b) of the Convention);
- Parties shall promote changes in social and cultural patterns of behavior which considers women as being inferior to men (Art 12 Para 1 of the Convention);
- Parties shall ensure that culture, custom, religion, tradition or so-called „honor" shall not be considered as justification for any acts of violence covered by the scope of this Convention (Art 12 Para 5 of the Convention);

[8] Regardless of the ministries' name and restructuration from a government to another, the main components should remain the same: the education of students in the spirit of gender-based equality at all levels, the achievement of general programs for young people for the promotion of equality between men and women, involving justice, local, county or central public authorities, police, and also medical staff.

[9] Art 70 Para 1 of the Istanbul Convention

- Parties shall promote or conduct campaigns and awareness-raising programs among the general public of the different manifestations of all forms of violence (Art 13 Para 1 of the Convention).
- Parties shall take the necessary steps to include teaching material on equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships at all levels of education (primary, secondary, high school, university) (Art 14 of the Convention);
- The involvement of mass-media and private sector regarding the compliance of regulations specific to both sides of the social life, for spreading information regarding violence against women and to increase the respect for them.

Specifically speaking, among the protection measures we have identified:

- Parties shall take the necessary legislative or other measures to ensure that victims have access to services facilitating their recovery from violence. These services have a legal nature, including the possibility of elaborating individual or collective complaints based on psychological, financial and medical internal and international regulations (including European), counseling that will help women to continue their education or to pursue a new form of education, as well as assistance in finding employment (Art 20 Para 1 and Art 21 of the Convention);
- Parties shall take the necessary measures to provide for the setting-up of appropriate, easily accessible shelters in sufficient numbers to provide safe accommodation for and to reach out pro-actively to victims, especially women and their children (Art 23 of the Convention);
- Parties shall take the necessary measures to set up state-wide round-the-clock (24/7) telephone helplines free of charge to provide advice to callers, confidentially or with due regard for their anonymity, in relation to all forms of violence covered by the scope of this Convention (Art 24 of the Convention);
- Protection and support for children witnessing domestic violence (Art 26 of the Convention);
- Encouraging any person witness to domestic violence or violence against women to report this to the competent organizations or authorities (Art 27 of the Convention);
- Ensuring the possibility NGOs and domestic violence counselors to assist and/or support victims during judicial proceedings (Art 55 Para 2 of the Convention);
- Protection of the victim's family and witnesses from intimidation, retaliation and repeat victimization (Art 56 Para 1 Let a) of the Convention).
- Ensuring that victims are informed when the perpetrator escapes or is released temporarily or definitively (Art 56 Para 1 Let b) of the Convention);
- Informing the victims of their rights and the services at their disposal (Art 56 Para 1 Let c) of the Convention);
- Special attention must be paid to child victims and child witnesses of violence against women and domestic violence (Art 56 Para 2 of the Convention).

6. Material law and the Convention. From the perspective of the material law, the Convention states that domestic violence victims, including women, must enjoy civil damages from the perpetrator, but also from the authorities who have not fulfilled their obligations stated by this Convention, if the prejudice suffered by the victim cannot be covered by the perpetrator, from insurances and medical pensions, both for psychical sufferance regardless of the forms of violence suffered, but also for physical sufferance,

manifested by bodily harm or by health deterioration[10]. Compared to civil law, the Convention encourages states to adopt those legislative measures, by which in the establishment of child custody and right to visit them should also be considered violence committed within the family, so that children will not stay with the aggressive parent or relative, and in the case of forced marriage, for it to be annulled or declared as void without imposing a certain undue financial or administrative burden to the victim[11].

Regarding this latter aspect, the Convention recommends its parties that, criminally speaking, forced marriages between an adult and a child, as well as luring a child or an adult on the territory of another state other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalized [12].

Also in relation to criminal law, the Convention recommends the criminalization of psychological violence, manifested as threats or coercion, as well as constant threats in order to determine a person to fear for his safety[13]. It is also requested the criminalization of any form of sexual violence, identified by us under the form of a sexual act achieved by constraint of the victim, as well as under the form of forced prostitution, even if the perpetrator is the husband or former husband, concubine, or ex-partner of the victim[14]. We notice that, for sexual violence, the Convention also considers this type of violence committed by the ex-partner, in comparison with the initial definition given to violence against women. We wonder whether it is an omission in the Convention or, if by an extended interpretation, violence committed by the ex-partner, other than sexual ones, cannot be part of the area of application of the Convention?

Also from the area of sexual violence, the Convention „attacks" the issue of female genital mutilation, which assumes the excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris, coercing or procuring a woman to undergo any of these acts, *forced abortion or forced sterilization*, as well as *sexual harassment*, defined as any form of unwanted verbal, non-verbal or sexual conduct affecting the dignity of the person, by creating a hostile, offensive, degrading and humiliating environment, regardless of the perpetrator's or victim's sex and place of the offence[15].

Analyzing current Romanian legislation in relation to the Convention, we shall notice that there are enough consistencies, some lacks which must be remedied, and also reservations which can be made.

From the Romanian civil legislation standpoint, and starting with the case of *forced marriage*, we shall see that, in the Romanian civil law, the base of marriage is the consent express by both husbands, which is official given in front of the registrar from the city hall where the ceremony is performed. As a consequence, the lack of the consent, being a mandatory condition in concluding a marriage, determines its nullity, according to Art 293 Para 1 corroborated with Art 271 of the New Romanian Civil Code.

7. The compatibility between the Romanian criminal legislation and the Convention. Within the analysis of the Romanian criminal legislation compared with the material provisions of the Convention, we shall start our analysis from Art 193 of the Romanian Criminal Code, which incriminates *threat*. According to it, the act of threatening a

[10] Art 29-30 of the Istanbul Convention
[11] Art 31-32 of the Istanbul Convention
[12] Art 37 of the Istanbul Convention
[13] Art 33-34 of the Istanbul Convention
[14] Art 36 of the Istanbul Convention
[15] Art 38-40 of the Istanbul Convention

person with the commission of an offence or of a damaging act against him/her, his/her spouse or a close relative, it is likely to alarm this person. Committing such an offence „constantly", as the Convention states, shall be considered a plurality of offences or a continuous offence, being more seriously sanctioned[16]. But, unlike the actual Romanian Criminal Code, Art 34 of the Convention is more suited with Art 208 of the New Criminal Code[17] which states the *harassment*[18].

At the same time, Art 197 of the Romanian Criminal Code incriminates rape as a sexual intercourse of any kind[19], with a person of the opposite sex or of the same sex, by coercion of this person or by taking advantage of the person's inability to defend him/herself or to express volition, nowadays being punished as an aggravated form (Art 197 Para 2 Let b^1) of the Romanian Criminal Code), without the possibility of reconciliation between parties, rape committed between family members[20], thus including marital rape. There is also a rich legislation to incriminate prostitution and pimping, beside the Romanian Criminal Code[21], being the Law No 678/2001 on the prevention and combat trafficking in human beings, which fully covers and even develops the Convention's provisions[22].

Regarding the female genital mutilation, or even male, as well as the forced sterilization, though there is not a special regulation in this regard, if such offences would occur, both would be incriminated as serious bodily harm, in aggravated forms stated by

[16] Being sanctioned according to Art 33-36 and 41 of the Romanian Criminal Code

[17] The new Romanian Criminal Code was adopted by Law No 286/2009, but, even if was published in the Official Gazette No 510/24 July 2009, it has not entered into force until now.

[18] According to Art 208 of the New Criminal Code, *harassment* is: *(1) The act of the person who, constantly, pursues, without right or legitimate interest, another person or surveys his residence, workplace or other places frequented by him, causing a state of fear; (2) Making phone calls or communications by means of sending them from distance which, by frequency or content, causes a state of fear for the victim; (3) The action is initialized after the prior complaint submitted by the victim.*

[19] "*Sexual intercourse of any kind*" stated by Art 197 (rape) and Art 198 (sexual intercourse with a minor) of the Criminal Code was intensively debated by the Romanian penal doctrine, enjoying even a referral in the interests of the law, admitted by the High Court of Cassation and Justice by Decision No 3/ 23 May 2005 (www.scj.ro). According to this decision, and to the clarifications made by practice and doctrinaire interpretation resulted that in area of application of a "*sexual intercourse of any kind*" comprises: any mean of achieving sexual satisfaction by using sex or acting upon sex, with a person of the opposite sex or of the same sex, by coercion of this person or by taking advantage of the person's inability to defend him/herself or to express volition. This firstly assumes sexual penetration and can be met in the case of sexual intercourses between persons of opposite sex (heterosexual relations), between persons of the same sex (homosexual relations), both types of relations assuming a vaginal, anal or oral penetration, regardless if it is achieved by the use of sex, of other parts of the body or by using objects. See Olivian Mastacan, Lavinia Vlădilă, *Instituții de drept penal. Curs selectiv pentru licență*, Universul Juridic Publishing-House, Bucharest, 2012, pp. 254-255. Matei Basarab, Viorel Paşca, Gheorghiță Mateuț, Tiberiu Medeanu, Constantin Butiuc, Mircea Bădilă, Radu Bodea, Petre Dungan, Valentin Mirtişan, Ramiro Mancaş and Cristian Miheş, *Codul penal comentat. Partea specială*, 2nd Volume, Hamangiu Publishing-House, Bucharest, 2009, p. 275. Avram Filipaş, *Drept penal român. Partea specială*, Universul Juridic Publishing-House, Bucharest, 2008, pp. 271-273. Valerian Cioclei, *Drept penal. Partea specială. Infracțiuni contra vieții*, C.H. Beck Publishing-House, Bucharest, 2009, p. 237. We may also add the decisions of the High Court of Cassation and Justice No 1712/11 May 2009 presented in the volume *Buletinul jurisprudenței.Culegere de decizii pe anul 2009*, C.H. Beck Publishing-House, Bucharest, 2010, pp. 717-721 and No 1148/30 March 2009 presented in the same volume, pp. 724-731.

[20] According to Art 149^1 of the Romanian Criminal Code *family member* means the spouse or the close relative, if living and sharing a household with the perpetrator. According to Art 149 of the same Code *close relatives* are ascendants and descendants, brothers and sisters, their children, as well as persons who gained this statute through adoption, according to the law.

[21] Prostitution is incriminated by Art 328, and pimping by Art 329 of the Romanian Criminal Code

[22] Law No 678/2001 on the prevention and combat of trafficking in human beings, published in the Official Gazette No 783/11 December 2001, modified by Government Emergency Injunction No 143/2002 (Official Gazette No 804/5 November 2002), approved by Law No 45/2003 (Official Gazette No 51/29 January 2003), by Law No 39/2003 (Official Gazette No 50/29 January 2003), by Government Emergency Injunction No 79/2005 (Official Gazette No 629/19 July 2005) approved by Law No 287/2005 (Official Gazette No 917/13 October 2005), by Law No 230/2010 (Official Gazette No 812/6 December 2010), by Government Emergency Injunction No 117/2010 (Official Gazette No 891/30 December 2010) and by Government Emergency Injunction No 41/2011 (Official Gazette No 304/3 May 2011) approved by Law No 210/2011 (Official Gazette No 819/21 November 2011).

Art 182 Para 2-3, namely when the offence determined the loss of an organ, a permanent physical infirmity and has been committed with the explicit intention of causing such harm (for the latter case, the offence was committed with qualified intention by its purpose)[23].

As regards *forced abortion*, it is considered offence according to Art 185 Para 2 of the Romanian Criminal Code, representing a serious form of this offence. We must note here that the text of the Code establishes a cause for exoneration from liability of the doctor who performs the abortion without his patient's consent if she was unable to give it and the abortion was necessary for medical reasons[24]. I believe that in this case Romania should make a reservation on the Convention, because it makes no such differentiation, welcomed in practice, where such situations could be met.

The situation of *sexual harassment* it is also partially resolved, because according to Art 203[1] of the Criminal Code, is „*the act of harassing a person by threat or coercion in order to obtain sexual satisfaction, committed by a person abusing his/her authority or influence provided by the office held at the workplace*". Unlike the definition offered by the Convention, we notice some limitations of the Romanian Criminal Code: it is considered offence only if it is committed at the workplace or in relation to work, even if it is achieved by constraint or threat, without including non-verbal language, if the person abusing his/her authority or influence, condition not requested by the Convention. In addition, according to the definition stated by the Convention for sexual harassment, it is seen as an offence against dignity and sexual freedom of the victim, having a special complex legal object, while in the Romanian Criminal Code the sexual freedom is its main special legal object, because its purpose (according to the definition) is gaining sexual advantages due to the authority of the perpetrator, and the secondary special legal object is represented by work relations (good function of them in a reliable environment). The Criminal Code of 2009 is closer to the Convention, by enlarging the application framework also for similar work relations, adding as essential condition that the victim should have been intimidated or subjected to a humiliating situation[25].

Art 42 of the Convention states that neither Romania, nor Spain may invoke tradition, culture or custom to justify an offence or a so-called „honor" could exonerate from criminal liability.

Unlike these regulations, what we must add to the Romanian legislation, *from a civil perspective*, would be the correlation of the civil and criminal legislations, by adding the explicit condition that child custody must not be given to the aggressive parent, and his right to visit must be limited, or in the presence of the custodial parent[26], as well as the possibility of offering material and moral damages, exempted from legal stamp duty, or offering a life annuity for the victim, as stated by the actual Art 390 and following of the Civil Code, for the dissolution of marriage from the exclusive fault of the defendant. *Romanian Criminal Code could be improved* by criminalizing forced marriage, though as we have shown before, civilly it is struck by nullity, by completing the text of sexual harassment, according to prior observations, this in the given situation if the new Cod shall not enter into force, as well as by maintaining marital rape as aggravated form of this offence. To apply Art 41 of the Convention, the Code should incriminate the attempt to

[23] For details see Olivian Mastecan, Lavinia Vlădilă, op.cit., pp. 212-217
[24] Art 185 Para 6 of the Romanian Criminal Code
[25] The offence is sanctioned according to Art 223 of the New Romanian Criminal Code
[26] Until such modification, we are counting on the wisdom of judges and the ability of lawyers to emphasize such necessity of the case.

threat (Art 193) and sexual harassment (Art 203[1]), imperfect forms of offence which are not sanctioned by the actual Criminal Code.

8. Conclusions. From all that was mention, it results that the Romanian legislation has enough premises to ratify the Istanbul Convention and to make an important step in the fight against domestic violence and violence against women. Probably, out authorities are retained because of financial resources which must be invested to really apply the Convention and for the adopted measures to be efficient.

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THE SANCTIONING TREATMENT OF RELAPSE ACCORDING TO THE NEW CRIMINAL CODE

Ion RISTEA[*]

Abstract: *Law No 289/2009 on the new Criminal Code and implemented by Law No 187/2012 states a different and more severe regime for relapse than the actual Criminal Code. The legislator used the system of cumulative sentencing for the post-conviction relapse and the legal increase by half of the special limits of penalty for the post-execution relapse. If the second term of relapse is a plurality of offences, was established a different algorithm of applying the penalty than the one used today, firstly applying the provisions regarding the plurality, and after that the ones for relapse.*

By the new regulation on relapse the legislator created increased possibilities for the courts to individualize the penalties for relapse, in relation to the social danger of the offence committed and the dangerousness of the offender.

Keywords: *relapse, post-conviction relapse, post-execution relapse, penalty*

As a comparison with the 1968 Criminal Code, the new Criminal Code brings substantial changes in the sanctioning treatment of post-serving and post-conviction relapse.

The new Criminal Code, as well as the actual one, considers that relapse is not an aggravating circumstance, even if it represents a circumstance regarding the offender (a personal circumstance of identity or individuality), aggravating his liability. The Romanian legislator, by the penal treatment stated, has included relapse in the modifying causes, considering it as an aggravating circumstance, given Art 79 Para 2 of the new Criminal Code ("if two or more provisions stating the aggravation of the criminal liability are incident, the penalty shall be established by the successively application of the provisions regarding aggravating circumstances, continued offences, plurality of offences or relapse").

Regarding this aspect, it was appreciated[1] that relapse cannot be considered as aggravating circumstance for all cases, because both the new law, as well as the previous one, does not state that always, for relapse, there is the possibility of exceeding the sum of punishments in order to talk about an aggravation of the penalty. At the same time, there could be no talk about „a cause for the modification of the penalty" because such neutral wording is equivocal, leaving to believe that the modification could function in both ways, mitigating or aggravating, which does not correspond with the reality emphasizing that such penal treatment (which does not exceeds the arithmetic cumulus) is easier.

Thus, for post-conviction relapse, the legislator stated in the new Criminal Code (Art 43 Para 1) that the penalty established for the second term of relapse is added to the previous penalty which has not been served yet or to the rest left to be served. In this situation we cannot talk about an exceeding of the arithmetic cumulus, which means that relapse cannot be considered as aggravating the penalty.

One could talk about an aggravating circumstance of the penalty for the post-serving relapse (Art 43 Para 5) of the new Criminal Code, because in this situation the convicted

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[1] Gh. Ivan in G.Antoniu (coord.), *Explicații preliminare ale noului Cod penal*, 1st Volume, Universul Juridic Publishing-House, Bucharest, 2010, p.447

shall compulsory serve both penalties, and the special limits for the new offence shall be incremented by half. It is obvious that in this case, the sanctioning treatment shall exceed the total of the two penalties.

A) The sanctioning treatment of the post-serving relapse is stated by Art 43 Para 1-4 of the new Criminal Code. Thus, „if before the previous penalty be served or considered as served a new offence is committed as relapse, the penalty for it shall be added to the previous not served penalty or to the rest of if which must be served" (Art 43 Para 1). From the law which uses the expression „is added" it results the compulsory application of the arithmetic cumulus of the two punishments, without exception, even if the general maximum of the penalty is exceeded. With this, the new Criminal Code is different than the 1968 Criminal Code, which did not allowed either the exceeding of the general maximum of the penalty, nor the total of the penalties established for relapse, because it creates a situation far harder for the convict than in the case if he would have served the cumulated penalties to which was convicted.

Although, apparently the new Criminal Code has adopted a different concept in sanctioning relapse, it has maintained some principles, such as the principle of not exceeding the total penalties established, namely the non-aggravation of the defendant-recidivist's situation. According to some authors, this mention does not make sense[2] as long as the offender has in many times defied the criminal law; he must bear the consequences of it, but in an aggravated form. This idea, but only as an exception, is acquired by the new legislator, who in Art 39 Para 2 states that in certain conditions life imprisonment shall be applied, even if this penalty is not stated for any of the concurrent offences.

Sanctioning post-conviction relapse has two steps:

a) Establishing the penalty for the second offence is the first step, as stated by Art 43 Para 1of the new Criminal Code. The penalty is established according to the general criteria of individualization stated by Art 74 of the new Criminal Code, but apart the post-conviction relapse because it would be considered the existence of the relapse, establishing on this ground, for the new offence, an aggravated penalty, the same circumstance (relapse) would attract two successive aggravations of the sanctioning treatment, which is inadmissible[3].

   The second term of relapse is a plurality of offences, the court deciding for each offence, without considering the relapse.

b) Applying the resulting penalty for the entire plurality of offences, is the successive step, where the penalty established for the new offence is added to the previous penalty not served or to the rest left to be served of it (the system of the arithmetic cumulus). The resulting penalty, as a consequence of the arithmetic cumulus is possible to exceed the general maximum for imprisonment (30 years), but cannot exceed the total of the penalties for each term of relapse.

If the penalty was partially served, the penalty established for the new offence shall be added to the rest of the penalty.

If the defendant has served the subsequent offence during serving his penalty for the previous offence, in determining the rest to be served shall be considered the duration of the penalty from the moment when the subsequent offence was committed until when the

[2] G. Antoniu (coord.) et al., *Explicații preliminare ale noului Cod penal*, 1st Volume, Universul Juridic Publishing-House, Bucharest, 2010, p.449

[3] V. Dongoroz et al., *Explicații teoretice ale Codului penal român*, 1st Volume, Romanian Academy's Publishing-House, Bucharest,1969, p.311

previous penalty has been applied, and not from the moment when the decision was sentenced, or from the moment when the prosecution was initiated for the subsequent offence. The penalty served from the moment when the post-conviction relapse is deduced from the penalty resulted, being an anticipated serving of it[4]. In this hypothesis, the convicted person during his serving time commits a new offence and then continues to serve his previous penalty. The rest of the penalty served after committing the subsequent offence is no longer part of the previous penalty, its serving being interrupted by committing a new offence in post-conviction relapse[5]. Even if the offender continues to serve his penalty this will only be an anticipated serving of the penalty established by the court for the defendant, with retention of the post-conviction relapse. This penalty shall be a result of adding the penalty for the subsequent offence to the rest which was not served from the previous penalty, calculated from the moment of its interruption (by committing a new offence) until the fulfillment of the initial duration established by the court for the first offence. From this resulting penalty shall be deduced the duration of the penalty served in advance from the moment of committing the subsequent offence until the moment when the conviction decision remains final. The duration of the penalty served from the first term of post-conviction relapse shall not be computed because it is not included in the aggregation, according to Art 43 Para 1 of the new Code, but only the rest to be served from the previous penalty which is added to the penalty for the subsequent offence[6].

If during the interruption in serving the penalty a new offence has been committed, the penalty for the new offence shall be added to the rest of the previous penalty.

If the convicted committed *escape*, Art 285 Para 4 of the new Code shall be applied: „the penalty for escape shall be added to the rest of the penalty at the moment of his escape", regardless if this offence was or not committed as relapse. The new text shows that the legislator considered the orientation of the Supreme Court in interpreting Art 269 Para 3 of the actual Criminal Code, in that the penalty for escape shall be added to the serving penalty, without exceeding the general maximum of the offence. The wording „penalty being served", is used by the Supreme Court to define the penalty which is left to be served from the penalty which the convicted must serve when he committed escape[7].

The hypothesis of committing an offence after escape is not stated by the new Criminal Code. In literature, regarding this aspect, was shaped the opinion argued on the plurality of offences as stated by the new Criminal Code, that for an offence committed after escape, the penalties for escape and for the offence committed after escape shall be cumulated according to the regulation of the plurality of offences, and the penalty resulted shall be added to the rest from the penalty which the convicted was serving when he escaped. The penalty served after escape is deduced from the resulting penalty, being an anticipated serving of it.

Same solution is required in the case of multiple offences committed after escape or if the subsequent offence is committed in the same time with the escape or before it[8].

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[4] G. Antoniu (coord.) et al., *op. cit.*, p.450
[5] V. Dongoroz et al., *op. cit.*, 1st Volume, p.313
[6] G. Antoniu (coord.) et al., *op. cit.*, p.451; G. Antoniu (coord.), C. Bulai (coord.), R.M.Stănoiu, A. Filipaş, C. Mitrache, V. Papadopol, C. Filipaş, *Practică judiciară penală*, 1st Volume, General Part, Romanian Academy's Publishing-House, Bucharest 1988, p.175, 2nd Comment
[7] High Court of Cassation and Justice, United Sections, Decision No 81/2007, published in the Official Gazette No 780/21 November 2008
[8] G. Antoniu (coord.) et al., *op. cit.*, pp.451, 452

It must be emphasized that Art 285 Para 4 of the new Criminal Code is not applicable if the escape was committed during remand on custody. The penalty sentenced for the offence that required remand on custody shall be added to the penalty for escape because, in this case, the escape is concurrent with the other offence committed.

If the convicted committed a new offence during his *parole* and is qualified as relapse, according to Art 96 Para 5 of the new Criminal Code „the main penalty for the new offence shall be established and served according to the provisions regarding relapse and intermediate plurality". Thus, the main penalty stated by the court for the new offence shall be added to the previous penalty, rule founding also the sanctioning treatment stated by Art 83 Para 1 of the 1968 Criminal Code.

If the convicted committed a new offence during his hearing for conditional pardon shall be applied the sanctioning treatment stated by the laws for pardon, which do not derogate from the common regime of sanctioning post-conviction relapse stated by the new Code, namely, that after the revocation of pardon the offender shall cumulatively serve the penalty applied for the first offence for which the pardon was revoked and the penalty applied for the subsequent offence[9].

If after committing a new offence during his hearing for conditional pardon applied for concurrent offences, the court revokes the benefit of pardon for the rest of the previously fused sentences which was incremented, it must state the serving together with the last penalty not only of the rest from the resulting penalty, but also to the increment added to the hardest penalty.

If the offender committed a new offence during his parole and is qualified as relapse, Art 104 Para 2 of the new Code shall be applied namely, the main penalty established for the new offence shall be added to the rest of the previous penalty at the moment of release.

If the second term of relapse is represented by a *plurality of offences* Art 43 Para 2 of the new Code states: „When before the previous penalty be served or considered as served are committed more concurrent offences, of which at least one is considered as relapse, the penalties established shall be merged according to the provisions regarding the plurality of offences, and the penalty resulted shall be added to the previous penalty not served or to the rest of it".

Analyzing the law it results that for establishing the penalty, for the post-conviction relapse, shall firstly be applied penalty for each offence committed again, according to the criteria of individualization stated by Art 74 of the new Code, without considering the relapse. Secondly, the penalties thus established shall be merged according to the provisions regarding the plurality of offences; thirdly, the resulted penalty shall be added to the previous penalty left to be served or to the rest of the penalty to be served.

The legislator provided in Art 43 Para 3 of the new Code, that in all these cases, if by summing the penalties the general maximum for imprisonment is exceeded with 10 years, and for at least one of the offences committed the penalty stated is of 20 years or higher, instead of imprisonment shall be applied the penalty of life imprisonment.

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[9] G. Antoniu (coord.) et al., *op. cit.*, p. 452; Suceava Tribunal, Criminal Department, Decision No 896/1983 in CD/1983, p.192; Suceava Tribunal, Criminal Department, Decision No 286/1979 in CD/1983, p.181; Suceava Tribunal, Criminal Department, Decision No 371/1973 in CD/1973, p.275; Braşov Tribunal, Criminal Department, Decision No 547/1971 in Romanian Law Review, No 12/1971, p.154; Bucharest Tribunal, 2nd Criminal Department, Decision No 56/1992 in Criminal Judicial Practice Collection on 2011, p.27; Bucharest Tribunal, 1st Criminal Department, Decision No 263/A/1993. On the contrary, Suceava Tribunal, Decision No 927/1995 in V. Păvăleanu, *Practica de casare a Tribunalului Suceava în materie penală pe sem.II/1995* published in the Law Review No 11/1996, p.101

It is estimated that[10], even though the new Criminal Code refers only to the hypotheses stated by Art 43 Para 1-2, nevertheless Art 43 Para 3 shall be applied in all cases aiming the application of the same sanctioning regime of relapse (*ubi eadem ratio, ibi idem jus*).

A common rule for all above-mentioned hypotheses is that if the previous penalty or the penalty established for the offence committed in relapse is life imprisonment it shall be served (Art 43 Para 4 of the new Code).

B) The criminal treatment of post-serving relapse is stated by Art 43 Para 5 of the new Criminal Code. According to it, if after the previous penalty has been served or considered as served, a new offence is committed in relapse, the special limits of the penalty stated for the new offence, namely the special minimum and maximum shall be incremented by half.

A penalty is considered as served when the offender was completely or partially pardoned, when the penalty was prescribed, when the term for the supervised suspension of penalty service or when the term for parole was fulfilled.

For the post-serving relapse, a single penalty shall be established between the special minimum and maximum of the penalty stated by the law for the new offence, which were incremented by half, by respecting the general criteria for individualizing the penalty stated by Art 74 of the new Criminal Code, but without considering the relapse.

If the second term of post-serving relapse is a plurality of offences the court shall first establish the penalty for each concurrent offence, which will be placed between the special minimum and maximum of the penalty stated for the new offence, incremented by half, then the penalties shall be merged according to Art 39 of the new Code.

A special situation regarding the treatment of post-serving relapse is the *subsequent discovery of relapse*. In this regard, Art 43 Para 6 of the new Code states that, after the conviction decision for the new offence remains final and before the penalty be served or considered as served it is found that the convicted was in relapse, the court shall apply Para 1-5.

Thus, according to the above mentioned regulation, the recalculation of the penalty can only be made in the following conditions:

a) *The relapse was subsequently found*, namely the court was not aware of the relapse in the moment when it issued and applied the sentence;

b) *The relapse was found after the conviction decision remains final*. The conviction decision remains final in the conditions of the new Criminal Procedure Code, namely when the ordinary means of attack cannot be used against it. It is not relevant if the conviction decision for the new offence is dissolved or annulled following the exercise of the extraordinary means of attack (appeal for annulment, revision); what interests us is the fact of discovering relapse, regardless the faith of the subsequent conviction decision; as such the recalculation of the penalty cannot be rejected based on the fact that the relapse was not found after the conviction decision remained final issued after the case was re-trialed[11].

c) *The relapse was found before the penalty be served or considered as served.* As previously shown, a penalty is considered as served when total or partial pardon occurred, when the penalty was prescribed, when the term for the supervised suspension of penalty service or when the term for parole was fulfilled.

The regulation stated by Art 43 Para 6 of the new Code shall apply also if life imprisonment was changed or replaced with imprisonment, as resulted from Art 43 Para 7

[10] Gh. Ivan, *Comentarii G. Antoniu, Explicații preliminare ale noului Cod penal*, 1st Volume, p.456

[11] G. Antoniu (coord.) et al., *Explicații preliminare ale noului Cod penal*, 1st Volume (Art 1 – 52), Universul Juridic Publishing-House, Bucharest, 2010, p.457

of the new Criminal Code. Therefore, if during serving life imprisonment this was commuted, as result of pardon or replaced with imprisonment, according to Art 58 of the new Code and after the conviction decision for the new offence remained final and before the penalty of imprisonment be served or considered as served is found that the offender is in relapse, the court shall recalculate the penalty of imprisonment according to Art 43 Para 1-5 of the new Code and infers the detention served from the resulting penalty.

If after the conviction decision for the new offence remains final and before the penalty of life imprisonment be served or considered as served, it is found that the offender is in relapse, the court shall not recalculate the penalty; this will be possible only if life imprisonment shall be commuted or replaced with imprisonment.

In relation to all the facts presented, we must note that the legislator with the new Criminal Code has inserted a much more severe sanctioning regime for relapse than the actual Code. We consider this regulation as being superior to the existing one because only by hardening the sanctioning treatment for persons who constantly defy the criminal law could combat or diminish crime and efficiently protect social values.

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TERRORISM AND WEAPONS OF MASS DESTRUCTION

Ioana PANAGORET*

Abstract: *Considered the faceless enemy and the user of immethodical tactics of boundless brutality, terrorism represents an obscure world and even more, a guerrilla war, in which all types of weapons are used. Recognized for the great power of destruction on the territory of other states, weapons of mass destruction offer to state leaders advantages which differ from conventional military forces and a mere threat of these weapons not only undermines the territorial integrity but also the security of the states in the international system. Becoming aware of the effects of the use of such weapons, both researchers and people in decisition positions pay great attention to these weapons and to the proliferation potential. The actions of the states for tracking and interception of suspected terrorists as well as drug traffickers and other criminals are coordinated by international agencies, especially Interpol and Europol and the National Governments have agencies which try to discover the secrets around terrorist operations. The governments and people around the world adapt to the new security environment coming from a global terrorist threat and, since 2001 they have become more active and focused on terrorism.*

Keywords: *terrorism, nuclear weapons, treaties, destruction.*

Recognized for the great power of destruction on the territory of other states, weapons of mass destruction (nuclear, chemical, biological) offer to state leaders advantages which differ from conventional military forces and a mere threat of these weapons not only undermines the territorial integrity but also the security of the states in the international system.

Realizing the effects of the use of such weapons, both researchers and people in decisition positions pay great attention to these weapons, to ballistic missiles that carry them and the potential for proliferation. If, for the powers at the middle ranking weapons of mass destruction could provide a destructive power equivalent to that of the great powers, also giving them the opportunity to be part of a symbolic balance, for terrorists, the aim to kill as many people comes first.

Representing an obscure world and more a guerrilla war, terrorism can be considered the faceless enemy and the user of immethodical tactics of boundless brutality.

In fact, terrorism is not something which appeared now, but just a step above in the spectrum of violence use. Mindless most of the times, terrorism uses violence as an influencing factor in order to send to the other actors a message with psychological effect.

The period 1870-2001 is marked by classic cases of terrorism in which a non-state actor, with no uniform organizes attacks against civilians trying to influence state actors.

The radical separatist groups or political factions place bombs in crowded places, hijack or blow up airplanes. Taking them in chronological order and the most relevant, one can start with the year 1972, when radical Palestinian saw the arabic states defeated in war by Israel and could not find another way to make their case heard than by capturing media attention worldwide by generating some dramatic incidents.

In fact, the main objective was to bring the aspirations of Palestinians on the table when the Western governments would discuss strategies regarding the Middle East.

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If you mention the The Palestine Liberation Organization during the peace process in the period 1993-2000 or the Irish Republican Army since 1995, one can say that the call for terrorist acts declined due to the fact that they have become political groups who acquired some power or recognition.

Another type of terrorism is the one undertaken by some countries, the specialists often calling it repression or war.

In this case, the 1995 Russian attacks on Chechnya or guerrilla tactics used by troops during the civil wars that took place in Central America in the '80s can be given as examples. In order to attain certain political purposes, some states secretly use the groups of terrorists placed under the control of the state secret services. Thus, in the bombing of Pan Am 103 flight over the Scottish village, the U.S. and British governments have identified two secret Lybian agents who have placed the bomb in the aircraft. The two governments were backed by the UN Security Council, and, in 1992, they asked Libya to submit the two agents for trial. Because Libya refused, the UN imposed severe sanctions and only in 1999 were the two handed over for trial.

Responsibility for these bombings was only officially accepted in 2003 when they agreed to compensate the families of the victims and thus Lybia has found place in the international community again.

The 1993 bombing of the World Trade Center in New York, as well as the ones in 2001 determined the governments and the vast majority of ordinary people to grant a special attention to terrorism. Following a somewhat different pattern, i.e. not to create too much panic but to kill as many Americans and their allies, al-Qaeda has managed to provoke a violence close to apocalypse. Besides the fact that this terrorist network tried to obtain nuclear weapons to kill hundreds of thousands of Americans, they also tried by mail and anthrax attacks. Although only a few people were killed, the psychological effect was much greater because of the fact that a new bioteroris capable of mass killings was tried[1].

It is known that the defense against the majority of chemical weapons is possible by overlaying troop protection equipment and use of respirators as well as the use of procedures designed to decontaminate equipment. It is unlikely, however, that civilians outside military forces dispose of protection against chemical weapons which do not make a distinction in terms of victims. Because of this danger, the use of chemical weapons in war was quite rare, them being used in World War I (IPER which produces blisters on the skin and destroys the lungs has been widely used in projectiles) and in the 80's when the Iraqi government deliberately used them against civilians (Iraqi Kurds). Although in the Second World War both parties had chemical weapons, none used them, being afraid of the retaliation. Taking into account that chemical weapons can be produced using processes and facilities similar to those for pesticides, pharmaceuticals and other civilian products, it is difficult to identify units for the production of chemical weapons in suspicious countries or those countries denying access to substances and necessary equipment. Thus, in 1998 the Americans attacked with cruise missiles and destroyed a unit in Sudan suspected of producing chemical weapons, but it was possible that this was just a factory of pharmaceutical products. As dangerous and destructive are also biological weapons which use microorganisms or toxins obtained biologically. If some use viruses or bacteria that cause deadly diseases (smallpox, bubonic plague, anthrax) others cause diseases that are not fatal but incapacitate or kill animals. Biological weapons were practically never used in

[1] Young Mitchell, *The War on Terrorism*, Greenhaven Press, Farmington Hills, 2003, p.59

war, exception making Japan, which tried some on some villages in China during the Second World War. Although the production and possession of biological weapons are prohibited by the Biological Weapons Convention of 1972, signed by over one hundred countries, evidence emerged that the Soviet Union had a secret program to produce biological weapons, and the UN inspections in Iraq in the mid-90, discovered an active program for biological weapons.

Outlining a few characteristics of terrorism of any kind, one can conclude:

- terrorism is effective in capturing attention by dramatic incidents and how these are presented in the media;
- the fundamental effect of terrorism is of psychological nature;
- attacks on airplanes intensifies the fear of those who use this means of transport;
- terrorism is most of the time a tool in the hands of the powerless.

Since 2006, the U.S. accused North Korea, Iran, Syria, Sudan and Cuba as supporting international terrorism and banned U.S. companies to do business with these five states.

However, the U.S. position is undermined by the fact that Canada does business with Cuba and Iran with Russia.

Although the obtaining of the fissionable uranium (U-235) used in constructing atomic bombs is extremely difficult (the natural uranium extracted in different countries has less than 1% U-235 mixed with not- fissionable uranium), North Korea, Iran, Iraq and Libya succeeded to build the infrastructure necessary to obtain it in recent years.

Invented by the American researchers less than 60 years ago in the Manhattan Project, nuclear weapons have shown the power of destruction in 1945 when the cities of Hiroshima and Nagasaki were bombed and approximately 100,000 civilians were killed in each city. Since nuclear weapons have as effect not only burst but also heat and radiation, heat causing in a city a real storm of fire that can be self-sustaining. The harmful effects of radiation are particularly poisonous considering the fact that in large doses they kill people in a few days and, in smaller doses create serious long term health problems, especially cancer.

One may add here that the use of these nuclear weapons affects large regions or even the entire planet, as a result of radiation that can be carried in the atmosphere as nuclear falls.

At the same time, the nuclear weapons may create an electromagnetic pulse which affects the electrical equipment leading even to its destruction.

It is to be mentioned that the use of more nuclear weapons at the same time, could affect the global climate causing a true „nuclear winter", meaning years in a row with very low temperatures and lack of sunlight.

During the Cold War, both superpowers designed and constructed tactical nuclear weapons in conventional forces on land, sea and air and used a variety of carrier systems (shells, gravity bombs, short-range rockets, anti-personnel mines). As tens of thousands of nuclear warheads integrated into conventional forces were subjected to accident or theft, and their use would involve major risk of starting a strategic nuclear war, both powers almost completely excluded nuclear weapons with the end of the Cold War.

The Cuban Missile Crisis of 1962, when the Soviet Union had installed medium range nuclear missiles in Cuba, demonstrates that it wanted to reduce the strategic nuclear inferiority to counter U.S. missile deployment in Turkey, to the borders of the USSR, and to prevent another U.S. invasion of Cuba. As the historical documents indicated later, U.S. leaders considered these missiles as a threat and as a challenge, being at the point on the brink of a nuclear war. If some American politicians have preferred military strikes before missiles become operational, when in fact some nuclear weapons in Cuba were already

operational and commanders were authorized to use in the event of a U.S. attack, President John F. Kennedy imposed a naval blockade for their forced removal. The Soviet Union backed down on missiles, the United States promised not to invade Cuba in the future, and trembled as the possibility of nuclear war, the leaders of both sides decided to sign the Partial Test Ban Treaty Nuclear 1963.

It is interesting to mention the fact that the main strategic carrier vehicles are ballistic missiles, and it is extremely difficult to protect yourself against them. Thus, their spread was difficult to control, requiring the establishment of the Missile Technology Control Regime by which the industrialized countries are trying to restrict the flow of missile technology to countries in the global South[2].

Taking into account that nuclear proliferation erodes the advantage of the great powers in relation to the middle powers and the implications of the proliferation for the international relations are profound and difficult to predict, there are many global concerns, fears justified by the following examples:

- Terrorists could take possession of nuclear weapons and would remain immune to the threat of retaliation given the fact that they have no territories or cities in which they operate (evidence obtained showed that the Al-Qaeda organization has tried to get nuclear weapons during the war in Afghanistan in 2001).
- States selling technology with proliferation potential can make profit (Russia and China sold technology to Iran).
- The Russian crisis of the 90s made huge amounts of fissile material vulnerable because they were under the control of officers and workers who were underpaid or corrupt
- Countries develop nuclear complex in order to continue to produce its own nuclear weapons[3].

These fears, closely related to the mighty forms of proliferation attract attention and worries towards the relevant regional conflicts between the Arab states and Israel, India and Pakistan, Iran and its neighbors, the two Koreas and maybe Taiwan and China.

South Africa can also be added as it denied having developed nuclear weapons under the lead of the big Arab countries, but that they constructed them in the '80s.

In 1981 Israel carried out bombing raid on Iraqi nuclear complex, this having the aim to stop Iraq from developing nuclear weapons. If this raid had not taken place, probably Iraq would have had nuclear weapons at the beginning of the 1991 Gulf war.

Also in the 80's, the interruption of the Argentine-Egyptian-Iraqi partnership to develop long-range missiles has been a real success.

Small states or terrorists who will acquire nuclear weapons in the future could obtain them through all kinds of ingenious means or they could smuggle them in a state through cars, boats or diplomatic bags.

Thus, since 2001 the United States began a Container Security Initiative aimed at preventing the arrival of weapons of mass destruction on the U.S. realms in sea freight containers.

In order to control the spread of nuclear weapons and nuclear expertise[4], the framework necessary for the commencement of non-proliferation was created in 1968. The International Atomic Energy Agency and the association with the United Nations in Vienna

[2] Karp Aaron, *Ballistic Missile Proliferation:The Politics and Technics*, Oxford/SIPRI, New York, 1996, pp. 123-128
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were created and were responsible for the inspection of nuclear power industry in the Member States and to prevent secret diversion of nuclear material for military purposes.

However, a number of potential nuclear states (Israel) did not sign the treaties or some states that have signed (Iran, Iraq) can infringe the provisions by keeping some secret capabilities. With the cease-fire and end of the Gulf War, Iraq's nuclear program was discovered by IAEA (International Atomic Energy Agency)[5].

Although North Korea withdrew in 1993 from IAEA, it negotiated with the Western leaders demanding economic aid (including safer nuclear reactors) in exchange for freezing its nuclear program. Also, in 1999 it allowed inspection of the underground complex and agreed to suspend missile tests in return for aid and the lifting of the potential U.S. trade sanctions.

But in 2002 all of these proved to be false, the USA discovered that North Korea was actually developing a secret program for nuclear enrichment.

Relations between the U.S. and North Korea have continued to deteriorate and North Korea resumed the activity of its nuclear reactor and threatened that, in a few months it can transpose the plutonium in its possession into 6 bombs.

In 2006 the American, Chinese, Japanese and Korean leaders continued the negotiations, but the results were unreliable. At the present moment, there are a number of small and medium powers and two great powers (Germany and Japan) who are able to produce nuclear weapons but chose not to do so, the undeclared nuclear powers including North Korea and the declared nuclear states, i.e. India and Pakistan. Although Iran denies it seems to be working to develop nuclear weapons, nuclear states should remain the same, they have largely complied with the exception of Israel, India, Pakistan which had not signed the treaty.

Nuclear States should have developed but many refused. Review Conference held in 2005 failed when the U.S. and other countries did not agree in what concerned the Iran Program and the realization of a treaty.

For information sharing during crisis situations superpowers have developed centers and special systems and concluded treaties in order to strengthen basic parity in nuclear capacity.

The Anti-Ballistic Missile Treaty signed in 1972 stopped either party to use the missile defense as a shield behind which to launch a first strike.

The treaties connected to the strategic arms limitation have established the formal limit to increase formal strategic armaments of both sides.

Test-Ban Treaty was signed in 1996 to stop all explosions corresponding to nuclear tests.

In conclusion, terrorism and nuclear weapons are a huge threat and counterterrorism has become a sophisticated action, a trend that has increased after the terrorist attacks of September 2001.

The actions of the Member States for tracking and interception of suspected terrorists, drug traffickers and other criminals are coordinated by international agencies, especially Interpol and Europol.

The national governments have agencies (FBI, CIA) which try to discover the secrets around terrorist operations. Also, some private companies have expanded their business of security services including anti-terrorist forces and equipment, to companies and individuals that do business internationally. As governments and people around the world adapt to the new security environment from a global terrorist threat since 2001, they have become more active and focused on terrorism.

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THE RIGHT TO WATER. THE PLIGHT FOR A HUMAN RIGHT OF THE FOURTH GENERATION

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Abstract: *Water is a paramount asset for mankind, until recently it was not taken seriously as States that had surplus took it for granted and those which were in dire straits with the quantity learned to live under drought. However, Global warming and pollution due to high industrialization has affected equally the international community and water starts to be treated with a special care both nationally and internationally. Today water resources are depleting and international cooperation is essential specifically in the use of groundwater reservoirs and international rivers. Customary law is turning into regional conventional systems ruled by the community of interests' principle. In this sense, good water governance can bring about cooperation in many fields and levels of integration akin to those of the European Union once based on the coal and steel market.*

Keywords: *international water law, community of interests, human security, hidropolitics.*

Water is a finite resource with an access progressively more complicated due to numerous factors like the climatic change and the establishment of a weak answer to this challenge; the growth of the world-wide population, the economic growth, the extractive contamination and activities like the mining industry, of the gas or petroleum. Although in the United Nation Seventies I adopt his first measures in which mention to the growth of the world-wide population and to the necessity became to preserve and to regulate the hydric resources. Five years later the First Conference of the Water of Nations was celebrated that brought about a first Plan of Action.

The distribution of the resource is capricious and knows no borders, especially true inasmuch as the aquifers, and large water tanks occupy territories subjected to multiple jurisdictions, in fact 2 of every 5 inhabitants of the Earth live in a State that shares water resources with another State.

That is why other components on which is built a true right to water than the indiscriminate accessibility. An expert in the field as Dellapenna, J.; called water as ¨ the public good essential per se ¨ and as all public good is characterised by its indivisibility and public character.

The international society begins to be aware of the magnitude of the problem with threats by pandemics and other serious consequences in the near future. Water scarcity is also linked to underdevelopment, on this particular as article 8 (1) of the Vienna Declaration on development aims: ¨ States should undertake to adopt all necessary measures for the realization of the right to development at the national level, and should ensure, inter alia, equality of opportunity in access to essential core resources... ¨ in his interpretation of this articlethe General Assembly clarified and reaffirmed in resolution 54/175 that ¨ the rights to food and drinking water are fundamental human rights and their promotion represents a moral imperative both for Governments and for the international community. ¨

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According to political analysts, both internal and international conflicts in the 21st century will be over access to water, this element becomes the equivalent of the black gold, origin of conflicts in the last century, even local conflicts, i. e, the water war in Bolivia that put human security at risk, and resulted in the Declaration of Cochabamba, or the cancellation of the program of privatization of water in Manila. Not only the traditional disputes on the management of the course by coastal States but also own competition for a scarce resource affecting both peace and international security. Therefore, the international community in various national, international and intergovernmental forums strives to establish a water governance that allow fair use or as a aims Pardy ¨ a common global property ¨ based on an innovative creation of restricted sovereignty, and progress with regard to the customary rule that the use of water can only be done by coastal States or by one who is the origin of the watercourse, and the goal is to reach a codification of international water law, and consequently greater human and international security.

Water and its reasonable utilization is not a trivial matter, and requires an international concern the management model of the seabed of the high seas, Antarctica, or the Arctic Circle as a destination point, taking courses in aquifers and surface water as a common heritage of humanity and heritage for generations to come on the basis of various forms of management and in accordance with the geographical areas in questionthe regional customs and bilateral and multilateral agreements establish a system of management of the biosphere by bodies acting in the interest of humanity.

International law is the appropriate instrument to manage this new governance while it is necessary to go not so hasty to his classical instruments, for example the signature of a Convention not involving the most representative countries in order to avoid failures due to its entry into force, see the case of the Convention on migrant workers, or the adoption of resolutions by wide majorities in the general Assembly of Nations United but lacking of effectiveness by the locked position of countries of weight, orextremely ambitious instruments with low efficiency to date, for example, the Millennium Declaration and its goals. Although humble these advances are welcome because they put an end to a historical debt of more than six decades.

As noted, drinking water and universal sanitation is a point of such significance linked to first generation rights such as the right to life, health and human dignity that requires a multifaceted approach and a commitment to serious and constant awareness of civil society and pre legislative both nationally and internationallyin order to achieve truly effective minimum agreements. As he points out the majority doctrine, the current idea of the international human rights law rests on human dignity. At the level of international jurisdiction, the Inter-American Court of human rights has interpreted that article 4 (right to life) and article 5 (right to humane treatment) of the American Convention on human rights includes the right to hold a life project, addressing essential elements as, among other things, the rights to education, to food, to a healthy environment and to sanitation.

The recent resolution of the UN General Assembly is proof of the difficulty of crafting a text according to all the interests at stake, thus the ¨ drafting the right to clean water, a safe, and drinking and sanitation as a human right that is essential for the full enjoyment of life and the other human rights.

Professor Gupta said that explanation that the developed countries to refrain from voting in favour of the resolution can be found in issues such as the global responsibility and liability for damage to the water supply. For example, in the opinion of the Dutch Ambassador to UNESCO, the text of the resolution presents two controversial aspects: (1) mentioned the

global responsibility the primary responsibility of ensuring the full realization of all human rights Governments responsibility to both levelsshould therefore be established and (2) the initiative did not support the efforts of the independent human rights expert.

Certainly, the resolutions of the United Nations do not have a legal nature per is but a language such a treaty would lead us to consider completely contradictory interpretations. Thus, it would infer that some countries could force others to provide water and / or financial resources for projects related to it; ((b) that individual citizens require their own Governments that they will pay water services and sanitation, or c) finally, and worse that didn't have any effect.

As a result, these measures risk being criticized as premature, demagogic or prone to your misrepresentation that leads to a radical division of positions between countries water and dry by way of a cold war, water, or a bipolar confrontation, not necessarily the classic separation between rich countries and the third world countries. The latter could lead to an opposite effect desired, Commodifying water according to the pattern of the carbon footprint and the acquisition of rights to pollute, unintended consequence of the Kyoto Protocol, and the emergence of private companies interested exclusively in its management and marketing, or projects covered by international economic bodies that do not attract an endorsement by local peoples.

Another aspect in this regard is the fact that the right to water is ¨ legalize ¨ internationally does not imply that the condition of those weaker communities will be improved in the same way that, for example, the right not to be tortured or detained arbitrarily, both internationally recognized, has not brought greater protection per, and can denature the very concept of law. A right to water that is not executable is non-existent because there is no rape, no one is responsible, no one forced to compensate.

It is also necessary to count with the transnational companies that also are subjects of law international and not exclusively for the purposes of the promotion of human rights through the so-called corporate social responsibility, being necessary in this case special attention in search of the balance between added value, benefit and welfare, since the business sector through the production of goods and services has a major impact on water resources. They are also of interest, the rules of United Nations of 2003 on the responsibilities of transnational corporations with regard to human rights. This responsibility should be added to the responsibility toprotect as own and autonomous institution of the international legal system, whose limits can be more imaginative than the classical triad prevention, reaction and reconstruction.

In its report on the right to water, the world Organization of the health (who) establishes a framework of conduct for companies depending on their composition, so: increase the provision of services so that the number of people provided always see growing sustainable policies for water conservation in its own activities. The use of differentiated and progressive recovery/cost prices that contribute to increased coverage. Ensure equity in the reliability of the priority service in the supply to the most marginalized communities, establish a policyof responsible for connecting the participation of citizens in decision-making &provide accurate and clear information to users.

The Horizontal application of the law of human rights

International economic activity is an area in which international rules apply both to nationals and to their countries. In fact, national constitutions and international human rights protection not only has an effect vertical but also horizontal, in other words, the

constitutional framework imposes obligations on private actors who are required to observe the fundamental rights in their relations with third parties. Generally, human rights protect individuals from excessive action by Governments, thus a person injured by a State body is a violation of human rights, something which would not happen if the same Act is committed by a non-State actor; Therefore, we have two categories of obligations in respect of human rights.

The first category refers to the obligations of the States against individuals and vice versa, these would be as points Van der Walt, the properly vertical. The second category of obligations between individuals is known as obligations horizontal since they apply to the same level to enterprises, individuals and other private actors, and it we refer to as corporate human rights obligations aimed at protecting the ability of individuals, local communities, and indigenous peoples to enjoy human rights.

At the constitutional level, there are several jurisdictions that provide a direct horizontal application of the coming human rights obligations, thus in section 9 of the basic principles of the Constitution of the Republic of South Africa is set ¨ a provision of this section only oblige the physical or legal persons when taking into account the nature of the right and the entity of the duty imposed by that law. ¨ The Constitutional Court confirmed the horizontal applicability of human rights between individuals in the following: FoseVs. Ministry of Health, Soobramoney vs. Ministry of Health, and Ministry of Health vs. Campaign for Treatment Action.

In the European system, both the German Constitutional Court and the High Court of Ireland have confirmed the horizontal nature of the human rights provided for in the national Constitution. The own European Court of human rights coined the theory of the drittwirkung according to which certain provisions of the European Convention on human rights is considered to have horizontal effects and apply to individuals.

In relation to this horizontal efficiency, we start from the tripartite typology to be used by the former United Nations Special Rapporteur on right to food, AshjornEide, who distinguish the obligations of States as regards economic, social and cultural rights in three levels; (((a) respect, (b) protection and (c) realization of them. These obligations apply, universally, to all the rights and imply a combination of positive and negative duties. For its part, the African Commission on human rights went further and maintained: ¨ ideas internationally accepted thatthe different obligations that arise from human rights, suggests that all rights - both civil and political, social and economic - generate at least 4 levels of duties for the State that undertakes to adhere to such a regime, namely the duty to respect, protect, promote and realize these rights. ¨

These tripartite or quadripartite obligations concerning the right to access to drinking water also extend to private companies, and thus continues the Rapporteur, ¨ must be taken into account that all members of society share the responsibility for the realization of human rights.

Major milestones in the formation of international law on water drinking water

Mar de Plata. Plan of action of the Conference of United Nations recognized water as a human right for the first time and declared that "all peoples, whatever their level of development or economic and social conditions, have right of access to drinking water in quantity and quality in line with their basic needs"

Declaration of Dublin Statement 4 establishes that "...is essential recognize first and foremost the fundamental right of every human being to have access to a clean water and sanitation at an affordable price"

Summit in Rio 1992 chapter 18 of Agenda 21 endorsed the resolution of the Conference of Mar del Plata on water which recognized that all persons have right of access to drinking water, what came to be called "the agreed premise"

September 1994 International Conference of United Nations on population and development the program of action of the Conference International of United Nations on population and development States that everyone "has right to a standard of living adequate for himself and his family, including food, dress, housing, water and sanitation ¨

December 1999 resolution of the Assembly General of the Nations United A/Res/54/175 "The right to development" article 12de the resolution says that "in the full realization of the right to development, among others: (a) the right to food and pure water are fundamental human rights and their promotion constitutes a moral imperative both for Governments and for the international community".

September 2002 World Summit on sustainable development policy Summit Declaration indicated "we are delighted that the Johannesburg Summit has focused attention on the universality of human dignity and are resolved, not only through the adoption of decisions on targets and timetables but also through partnerships, to rapidly increase access to basic servicessuch as drinking water supply, sanitation, adequate housing, energy, health care, food security and the protection of biodiversity".

November 2002 general comment n. 15 the right to water the General comment 15 interprets the Covenant on economic, social and cultural rights of 1966, reaffirming the right to water in international law. This observation provides some guidance for the interpretation of the right to water, framing it in two articles: article 11, which recognizes the right to an adequate standard of living, and article 12, which recognizes the right to enjoy the highest level of health possible. The observation clearly establishes the obligations of States parties in respect of human right to water and defines what actions could be considered as a violation of the said principle.

Article I.1 stipulates that "... The human right to water is indispensable to live with dignity and a precondition for the realization of other human rights"

July 2005 draft guidelines for the realization of the right to drinking water and sanitation. E/CN.4/Sub.2/2005/25 this draft guidelines, included in the report of the Special Rapporteur for the Economic Council and Social of the United Nations, El HadjiGuissé, and requested by the Sub-Commission on the promotion and protection of human rights, is intended to assist those responsible for developing policies at the level of Governments and international agencies and members of civil society working in the water and sanitation sector to realizedthe right to drinking water and sanitation. These guidelines not claim to give a legal definition of the right to water and sanitation, but provide guidance for its implementation.

November 2006 Council of human rights, Decision 2/104 the Human Rights Council "requests the Office of the High Commissioner of the United Nations for human rights which, taking into account the views of States and other stakeholders, takes place, within the limits of existing resources, a detailed study on the scope and content of the relevant obligations in human rights related to equal to drinking water and sanitation access"they impose the international human rights instruments, which includes conclusions and relevantrecommendations in this regard, for submission to the Council before its sixth session ¨

December 2006 Convention on the rights of persons with disabilities article 28 defines the right of persons with disabilities to a standard of living adequate for them and their families, and 28 (2) "State party recognize the right of persons with disabilities to social protection and to enjoy that right without discrimination on grounds of disability"", and shall take appropriate measures to protect and promote the exercise of this right, including: (a) ensure access under conditions of equality of persons with disabilities to drinking water and their access to services, devicesand other assistance appropriate services at affordable prices to meet the needs related to their disability". At the regional level, the Abuja Declaration, approved by 45 African States and 12 States from South America in Africa-the first America of the South Summit, held in 2006, is committed to promoting "the right of our citizens to access safe, clean water, and sanitation under their jurisdictions. ¨

August 2007 report of the United Nations High Commissioner for human rights on the scope and content of the relevant obligations in human rights related to equitable access to safe drinking water and sanitation that the international instruments of human rights says:

¨ Following Decision 2/104 of the Human Rights Council, the report of the High Commissioner of the United Nations for human rights establishes that "it is now time to consider access to healthy drinking water and sanitation as a human right, defined as the right to an equitable and non-discriminatory access to one sufficient quantity of drinking water healthy for personal and household use... that guarantees the preservation of life and health".

In the same year at a regional level, the "message from Beppu", approved by 37 States of the region of Asia and the Pacific as a whole, at the first Summit of the water of Asia-Pacific, held in Beppu (Japan), in December 2007, recognized "the right of the people." to provide safe drinking water and sanitation as an essential human right and a fundamental aspect of human security.

March 2008 Council of human rights, resolution 7/22 through this resolution the Human Rights Council decides to appoint, for a period of 3 years, an independent expert on the question of human rights obligations related to access to drinking water and sanitation. At the regional level it is noteworthy, the Declaration of Delhi, approved by eight States in South Asia in the third Conference on South Asian sanitation (SACOSAN III), held in Delhi, in November 2008, acknowledged that "access to sanitation and safe drinking water is a basic right, andaccording to the national priority accorded to sanitationis essential"

October 2009 Council of human rights, resolution 12/8 in this resolution, the Human Rights Council welcomes the query with the independent expert on the question of human rights obligations related to access to drinking water and sanitation, receives the first annual report of the independent expert and, for the first time, recognizes that States have an obligation to address and eliminate discrimination in respect of access to sanitationurging them to effectively treat the inequalities in this respect.

July 2010 United Nations General Assembly, resolution A/RES/64/292 for the first time, this resolution of the United Nations officially recognized the human right to water and sanitation and assumes that the pure drinking water and sanitation are essential to the realization of all human rights. The resolution urges States and the international organizations to provide financial resources, to support the training and technology transfer to help countries, particularly developing countries, to provide safe drinking water and sanitation services, clean, accessible and affordable for all.

September 2010 Human Rights Council, resolution A/HRC/RES/15/9 following the resolution of the General Assembly of the United Nations, the resolution of the UN Human Rights Council said that the right to water and sanitation is part of the current international law and confirms that this right is legally binding for the States. It also urges States to develop tools and mechanisms appropriate to progressively achieve the full compliance with the obligations related to secure access to drinking water and sanitation, including those areas currently without service or an inadequate service.

April 2011 Human Rights Council, resolution A/HRC/RES/16/2 in this resolution, the Human Rights Council decides to "extend the mandate of the current holder of the mandate as Special Rapporteur on the human right to drinking water and sanitation for a period of three years" and "encourages to the / the rapporteur to special that, in carrying out its mandate..." "Promote the full realization of the human right to drinking water and sanitation, among other means, paying special attention to practical solutions in relation to the exercise of this right, particularly in the context of missions to countries, and according to the availability, quality, physical accessibility, affordability and acceptability criteria"

ADVERTISING DISHARMONY

Olga BALANESCU[1]

Abstract: *The present paper intends to prove that the advertising innovation may be sometimes dangerous in the sense that the advertiser is so much preoccupied by targeting a larger and larger public that he cannot always keep the advertising discourse under control. As it is well known, the advertising discourse is made up of the linguistic message and of the iconic one. The disharmony above mentioned may appear at every single level of the advertising compositional structure: headline, copy, slogan, trade-mark or logo (as referring to the linguistic message), or guarantee, context, layout (as referring to the iconic message). Thus the communicative intention of the advertiser is distorted: instead of persuading the consumer, the message will finally offend or make him confused so that he should not be able to have the expected behavior. Another set of disharmonies is to be detected at the level of applying the theories of advertising. The contemporary rush for getting a better marketing position for the promoted product/service is again responsible for the disastrous results. The case study is represented by a group of Romanian advertisements viewed from the pragmatics point of view as pragmatics is the linguistic science focused on the spoken, dynamic language, and advertising is the best sample of nowadays dialogue.*

Keywords: *headline, copy, slogan, guarantee, pragmatic act, context.*

Our contemporary society hostess a permanent, sometimes even aggressive advertising campaign: fliers, banners, radio or TV spots, advertising on-line, door to door advertising, and so on. This is why the advertiser has a more and more difficult task to accomplish when it comes about creating an advertising campaign of great impact upon the consumer who is, in his turn, more and more bored with so many advertisements, and consequently harder and harder to be convinced to purchase something.

At the beginnings of advertising, the simple stating of the qualities of products was enough for persuading or convincing the consumer. Owing to the huge diversity of products/services, nowadays such a presentation proves to be useless. Moreover, the producers got the technological secrets, and in order to operate an efficient product positioning in the market, one needs very attractive and innovative and original messages (sometimes, they turn into aggressive ones).

It has been shown[2] that nowadays products and services promote not only their inner and obvious qualities (for example, shampoo washes off your hair; it is a truth well-known by everybody), but also an extra benefit which the respective product/service brings about (for example, by using *this* trade-mark of shampoo, your hair will be glossy, *that* type of

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[2] John O`Shaughnessy, Nicholas O`Shaughnessy, *Persuasion Today,* Routledge, London, 2008.

shampoo will make it silky soft, and *that other* type will make you look exactly like a Hollywood cinema star. The extra benefit implies, as far as we can see, an affective and subjective component, which corresponds to the dream every female consumer has deep inside. This is the very difference between *persuasion* (involving subjective arguments) and *conviction* (involving objective reasons and proofs).

The fierce competition we face nowadays makes the advertiser have harder and harder times, as it depends on his creativity to make AIDA principle[3] work (attention, interest, desire action). The most important step in advertising (according to AIDA principle) is to draw the *attention* of the public (who wants to protect and to defend himself against `the attacks` of advertising); once this procedure has been accomplish, by means of *the iconic message*, the advertiser has to offer his consumer something to raise his *interest.* This is where *the textual message* enters the stage (you have just seen something which drew your attention, and you are interested in finding out what it is about). So that the consumer starts reading the text and if it is inciting enough, he will *desire* to purchase it, namely to take *action.*

The difference between an efficient and a non-efficient advertisement is given by the quality of communication (which involves both the textual and the iconic messages) and can be measured by means of reactions of the consumer facing the respective advertisement. Life experience has proved us that many *slogans* turned into memorable sayings, being quickly adopted by consumers in their every-day talk.

The creativity of advertisers has much been exploited nowadays and life seems simply so much unimaginably connected with advertising banners in the streets, that the urban landscape could not be projected in the absence of these `details`.

Unfortunately, not all that glitters is gold, and advertising does not always produce memorable `products`, in the sense that:

- Sometimes the whole message is confused and the consumer does not get its point (does not simply understand what it promotes);
- Sometimes advertising has a negative impact on consumers inducing false needs, false values or even offending the consumer;
- Sometimes advertising contains regrettable disharmonies which are to be detected at the level of the iconic message, or at the level of the textual message;
- Sometimes the disharmonies are found at the level of the moral values of the entire campaign.

The present paper intends to point out several examples of nowadays advertising disharmony with the view to correct them and make the discourse function normally.

The *compositional structure* of an advertisement and the real *communicative intention* of the emitter can be better understood if make use of pragmatics, more exactly, of the effects of the *pragmatic act.* The real meaning may be hidden behind the proper textual message, and it is up to the receiver to decode it properly.

This hidden message, which is actually a pragmatic act, represents *the real communicative intention.* If the advertiser succeeded in creating a cohesion between it and the nature of the promoted product/service, the advertisement will be a successful one. If he cannot make it compatible with the nature of the promoted product, the advertisement fails. And this is the most frequent type of disharmony in advertising. We will present these cases in turn.

[3] Joe Marconi, *Ghid practic de relatii publice,* Collegium, Editura Polirom, Bucuresti, 2007, trad. Camelia Cmeciu.

The interlocutors of the advertising discourse

There are two interlocutors of the advertising discourse: the advertiser and the consumer. There is a strong relationship of co-operation established between them, in the sense that each of them has his clear part to play. The advertiser has to take into consideration the main features of his target: age, level of culture and instruction, sex, income, religion, etc. in order to be able to offer his consumer what he (the consumer) really needs. The specialists [4] have appreciated that what a consumer wants to find out in an advertisement are:

- Advantages offered by the promoted product/service comparing it with other similar ones in the market;
- Price, discount(if any);
- Trade-mark;
- Technical performances;
- Instructions of usage;
- The place where it can be found (supermarkets, show-rooms)

Suppose one single item of the above-mentioned list is missing, the advertisement is likely to fail.

The advertiser should also know the way his target speaks (his level of culture and instruction, his profession) in order to create a desirable message.

The consumer, in his turn, enters this *verbal interaction* by means of his consumer behavior. If AIDA principle (attention, interest, desire, action) is achieved and he purchased the promoted product/service, the advertisement was efficient and the advertiser can be satisfied with his work.

Discourse coherence

William Bernbach, one of the greatest advertisers of the 20th century, used to say that advertising is persuasion, and persuasion is art`. In order to persuade, advertising needs a lot of intelligent mechanisms of gathering together key elements which belong both to the iconic message and to the textual one as well.

Discourse coherence involves two processes at the same time:

- The compatibility between the iconic message and the textual message;
- The compatibility between the whole advertising construct and the nature of the promoted product/service.

Advertising creation covers these two levels simultaneously and the secret of success to discover those key words able to link them.

A series of examples will follow now. We will make distinct considerations concerning the iconic message and the textual one.

Iconic message: a bunch of pink orchids (when I showed this print to my students asking them what they imagine it might promote – without showing them any text- they all agreed that the advertisement is sure to promote a perfume, a face cream, a shower gel, a body lotion, a product of feminine cosmetics).

Textual message

Headline: It is about emotions

Body text: When it comes about banks, everybody thinks of money. But we do think of dreams, needs and hopes. We think about you.

Slogan: Millenium Bank. Inspired by life.

[4] Vasile Sebastian Dancu, *Comunicarea simbolica. Arhitectura discursului publicitar,* Editura Dacia, Cluj-Napoca, 1999.

At first sight, there is a strong discrepancy between the advertising construct (image and text) and the nature of the promoted service. Both image and text evoke romanticism, purity, tenderness, lofty feelings, and above all, love, which are all elements of the feminine culture. On the contrary, the nature of the promoted product (namely, the banking services) evokes strength, seriousness, objectivity, safety, protection, which are all elements of the masculine culture.

The disharmony is obvious at the level of discourse coherence. Although there is a compatibility between the iconic message and the textual one (think of the words *dreams, hopes, needs* and of the pink orchids), the semantic unity is opposite to the nature of the promoted product. No one will accept to make a deposit (with all his savings) in terms of `dreams, hopes and needs`. Moreover, when he hears that the respective bank is not concerned with money at all, but with `dreams`, his first idea is to give up this bank and to go to other similar financial institution which inspires and offers credibility and safety.

The strategy of association was made use of in this print as the promoted product was associated with a totally opposite reality. The strategy in itself has nothing wrong in it, on the contrary, it is considered to be one of the most efficient ones[5]. The failure of this advertisement is explained by the concept of discourse coherence.

In order to prove that the strategy of association is an efficient one, on condition it is properly made use of, we will provide another example taken from the same sphere: banking services. This time we focus out attention upon Raiffeisen Bank campaign.

Iconic message: some jars full of pickles, so nicely arranged that you simply feel the taste of pickles (I made the same experiment asking my students what the print could promote. At first, they all agreed that it must be the ad for a new restaurant or for some good spices. Then, on second thought, one young lady said that it might be something connected with the idea of `saving, preserving`. May be life insurance, she said. When I showed them the textual message, they all agreed that the advertiser had a great idea and they were also happy for their colleague who had been that close to it.

Textual message

Headline: How do you save your money?

Body text: Come to Raiffeisen Bank. You will find here… (details about the specific deposit, rate of interest, term, and necessary papers were given).

Slogan: Reiffeisen Bank. Safety for your money.

At first sight, we might find no connection between pickles and banking services. On second thought, the word *save* links the two apparently different universes (gastronomy and banking services).

The iconic message invites us to the following *pragmatic act* decoded by means of the key word `save`: if you like the delicious pickles (which were prepared several months ago, you may have the same satisfaction when saving your money at the Raiffeisen Bank and finding your deposit tasting better in several months. So, the strategy of association may give extraordinary effects suppose it is used properly.

Irrelevant textual message

Dedeman Company has been presenting its products for more than one year totally irrelevant. The advertiser wants to induce a benefic state of mind (feeling which is absolutely positive for advertising as it creates a positive attitude towards the promoted

[5] Jean Jacques Boutaud, Comunicare, semiotica si semne publicitare, Editura Tritonic, Bucuresti, 2005.

product/service). It could be said that humor is an efficient technique of targeting the public on condition it is properly used.

Dedeman is a company producing building materials, meaning that promoted product is somehow deprived of any inner poetry: sinks, taps, mirrors, bricks. Different types of wall-paint and wallpaper, etc. What they did accomplish, was to break the well-known pattern of promoting such things. But, after breaking it, they did not put any thing suitable instead, They make you laugh, indeed, but, unfortunately you laughed at them, finally and not because of their humor.

Let us exemplify (we will put the original Romanian text, as the translation will spoil all its charm):

Două mere, două pere,
Eu îți spun că te spun că te iubesc
Şi la prima revedere
O oglindă-ți dăruiesc

There is really much to be said about it. Let us start with the *linguistic elements* of the message. There is no *headline.* The fact could not be severely incriminated, as a headline can be missing, especially when the promoted product (in our case, the producer) is already

known in the market. We all know now what this company deals with. Yet, there is no body text when they are to promote interior design. A mirror is not a product meant to imply a high degree of responsibility from the consumer, indeed, so the body text could not be incriminated for having been built in an affective register (there is no information necessary to be given o the consumer, but for the price, which is, after all, mentioned).

Yet there is no connection between the childish limerick evoking love (a lofty feeling, by all means) and the promoted product (a mere bathroom mirror). Something is viewed superficially, but we do not know exactly what: is it love? One could hardly say so, as long as love has not been ridiculed so far (only in comedies, in order to penalize the existence of pseudo-love between wrong persons and at a wrong time, or under wrong circumstances, but we do think that the advertiser did not want to mock at his own characters. Is it the mirror, then, the object of the mockery? One could hardly say so, either, as no advertiser laughs at the product he himself intends to promote.

The semantic fields implied (love and building materials) are totally unsuitable and they simply cannot function together efficiently. Another sample of a wrong usage of the strategy of association.

There are things to be said about the *logo* which accompanies the *trade-mark:* it represents a puppy wearing a helmet on its head. Well, if the helmet could evoke the atmosphere of a building site, what about the puppy? Could it stand for a toy building site? It means that Dedeman self minimizes its own object of activity.

Irrelevant iconic messages

It is well known that the iconic message draws the attention of the public, being able to suggest the promoted product/service. If so, it means that the advertisement BRD created wants to `speak` about an issue of much interest among teenagers, because this is what the iconic message presents: five girls having their usual gossip at the end of which one of them stares at us as if having been shocked with what she had heard.

From the pragmatics point of view, *the situational context*[6] is thus of great help: the mimics and the gestures of the guarantees stand for a certain action: having a gossip. There is nothing in common with banking services which could be connected with concepts as: protection, safety, welfare, wealth, strength. Moreover, it is known that girls (in their everyday gossip) will not be interested in such issues, but in love affairs, fashion, make-up and the like, women staff, as it is usually called.

The age of the guarantees is also irrelevant. They do not look more than twenty years old, and it is not likely for them to think of a bank credit. So, the iconic message is irrelevant for the nature of the promoted product (banking services).

There is also much to be said about the *key word* which is supposed to insure the link between the whole construct (text and image), and the nature of the *referent* (banking services). The key word is mentioned from the very beginning, although we cannot identify to what *type of linguistic segment* it belongs (`to tell`):

`*You simply cannot help telling it to the others*`.

`To tell` is reiterated in the structure `*credit de poveste*` bringing about a totally unhappy meaning because our Romanian language has attributed a negative connotation to this construction (when you say `*s-a facut de poveste*`about someone, you actually mean that `he made a fool of himself`.

There could be a compatibility between image and text in the sense that it is very possible for the girls to amuse themselves over a funny situation. But in no case can they make jokes on banking services, as banking services cannot be the subject either of gossip or of laughter.

So that, the single possible meaning of the pseudo-headline `*credit de poveste*` is that the respective credit brings about shame and disgrace for those who might ever intend to make it.

Confuse message

Every publisher would like his advertising creation to be efficiently received in the market. David Ogilvy[7] gave us a valuable piece of advice: if you want your advertisement to be trusted in and the promoted product to be sold by it, you yourself should strongly believe in the respective product. It means that the text should be that persuasive that the consumer should have no doubt about it.

Yet, there are still confuse messages, about which the target cannot clearly understand what they refer to. Here is such an example, an advertisement belonging to Cosmote campaign, which took place in 2010. The advertiser addresses himself to teenagers (highschool pupils or students in their first year of study), in order to offer them some `scholarships`.

As long as the target is that young and non-conformist, the iconic message should have been the most important and attractive point of the advertisement. On the contrary, the image is all together missing in favor of seven segments of linguistic message. Under such circumstances, the target will not read the message, and the effort of the advertiser will be in vain.

The textual message is, in its turn, quite confused, as the consumer does not finally understand what exactly offer he is going to get (suppose he consents to staying still and reading seven segments of linguistic message). The target is invited to `apply now` for a scholarship about which no detail is told.

[6] Gilles Ferreol, Noel Flageul, *Metode si tehnici de exprimare scrisa si orala,* Editura Polirom, Collegium, 2007, traducere de Ana Zastroiu

[7] David Ogilvy, *Ogilvy on Advertising,* Prion Books, Ogilvy & Mother Publishing House, 1999.

In the end

As advertising surrounds us everywhere we go, as a result of a fierce competition in the market, the task of the advertiser is harder and harder. He still has to persuade and to convince, no matter what. But the consumer is more and more bored with advertising creations and he hardly takes a look at a TV commercial or at a banner in the street.

This is why the advertiser wants by all means to draw the attention of his target The principle AIDA: attention, interest, desire, action, about which we have spoken before). This is why sometimes, the advertisements are so striking, that the public either feels itself offended, or simply does not understand what they refer to. Under such circumstances, advertising disharmonies appear. But for a severe competition, they would not happen that often. The present paper wanted not to penalize these disharmonies (actually, each advertising creation may be improved), but to draw the attention of the people involved within the process of advertising creation upon them in order to be able to avoid them.

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ARBITRARINESS, SUBCATEGORY OF THE ABUSE OF AUTHORITY, AS A PATHOLOGICAL MANIFESTATION OF PUBLIC FUNCTION

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Abstract: *The present work is part of a broader approach of the pathological manifestations of public functions, which include corruption, bureaucracy, politicization and servility. Arbitrariness has been identified as a subcategory of the abuse of authority, both being pathological manifestations of the public function.*

Keywords: *pathological manifestations, abusive behaviors, arbitrariness, abuse of authority.*

1. Introduction

Attempting to understand what „arbitrariness" means, the word has been looked for in DEX (the Explanatory Dictionary of the Romanian Language); the explanation found leads to the word „arbitrator" (from the Latin „arbitrium") which is associated to the following meanings: judgment made by arbitrators; freedom of the will, freedom to do something (to commit, to perform), as the mind commands but with full responsibility for one's own deeds [1].

Ever since the previous reedited editions of the work „Deontology of public function", we were considering identifying also other types of pathological manifestations of public function. We hesitated at that point to delineate a new form of manifestation, as we considered that the abuse of authority was quite comprehensive in terms of its definition, manifestations, causes and consequences.

Nonetheless, after analyzing the administrative and social background in which public functions are exerted, in general, and afterwards the European and Romanian public functions, in particular, we have considered that arbitrariness constitutes a subcategory of the abuse of authority, having a distinct form within this pathological manifestation.

2. Arbitrariness related to the European public function

After noticing the behavior of European institutions in respect to Romania but also to other European states, but particularly the behavior of certain highly ranked public servants of the European Union in respect to Romania and Bulgaria, the following conclusions can be drawn:

- the accession to the EU of some former communist countries, in 2004, involved for instance, in terms of the accession to the Schengen Area, only meeting the technical criteria for the border security, but also meeting some minimal requirements which are in fact stipulated in the constitutive EU Treaties. Thus, it was enough for the EU member-states to acknowledge the compliance with the technical criteria and minimal requirements mentioned above so as to allow to the states which had recently accessed the EU to be part also of the free movement space provided for by the Schengen Treaty.

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- after accessing the EU in 2007, Romania and Bulgaria expressed their interest in accessing the Schengen Area. Although the two EU member states with full rights had med the technical criteria and requirements provided for by the international regulations, just like the states previously accessing the EU, they were denied the accession to the Schengen Space, due to some political „pretexts", which have been successively invented and which had no ground in the Constitutive treaties (a proof are the monitoring reports of the Cooperation and Verification Mechanism – MCV – on justice matters). Even if the two states which afterwards accessed the EU requested repeatedly to be granted the same statute as the rest of the member states, they were denied by some of the latter (see for instance the position of Netherlands and Germany) the access to the Schengen Area and, in the absence of unanimity, the two states do not enjoy currently an equal treatment like the others state already integrated. Therefore, two categories of states emerge within EU, namely some with privileges and others without, under the circumstances in which all the member states must enjoy the same rights and duties, on the basis of the same constitutive Treaties.

- in terms of positive discrimination, it can be mentioned here the „special" position of Great Britain, which „negotiated" with the EU a preferential statute allowing it to maintain its national currency. It is well known that the European Commission, which makes sure that the general interest of the EU is met, as provided for by the constitutive treaties, has the possibility (through the infringement procedure) to warn the member states that they do not observe the provisions of these contracts in relation to some arbitrary positions adopted, and afterwards to inform the European Court of Justice that a certain member state infringes a certain constitutive treaty. Nonetheless, in the case related to Great Britain, mentioned before, all the EU institutions, just like their public servants and high officials, tolerate this situation and have no reaction about it, thus deepening even more the gap appearing between the various member states.

Another arbitrary situation also took place in the summer of 2012, on the occasion of the Romanian national referendum for the dismissal of the president. At that moment it had already been requested the consultative opinion of the Venice Commission, which is an advisory body on constitutional matters related to European states. Although the Commission ruled that there was not necessary any participation quorum for the referendum, the Constitutional Court of Romania ruled that there had to be one, so that the referendum in question, to which a considerable number of citizens took part, was invalidated for this reason. In our opinion, this constitutes a serious infringement of the democratic principles of any European state, setting a precedent which most of the EU member states do not have.

It is true that all the manifestations described above have not regarded public career servants directly, but rather states, international bodies and high officials of these states and international bodies; nonetheless, at the origins of these decisions were public servants of A category who, according to „The Status of Public Officials in Europe", are part of the category "involved in the elaboration of policies, drafting of legal acts and reports and enforcement of community law"[2].

3. Arbitrariness related to the Romanian public function

In relation to the Romanian public function, there have been encountered frequent manifestations of arbitrariness, both at the level of high officials and public servants.

Arbitrariness has usually the form of an exaggerated subjectivism, appearing among the interaction of leading public functions with execution public functions. This

accentuated subjectivism can have multiple causes, such as: the education, exaggerated empathy, cultural background, temporary mood and political determination of a public servant, and so on.

"The efficient leaders (Primal Leadership) are those who *listen* to the feelings of the people from the group, resonate with them and impress them in a positive meaning, unlike the *dissonant* ones, who make so that the *worse parts* of individuals are shown" [3].

It is normal to analyze arbitrariness related to leading functions, as arbitrariness appears precisely at the level of leadership and not at the level of implementation. If arbitrariness took place at the level of an implementation of a public function, then this manifestation could be easily corrected by the manager, who can use any legal means for that purpose. Yet, it is possible for arbitrariness to appear at the implementation level too, especially when the manager's subjectivism is significant and the employee who is favored by him adopts a subjective behavior in his turn, in relation to the other colleagues constituting the structure of the public service involved. Here it is obvious that the principle *sine ira et studio,* which Weber used for the creation of fair bureaucratic system, has been abandoned.

Consequently, the cause of arbitrariness in these circumstances can be the politicization of the public function, either by promoting and upholding among public functions some manifestations which are incompatible with them or by instituting at the level of a public structure other relations which are not legal.

The relation leader-subordinates inside a bureaucratic structure can be characterized in three ways [4]:

a) autocratic leadership: the manager takes decisions alone and asks his employees to obey him unconditionally. The manager using this style of leadership rests away from his subordinates.
b) laisser-faire leadership: the authority of the manager cannot be felt, so that each subordinate can do whatever he wants. It can be easily deducted that this style of leadership can generate disorder and rout among the members of the leaded group.
c) democratic leadership: has turned out to be the most efficient. This type of leadership encourages the development of the creativity of the leaded persons and its channeling towards the accomplishment of the tasks with which they are confronted. In this type of leadership the manager is the animator of the group and the communication is extremely positive.

Specialized literature has defined the autocratic leader in several ways. First of all, he can appear as „a severe leader and convinced conservative, who is afraid of tomorrow. He is an upholder of the theory *master and servant* and is ready to reward those employees who know what *their limits* are, being the one who knows better what is *good* for them. The autocratic leader can also take the guise of the *well-wisher* who takes care that his subordinates benefit from adequate material conditions, asking them to be content with what they get. Moreover, the autocratic leader can even meddle even in the most personal affairs of his employees, *for their sake*. Finally, the autocratic leader can also appear as an inexpert person who wants to be strong but lacks self-confidence; it is likely that he will promote a weaker subordinate rather than a better one, so that he can complain afterwards that everyone avoids taking responsibility" [5].

Taking into account all that has been mentioned above, the present work has attempted to capture some of the circumstances in which arbitrariness can appear and take place, in relation to a public function, as a subcategory of the abuse of power and pathological manifestation of the public function.

a) Arbitrariness related to the performance of public functions

Throughout time, there have been experimented several ways of recruiting public servants, starting with the random procedure of casting lots between them to the one of selecting them. After several attempts, there has been instituted among the democratic states the variant to select public servants by competition, being considered the most objective and adequate way to select and recruit public servants for carrying out a public function.

Although there is a legal modern framework, adapted at the same to the current needs [6], for organizing the selection competitions, the long administrative practice has shown that they can be vitiated; thus, the manager of the public institution or authority organizing the competition can appoint a commission faithful to his interests, so that the written exam becomes a „fake" one, as the favored candidate is helped and receives the topics of the exam in advance. At the interview, the subjectivism of the commission members will be even more obvious, as in the end, the person who has been favored in advance by the manager will be formally and legally selected and will fill in the vacancy afterwards.

In order to remove the practices mentioned above and taking inspiration from the experience of private environment, we consider that it would be ideal to outsource the competitions for filling in the vacancies related to public functions, to an institution or society specialized in recruitment, which, after receiving the job description and the objective profile of the candidates, can identify the most suitable person for obtaining the job, by means of competition and interview. In this way, any subjectivism, abuse or arbitrariness could be removed, whereas the politicization of public functions could be stopped also by means of this method, which is extremely efficient in the private environment, where the added value (profit) pursued by the manager is accomplished by including „the right man at the right time" in the working team.

b) Arbitrariness related to the annual assessment of public servants

In terms of the annual assessment of public servants, arbitrary and abusive manifestations can appear, the subjectivism of which can lead to two possible consequences affecting the public servant assessed: the first one can disadvantage him, by receiving a subjective score, under the level of his real results; the second one can advantage him, by exaggerating his qualities and receiving a score above his performance. Even if quantifiable performance criteria and indicators have been introduced in the system for assessing the performance of public servants, so as for the results to be objective, as long as the „evaluator" is the boss of the person being evaluated [7] the assessment can only be subjective and, consequently, arbitrary, if it is applied within an autocratic leadership.

For the reason mentioned above, we consider that the evaluation of the professional performances of public servants must be transferred from the area of the direct manager to an internal/external/mixed structure (commission), made up of work colleagues. This could analyze the performance indicators and criteria established in advance, both from the perspective of the direct manager and of the person evaluated, including too the opinion of the beneficiary of the public service in question (for instance opinions and complaints of citizens, press articles about the public service involved and the persons providing it, and so on). Only in this context the results of the evaluation will become more objective.

At the same time, we fully agree to the opinions expressed by specialized literature about the observations made by direct managers about public servants. Thus, a few rules should be applied:

"a) Before making any critical observation, the object of the criticism must be mentioned as clear as possible. Moreover, the measures necessary for accomplishing the objective of the criticism must be clear and adequate to the personality of the public servant characterized;

b) No critical observations should be stated about competent public servants, with a long experience in the field, who did something wrong but are capable to realize alone their mistakes and to make amends for them;

c) Critical observations must be made within a general assessment of public servants. This can diminish or, on the contrary, increase their sharpness. When a general presentation exists, as suggested before, the self-defense tendency of the criticized person tends to attenuate;

d) Criticism must be made so as not to offend the public servant being criticized. The latter must feel that the aim of the criticism received is his or her improvement" [8].

c) Arbitrariness related to the promotion of public servants

Arbitrariness takes place also in relation to the promotion of public servants. We do not uphold automatic promotions, which are not productive and efficient for the public service within which are applied; for this reason, it is necessary for promotions to be performed on the basis of certain criteria which can make the process more objective. Unfortunately, in this circumstance too, there is the risk for subjective and arbitrary promotions to take place.

For removing the disadvantages mentioned above, specialized literature has identified the following rules [9]:

"a) The competence for promoting a public servant must belong to a structure which is superior to the one to which the public servant to be promoted belongs. This rule obliges the person making the promotion proposal to have a strong motivation for that;

b) The assessment of the public servant to be promoted must be made by a group of persons and not just by one. The assessment of one single person can hardly be deprived of subjectivism, that is why is better for more persons to make the assessment;

c) There must be established certain conditions which public servants must necessarily meet, so as to be promoted (minimum internship, education, age, and so on). Knowing all these conditions, public servants will be highly motivated to carry out their activity, a fact which constitutes a great advantage for the increase in the efficiency of public administration".

d) Arbitrariness related to the disciplinary sanctioning of public servants

The disciplinary sanctioning has been regulated ever since the statute of public servant appeared and it was felt the need to make it objective and to remove the subjectivism of assessments.

"First of all, public servants were exposed to the arbitrariness of their direct managers, without having any possibility to defend themselves. Secondly, direct managers, out of their will to protect certain public servants, would not apply the punishments demanded by the good functioning of public services, in accordance to the deeds committed by the public servants involved" [10].

In order to remove the subjective character of the direct manager's behavior, there has been introduced the principle on the jurisdiction of disciplinary accountability (repression), which implies the „legal character of the disciplinary sanction, the legal character of the disciplinary deed and the formal judicial character of disciplinary decision" [11]. As the Romanian literature between the two world wars pointed out, this jurisdiction „aims to

remove arbitrariness and favoritism characterizing the leadership of public services from the exertion of disciplinary power" [12].

It can be easily noticed that the statute of the public servant from 1925 was superior from this perspective to the Statute of the public servant of today [13]; the latter, even if it contains the first two constitutive elements of the concept regarding the jurisdiction of disciplinary accountability, it lacks the third one – the „formal judicial character of disciplinary decision". Thus, there is no „disciplinary authority" to possess an efficient legal instrument (the sanctioning decision). The mere existence of a report which concludes the administrative procedure and its notification to the direct manager of the sanctioned person, so as for disciplinary measures to be taken, represents only a half-accomplished thing, while in the legal field the existence of this situation constitutes an inefficient manner of regulation.

4. Conclusions

In order to fight against arbitrariness, it is necessary to apply the same measures as with the abuse of authority, namely:

- improvement of the management within public administration;
- an institutional reform and strong moral;
- improvement of the working conditions in the administration;
- instituting a certain control in the public administration on the leadership style and methods;
- the existence of a dignified critical attitude of citizens in respect to public administration;

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4. Jacques Klein, s.a**,** *Qu' est-ce-que le management,* Dunod, Paris, 1071, p.76 *apud* Alexandru Negoita**,** *Stiinta adfministratiei,*Editura Didactica si Pedagocica, Bucharest, 1977, p.118.
5. V. I. Starosciak**,** *Elemente ale stiintei administratiei,*Editura Politica, Bucharest,1967, p.120 *apud* Alexandru Negoita, *quoted works,* p.118.
6. See the provisions of Law No. 188/1999 and Government Decision No. 611/2008.
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8. Al. Negoita, *quoted works*, p.99-100.
9. *Idem*, p.104.
10. Erast Diti Tarangul**,** *Tratat de drpt administrative roman,*Tipografia Glasul Bucovinei, Cernauti, 1944, p. 279.
11. *Idem.*
12. *Idem*, p.280.
13. See Law No. 188/1999 and Government Decision No. 1344/2007.

THE NEED FOR INTERPRETATION IN LAW

Maria-Luiza HRESTIC[*]

Abstract: *By interpretation one usually understands the explanation of a text or, more exactly, the operation consisting in the clarification of an obscure text. Or, this conception about interpretation does not correspond to reality. In the practice of law, the interpretation gathers together the set of intellectual procedures serving to determine and to highlight, in a given situation, the applicable principle. In this sense, to interpret certainly means to elucidate an unclear text, but to interpret also means to specify a general text, which is particularly important, considering, for instance, the Luxemburgish legislative technique, which likes to start from general principles; to rectify the imperfections of the texts and to adapt these texts to the actual demands; to solve the contradictions; to extend the texts so as to fill in the gaps. In one word, the interpretation includes the set of necessary operations required to make the rules of law concretely applicable. The need to interpret therefore results not from the imperfections of the law, but also from their intrinsic nature, from the generality of the norms they contain. This allows us to understand the whole importance of the issue approached by us, as the interpretation problems appear not just occasionally, but constantly and necessarily, when applying the law. François Laurent expressed these truths in an extremely insightful page: „To believe that you only need to make use of interpretation when the laws are obscure or insufficient is to have a wrong idea about this issue. If this were so, we could believe that the imperfection of the law makes the interpretation necessary.... It is enough to think for a moment at the essence of the laws to convince us that the need for interpretation results less from their obscurity or insufficiency and more from their nature.... As it is impossible for the legislator to give a particular decision for all the disputes born among men, what is left for him to do? He must act not by means of particular decisions, but by means of general decisions. This means that he imposes principles that the judge must then apply to the contestations addressed to him. The interpreter's work is just this application of a principle to a given case. It results that the interpretation is a permanent need, regardless of how many interpretations are brought to the existing legislation. Principles, no matter how well formulated we might assume they are, will always remain abstractions. When one needs to give life to an abstraction, a series of problems will appear. It is the duty of the interpretation science to solve them."*[1]

Keywords: *interpretation of law, application of law, interpreter's insightfulness, legislator's will and the spirit of a law, unity in diversity of the rule of law.*

From the perspective of the application of Law, the interpretation of the rules of law has the purpose to clarify the texts of the normative documents, an operation leading to the identification of the prescriptive significance of the given linguistic formulations. *The determination of the rule and of its authentic sense is the result, not the object of this species of juridical interpretation*[2].

If the *interpretation of the juridical norms, as a species of the juridical interpretation regarded as a proximal genre* aims to bring to light the sense of the norm that is to be applied[3], one can say that it actually highlights the normative content of the legal text more accurately. In the juridical literature, the expression „interpretation of the legal norms" is often equivalent to

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[1] François Laurent, *Principes de droit civil*, t. 1, n° 269 et 270, Bruylant, Paris-Bruxelles, 1869.

[2] Ioan Humă, *Cunoaştere şi interpretare în drept – Accente axiologice* (Knowledge and Interpretation in Law – Axiological Accents), Ed. Academiei Române, Bucureşti, 2005, p. 32.

[3] Nicolae Popa, *Teoria generală a dreptului* (The General Theory of Law), Ed. Actami, Bucureşti, 1998, p. 274.

the idea of „interpretation of Law/the law"[4]. But, it is also true that the interpretation of law can operate as well from an economic, political, ethical perspective etc., without necessarily designating the juridical interpretation of Law[5]. This is why their semantic superposition does not hold. Similarly, by „the interpretation of the law" we have in view, in a strict sense, „the activity of interpretation of the law as a main source of Law"[6], not the acceptance of interpretation of the text of some juridical norms considered in their individuality (which does not exclude their corroboration), to solve a given case, or the extended acceptance of interpretation of the whole written law. The interpretation of the juridical norms does not take place only in the literal area of the normative text in force but also in the area of its content, consisting in its normative significance[7]. In other words, the juridical meaning comprised in a grammatical sentence needs to be searched outside its literal meaning[8].

The interpretation of the rule of law in the process of the application of law, does not find its reason to be in anything else except in the knowledge of the law, in the rigorous deciphering of its regulations, to be applied in their primary dimension: the legislator's will and the spirit of the law[9].

If any human action is subordinated to a certain aim, then men's actions are submitted to certain determined rules and so comes the question whether the interpretation of the law takes place for the sake of interpretation or for the sake of a need. The answer is firm and unambiguous, as the need of interpreting the rule of law is beyond any doubt. It has to be regarded from at least three directions: 1. practical necessity; 2. theoretical necessity; 3. necessity from a practical legislative perspective. From a practical viewpoint, we stick to the area of the application of the rule of law, a permanent activity of realizing the agreement between the actual and the legal situations. Theoretically, ideas are developed and studies are carried out, which are concluded by means of theories relying on different juridical schools and trends. From a practical legislative perspective, we have two interconnected aspects:

a) the improvement of the legislative activity, through the elaboration of clear, precise juridical rules, which shall not require an important intervention of the interpreter;

b) the elaboration of interpretative rules of law, in the case of the imprecise juridical norms[10].

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[4] Therefore, as we have shown, M. Luburici or I. Dogaru – the last, coauthor of a work elaborated together with D. C. Dănişor and Gh. Dănişor -, speak about *interpretation of law* referring in fact to the *interpretation of the rule of law.* Gheorghe Boboş appreciates that the two expressions are synonymous [in *Teoria generală a dreptului* (General Theory of Law), Ed. Dacia, Cluj-Napoca, 1994, p. 234], attributing them *in a last analysis* the same significance, based on criteria of semantic evolution. Just as he mentions, the expression "the interpretation of law" was initially used to refer to the interpretation of the customary law and of the law created by the judge, being based on the idea of the non-lacunar character of the written law, an idea later on used both for the written and for the non-written law. Although, indeed, in the literature dedicated to this issue this evolution has shown up objectively, we need to notice, however, that today, on the background of the same necessary evolution, there is an increasingly marked discrimination, in an unavoidable dialectics of knowledge, between the two expressions, as it has been accepted more convincingly that they designate different notions.

[5] The fact that the expression "interpretation of law" can refer to various perspectives does not make it inoperative except for a situation in which we overlap it in a reductive way, through transfer of sense and logical sphere, over that of "interpretation of the rule of law". Consequently, we will not join the opinion of Dumitru Mazilu (in *Teoria generală a dreptului* / The General Theory of Law, Ed. All Beck, Bucureşti, 1999, note 2, p. 267), according to which the first would not be right. It depends on its meaning. Otherwise, we create a false semantic tension between these notions, a tension finally originating in the same logical-gnoseological position.

[6] Gheorghe Boboş, *op. cit.*, p. 234.

[7] Gheorghe C. Mihai, *Teoria dreptului* (Theory of Law), ediţia a II-a, Ed. All Beck, Bucureşti, 2004, p. 45-46.

[8] Ioan Humă, *op. cit.*, p. 33-34.

[9] *Ibidem*, p. 36.

[10] Iosif Friedmann-Nicolescu, *Interpretarea normei juridice* (Interpretation of the rule of law), Doctoral Thesis defended at the Juridical Research Institute of the Romanian Academy, Bucureşti, 2003, p. 20-21.

The juridical interpretation is sometimes requested as well by the need to clarify certain contradictions – apparent or actual – which can appear between the different rules of law in the same normative act, in different normative acts, or between the rules of law and the fundamental principles of law, to determine the legislator's true intention.[11]

As we have already seen, interpretation is necessary, first of all because of the generality of the rule. Yet, its necessity also results from the specificity of the juridical language, from the dynamics of the law's aims and from the internal contradictions inherent to the juridical system, and also from the fact that this system unavoidably has gaps.[12]

It has also been said that through the *interpretation of law, one manages to clear away the confusions that may appear, not just through the analysis of the text, but also through the synthesis of its elements reunited in a single whole (after having been previously dissociated through analysis)*[13].

The senses of the rule of law are infinite, and the interpretation reveals the life of the rule of law. We firmly believe that as long as there is life on Earth, the rules of law will have to be interpreted, the rules of the interpretation will evolve and will keep the pace with society", with the evolution of the society's way of thinking.

The opinion concerning the need to interpret the law is unanimous, „resulting, more often than not, from the idea that what the law wanted to express does not show up completely, or, the expressions being improper or ambiguous, oblige the one in charge to apply the law look for their true sense."[14]

It is necessary and important to study law, and the conditions influencing its modification and transformation in order to determine the direction of its future development, the adequate ways of assuring its application, the respect of its rules, and the assurance of the rights and freedoms of the society members, of men.[15]

The need to interpret the juridical norm is justified by the fact that the one who applies the law has to „decipher" the legislator's will.

The interpretation of law must be regarded as a necessary activity, directly related to the process of application of law.[16]

In general, the rule of law (the law *stricto sensu* and other acts with a normative character) are elaborated by jurists or with their help, and those who apply the law (rule of law), speaking the same language, usually find it clear what „the letter and the spirit of the law" mean; nevertheless, the need of interpretation comes from the very text submitted to the operation of interpretation, when such is the case. The operation of interpretation in law is very exacting, *calling for a good knowledge of all the juridical institutions, of the elements characteristic for the norms and a solid social experience*. Frequently, the interpretation of the juridical norm is an operation taking place instantaneously. The juridical norms, however numerous they may be, will never be able to cover all the actual

[11] Romul Petru Vonica, *Introducere generală în drept* (General Introduction to Law), Ed. "Lumina Lex", Bucureşti, 2000, p. 444.
[12] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului* (General Theory of Law), Ed. C.H. Beck, Bucureşti, 2006, p. 380.
[13] *Apud* Iosif Friedmann-Nicolescu, *op. cit.*, p. 167.
[14] Leonida Minculescu, *Interpretarea legilor şi convenţiunilor* (The Interpretation of Laws and Conventions) (BSc thesis), Facultatea Juridică din Bucuresci, 1901 (Examiners: G. Danielopol, G. Tocilescu, C. Dissescu, Valerian Urseanu and G. D. Mârzescu).
[15] Prof. Dr. Doc. Ioan Ceterchi and Reader Dr. Ion Craiovan, *Introducere în teoria generală a dreptului* (Introduction to the General Theory of Law), Ed. All, Bucureşti, 1998.
[16] Ştefan Rauschi, Gheorghe Popa, Ştefania Rauschi, *Drept civil* (Civil Law), chap. IV, Ed. Junimea, Seria JUS, Iaşi, 2000, p. 31.

situations that incessantly appear in the human society. Social life is so complex that, every day, new, increasingly complex situations appear, which will have to be „solved". The operation of interpretation of the rule of law cannot be turned into routine or in the application of a „template" because there are never two situations identical up to confusion but just similar cases, yet with different „parameters".

Law has the purpose of regulating social relations, of channeling people's activity within relations whose major interest agrees to the general will[17]. This aim can be attained in optimal conditions and can be efficient only through a correct interpretation of the „general will", expressed under the form of a rule of law.

Following the interpretation, we will have a general vision on law, on legislation, on what the unity of the system and of the law branch means, with the main features specific and non specific to the rule of law submitted to the operation of interpretation. We will notice the unity in diversity of the rule of law, of the juridical institutions, a general vision that can be extended as well by comparing the institution to another institution, from another country or from other countries. Maybe last but not least, by means of interpretation we will know the true identity of the rule of law and the way in which it can be fully perceived[18].

Conclusions

We can conclude, from what has been presented above, that any text needs to be interpreted. More precisely, any text is always interpreted. Strictly speaking, to interpret a text is to say its meaning, namely to say what realities it invokes. Without interpretation, a text is not understood. More precisely, if I do not interpret what my interlocutor says to me – namely if I do not try to know the realities to which the (graphic or sound) signs that he sends to me to express his thinking refer – I do not understand, namely I do not have the same image as he does concerning the realities he has in his head as concepts. To interpret, *stricto sensu*, is to give a significance to the expression of the legislator's will, is to discover his will, starting from the signs that are sentences enouncing the rules he has decreed. The need for interpretation comes from the fact that, like any message, the law is an evocation of concepts, of *abstractions of realities, of behaviors, of qualities, of ways of acting*. Or, concepts do not have an identical sense and consequently they have no identical significance in all the minds. In order to understand the legislator's will, one must necessarily try to determine the meaning and the significance the concepts evoked by his message have in his mind. The law is presented under the form of sentences announced as attached to certain acts „if… then…". The actual hypothesis can only be expressed by the legislator using words that evoke concepts. One has to determine their significance, without which it is not possible to say whether the acts realized or foreseen are concerned by the rule. Doubtlessly, to avoid this operation, the legislator should be more precise in the statement of the actual hypotheses, so that it may always appear clearly from the beginning whether the acts involved are concerned or not by the law. However, it is impossible for the legislator to do so, as it is impossible for him to foresee all the acts, with their detailed outlines; moreover, if this were possible, the case collection resulting from here would go into the opposite direction compared to the ordinary feeling of equality. So, the legislator

[17] Dr. Viorel Daghie, Dr. Ion Apostu, *Elemente de drept public şi privat* (Elements of Public and Private Law), Ed. Naţional, Bucureşti, 1998.
[18] Iosif Friedmann-Nicolescu, *op. cit.*, p. 167 and the next.

has to order the acts on categories. So, when, by a term, he invoked one of them, one has to look attentively to find out what the acts concerned actually were. The same happens in relation to the consequences attached to the actual hypotheses, consequences that are also stated by terms evoking concepts, so that we need to ask ourselves again what were the meaning and the significance of the respective concepts in the mind of the legislator. „It is enough to reflect for a moment to the essence of the laws, to be convinced that the need of interpretation results less from their obscurity or insufficiency than from their nature."[19]. So, as François Ost highlights: „interpretation is inherent to any reading, even the most common reading of the law"[20]. More precisely – and what F. Ost wants to highlight is obvious – interpretation is inherent to any understanding of the law.

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[20] François Ost: "L'interprétation logique et systématique et le postulat de rationalité du législateur", in *L'interprétation en droit*, Publications des Facultés Universitaires Saint-Louis, Bruxelles, 1978, p. 110.

THE POLITICIZATION OF PUBLIC ADMINISTRATION - TO WHERE?

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Abstract: *Theme politicization of administration is not unusual, it being the subject of many studies and analyzes of political science. Indeed, the administration branch of science which deals with predilection government which is considered by some authors that is part of political science, deals with this issue. Structure and functioning of public administration is really heavily influenced by politics in general and the other political party system in particular. The politicization of administration is a phenomenon that occurs anyway, it is important that it be adapted to Romanian realities, and a law to regulate the boundary between politics and administration, would contribute to the stability of the system and not its dysfunction. Depoliticizing public administration structures by eliminating political patronage is one of the priorities of the administrative reform, which makes it necessary to put into practice: the strict application of the Statute of civil servants, managing consistent and career civil servants in central government management improvement, local institutional and public service levels. The scientific basis of the problem is completed depoliticize article entitled showed some aspects of Romanian practice and presented some advantages of setting limits politicization of public administration.*

Keywords: *public administration, politicization, depoliticization*

1. The concept of politicization of administration

Theme politicization of administration is not unusual, it being the subject of many studies and analyzes of political science. Indeed, the administration branch of science which deals with predilection government which is considered by some authors that is part of political science[1], deals with this issue.

Thus, Professor Paul Negulescu administration believes that science is a political science because it is a legal and seeks critical analysis of government in terms of resources, means and results, issuing rules that, if applied in business administration would lead to increase its efficiency[2].

Structure and functioning of the administration is heavily influenced by politics in general and the other political party system in particular.

In societies characterized by the existence of a single party or a party's absolute majority either communist or fascist, the specific issue is that the party's program and objectives followed by the government are those of the state itself, the action of all social forces are subordinate to the objective supreme particular realization of the program of the party and government targets.

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[1] Ioan Alexandru, *Introduction to the theory of public administration*, vol.I, Pub. Sylvi, Bucharest, 1997, pp. 74-78.
[2] Paul Negulescu, *Administrative Law Treatise*, vol.I, Bucharest, 1934.

In this case administration as a means of achieving the state should be organized in such a way as to ensure the fulfillment of the government program. This leads to the politicization of public administration.

In countries with authoritarian, politicized administration is achieved by the recruitment of officials automatically fulfill the membership of the single party majority or absolute.

The politicization of administration in these cases corresponds to obedience its tendency sole or dominant party in "permanent change of people, ideas, information in both directions, from administration to parties and reverse[3].

This can lead to paradoxical situations where a public official receives significant seniority provisions inconsistent on the two lines that instructions received as a member of the party are incompatible with received as a public servant.

In contrast, multiparty political regimes political influence over government structure manifests itself differently. In this case the government, law enforcement and aims a high degree of autonomy from the political party or coalition.

There are opinions that the political influence on government is beneficial, and opinions that support a total depoliticization administration, which, we must admit, is impossible. Thus, the public official is a citizen and vote on who express it at the polls voting preferred party. Moreover, the law allows public officials to execution of political parties, but denying them to hold leadership positions in the party and to express political views during his service at work.

The concept of an apolitical administration requires some arguments, such as the:

- Political: the administration is composed of officials will try to implement policies favoring citizens discriminatory law adherents of that political party, but merit-based recruitment of civil servants who guarantee stability and consistent remuneration will remove corruption.
- Efficiency: politically appointed civil servants are efficient and competent, and their permanent change affect continuity of government activity.

Political doctrine based on three concepts Political Report - Directors[4]:

- Technocratic model: the technicians administrative decision-making positions, and they have a training policy and are not enrolling;
- Pragmatic model: economists hold the leading role and their work has a common goal to pursue profit in the legitimacy granted by the electorate;
- Political model: the political decisions are confused with administrative decisions, this model is closer to that legitimate community interests by voting policy-makers.

What we consider in this study is the extent to which politics can to subordinate the administration. Of course we mean the public and political office. Specifically the question as to which items should reserve them whenever political power comes from the government. Max Weber in his studies for the bureaucracy felt that there should be a limitation of political involvement in administration. This is a democracy. Because otherwise, we return to totalitarian states where there is no difference between the public and the political. Thus, Romania Communist state apparatus consisted only of members of the Romanian Communist Party. Also, all civil servants dictatorship regime of Charles II became members of the

[3] Bernard Gournay, *Introduction a la science administrative*, Presses de la Fondation Nationale des Sciences Politiques, 1978, p. 234.
[4] Dan Claudiu Dănişor, *Constitutional Law and Political Institutions*, Pub. Ştiinţifică, Bucharest, 1997, pp. 236, 237.

National Renaissance Front. In turn, established the National Legionary State September 14, 1940 required that all state apparatus to enter the Legion.

It requires, however, clearly states to legislate this limit, since the stability, efficiency and rigor can give them than a neutral body of officials and specialists that provide the foundations for the development and progress of their qualifications.

Max Weber admitted two categories of officials: civil career and political officials. Policy officials intervene in political struggle as politicians can fight. Other officials must conscientiously execute an order of higher authority even passing over their own opinion. Therefore considered that there should be a public service neutrality principle which requires it to be, although subject to strictly separate from political power - especially the power of political parties[5].

Raymond Aron noted that the separation between the politicians and the administration is far from complete[6]. However, this dissociation is the lever which maintain the balance of power and is at the same time, the operating principle of the democratic state government autonomy from political power.

Depoliticization public administration structures and eliminating political patronage is one of the priorities of the administrative reform, which requires transposition into practice: the strict application of the Statute of civil servants, managing consistent and career civil servants and improving management in central and local government[7].

2. Evaluation. Practical analysis

We have seen that it is the scientific basis of depoliticization of public administration and the question that is it reality to us?

After December 1989, all government programs included problem solving status of civil servants. Only at the end of 1999 was adopted, after long hesitation, Law no. 188/1999 on the Statute of civil servants. But politicians will not at that time led to the adoption of this regulation, but EU officials pressures. They point out that the Romanian state should regulate the status of the profession and numerous important (the entry into force of the law in Romania were approximately 115,000 civil servants).

It was widely recognized that the existence of such a state had a role in organizing the entire system of government, and even the rule of law and democracy. To give the status of a major professional categories mean basically consolidating a democratic system. Strange is that the politics of us did not want or was not able to understand the importance of status and administrative body that Law. 188/1999 was rather the result of external pressures (the EU accession negotiations).

Done hastily and without wider consultation with civil society and professional organizations of the beneficiaries, the law has evolved winding up today changed over changes largely through emergency ordinances and although under the Constitution is the organic law and not may be amended by simple ordinance.

Moreover, the Statute was not completed at the outset with a single wage bill for civil servants in what he did, as every year, in order to pay the salaries of civil servants, the Government to issue emergency ordinances. Currently, the Law no. 284/2010 on the unitary pay staff paid from public funds[8], regulates this matter but every year it issued a

[5] Max Weber, Policy vocation and profession, Pub.. Anima, Bucharest, 1992.
[6] Raymond Aron, *Les etapes de la pensee sociologique*, Gallimard, Biblioteque des Sciences Humaines, 1967, p. 40.
[7] Luminița-Gabriela Popescu, *Public Policy*, Pub. Economică, Bucharest, 2005
[8] Published in the Official Gazette of Romania, Part I, nr. 877 din 28 decembrie 2010

decree law does not apply, the latter O.U.G. no. 84 of 12 December 2012 on staff salaries in the public sector in 2013, extension of terms of legislation and fiscal measures[9].

Status of civil servants has often become the object of contention between political parties. First they had violated were even rulers came to power after the elections in the winter of 2000. They do not take into account the fact that the employment and dismissal of public office had a strictly regulated by law and switched to treatment during the same year officials who supported the certification examinations on post. In place of those removed from office or forced to resign were brought political party members or customers. Yes, in some cases, was used to test civil servants, although the law does not provide for this method of assessment (is eloquent example of the Ministry of Civil Service, now the Ministry of Public Administration where the 88 officials, only 48 have passed, the rest being released from function)[10].

Article 4 of the law, at the time, specifying some of the principles underlying public function:

- Ensure prompt and effective free of prejudice, corruption, abuse of power and political pressures of all activities carried out by civil servants;
- Selection of civil servants to make only the criterion of competence;
- Stability of civil servants

Case management civil servants

Category management civil servants has always been the main subject of political change. It is the next civil servants: general manager and deputy general manager of the unit autonomous administrative authorities, ministries and other specialized bodies of the central government, and their related specific public functions, director and deputy director of the unit autonomous administrative authorities, the ministries and other bodies of central government, and their related specific public functions, secretary of the administrative-territorial executive director and deputy executive director of decentralized public services of ministries and other bodies of administration central public administrative units of the institution of the prefect of the apparatus of local authorities and public institutions subordinated to them, as well as their related specific public functions, chief service and its equivalent in specific public functions; head office and specific public functions similar to it.

Although, all these functions are adequately protected by the state government in the sense that their occupation is not on political, reality has shown that the law did not impress the government, so they started a real game positions, instead of bringing dismissed or have resigned their political clients. What happened to the principles of stability, competence and assurance in the face of political pressure? Have been grossly violated.

The motivation was simple and childish government, namely that they can not govern people put others. Even if you break a law had to bring their people. It is argued that the law was not adopted by them, and therefore do not comply.

But the same thing happened thereafter. No new rulers have done otherwise. Could not apply the old government program with civil powers, they said, as if this program would not materialize into laws that everyone is then obliged to observe or enforce. Including officials blamed.

[9] Published in the Official Gazette of Romania, Part I, nr. 845 din 13 decembrie 2012

[10] Cristian Ghinea, *The politicization of the administration. Perseverance in error*, în Public Policy. Theory and Practice, Alina Mungiu Pippidi şi Sorin Ioniță(coordonatori), Pub. Polirom, Bucharest, 2002, pp.167-169

If public officials

A category analysis requires public officials. It appeared with Law no. 161/2003 on measures to ensure transparency in the exercise of public dignities, public functions and business environment, the prevention and punishment of corruption[11], basically a package easily passed by Parliament at the time for EU negotiations were deadlocked. European Commission officials in the country report Romania criticized for how slow the adoption of reforms. Referring were economic interest groups without a clear status, incompatibilities the exercise of public dignities, the eternal problem of corruption and politicization of the administration.

Just to delineate public political functions, Law no. 161/2003 with amendments to the Statute of civil servants has created this new category of civil, political, highly skilled professional. The functions covered were the most exposed to wave power changes basically top positions in central government: Secretary General of Government and Deputy Secretary General of the Government, secretary general of ministries and other bodies of central government, prefect, secretary general Deputy ministries and other bodies of central government, deputy prefect government inspector.

The solution to be adopted for each time in the country reports, Romania remains weak in terms of internal affairs and justice.

Prefects and sub-prefects became Law no. 161/2003, and later by his own organization and functioning Law no. 340/2004 regarding the prefect and the prefect institution[12], political officials, senior civil servants. This means that entry into the new body of prefects and sub-prefects to do after taking a national competition according article 18 of Law no. 188/1999, republished[13].

However, Law no. 340/2004 entered into force although in 2004, made an exception in that prefects and deputy prefects are senior civil servants from barely, 1 January 2006. In this situation the political power instituted in early 2005 and named in these posts unfettered party members in the area, who do not fulfill largely provided by law for these positions. Moreover, before the deadline of 1 January 2006, the National Agency of Civil Servants in place to organize a national competition for entry into the body of prefects and sub-prefects, as was natural, organized a certification exam on the post for those already occupying these functions after they previously attended a training course at the National Institute of Directors. As we realize how serious was this exam can only remember that all those who had passed the exam.

There was thus violated the fundamental principle of civil service recruitment namely competence criteria? And yet again?

3. Why we choose?

I saw that the new regulations and civil organization was the result of external pressures and not a coherent policy, internal realities based on similar examples in the West, to create an appropriate model for public office.

Democratic systems are the optimal organizational model which assumes a public function freely chosen political power and an administrative autonomous, efficient, stable which

[11] Published in the Official Gazette of Romania, Part I, nr.279/21 aprilie 2003
[12] Republished in the Official Gazette of Romania, Part I, nr. 225 din 24 martie 2008
[13] Republished in the Official Gazette of Romania, Part I, nr. 365/29 mai 2007

responds to commands that power. There are in practice these democrats desire to protect civil servant, and a danger of its island[14]. It is important not to fall into extremes. A total administration subjected to political power may lead to malfunctioning of the system, and an excessive protection of the civil result in extreme jams in implementing political decisions.

Let's see two opposing models of organizing public function, namely the UK and USA.

Britain drew a clear line between politics and administration. Each new government called less than 400 officials and below this level professional administration that does not touch anyone. Custom has established that the change relates to a number of well-determined positions. Instead, the U.S., the arrival of "administration" Bush or Clinton, for example, led to reconfirm or replacement of 6,000 officers.

Certainly the two systems mentioned are not the only ones. European states generally choose to limit the appointment of officials in public administration policies and strengthening professional body of neutral political career.

As regards EU law does not require Member States mentioned terms, a specific model for the simple reason that no such thing exists. Each state chooses its own system of establishing political-administrative boundary.

If we analyze what happens to us, we find that in practice we approach the American and British model legislation.

In Romania, the law specified in the function will call the new government. Officials, be they ministers, state secretaries and undersecretaries of state or even mayors are allowed to organize their offices where they can engage policy officials. But in practice the changes do not stop just at the offices of officials, but sometimes down to executive officers and even staff, drivers, security guards and janitors.

What good is the law if all a break? She has her point? It would be easier to police said all the posts, including the heads of decentralized public services so that a party or coalition got the power to be able to apply unhindered program?

The American model is the one that fits the post-revolutionary practice. All governments that came to power had a strong appetite for change people in some public office, which is the case in pre-Communist period. They are well-known characters from Caragiale's work.

We can compare with the British tradition that has long had an elite corps officials. With us there is no such thing.

4. A compromise solution

We have seen that our model of Directors is governed by strict law that virtually ignored. And then the question arises, why do not we change the law, adapting it to reality? The advantages seem clear. Power will not break the law, and any violations will be easier to control. Therefore, we must admit that the power politicize the administration, it happened all over the world. But this politicization is better to be controlled so as to be a balance and a normal state conducive to progress.

This is why we believe that the new category of public officials should be reconsidered. A minister can not implement public policies or a Cabinet secretary-general of the ministry who engages in projects. Given such a situation one can think that at the central government, the ministries or other bodies of central government, Secretaries General, Deputy Secretary

[14] Cristian Ghinea, *op.cit.*, pp. 158-160

General, no longer civil servants. At the level of this change would address the prefects, sub-prefects and heads and deputies of decentralized public services.

The recall should be specialist party / political alliance comes to power. Politicians can no longer blame their political and administrative structure for failure. Of course the question arises, if you change all of them, there will not be destabilizing? The solution is to promote the practice offers versatility of lower-ranking officials in the institution who are adept policies pursued by the new government and get help or support from it.

Reality has shown that the new government after these seats become vacant, shall endeavor to organize competitions by the National Agency of Civil Servants to legitimize those brought to these functions which deals with interim.

Disagreement between law and practice does nothing but create major disturbances in administration and a bad example on offense.

The solution should not necessarily lead us to the idea that we have in these important functions inexperienced politicians. If these rules should be clear and universally recognized then would join parties and career civil servants who will be interested to come to the party, which otherwise happens in practice is secret. With the change of power each of them will know very clearly what position you occupy. Additionally it can suspend from the public because the law allows. There will then be no social problems who have no job.

The politicization of public administration in Romania is a phenomenon that occurs anyway, it is important that it be adapted to Romanian realities, and the law governing the limit between politics and administration to contribute to the stability of the system, not its dysfunction.

The advantages of establishing the law limits the politicization of public administration may be:

- Public policy aiming to control the process of politicization of public administration by establishing a clear boundary between public officials and political officials, the administrative body will lead to stability, development and progress;
- A fact that government politicize against current law, it is normal for the rule of law and democracy, it generates instability, chaos and inefficiency in the administration of the entire administrative system to provide quality public services citizens;
- An important role in solving this problem would be to play and trade unions of civil servants and civil society. The political class should be drawn to adopt this policy because it could be great. Basically, while each political party will be able to create a body of specialists in each area and will not have problems taking power in seeking professionals to fill certain positions.

We do not think people will be affected by the public. On the contrary. Benefits are primarily for society. A dedicated corps of civil servants neutral and stable will increase the quality of public services for the citizen. If the system is stable are no prerequisites for it to develop and adapt more easily to new.

Beneficiaries are therefore public servants who will enjoy stability, can aspire to a career and a consistent earnings will diminish motivation by corruption. A person who is aware that a career will help unblemished professional affirmation is harder to corrupt.

At the opposite pole, now, the person who occupies a position on political criteria and is aware that the change of power will lose this function. Of course such an official is not motivated and concerned about the quality of his work.

Policy implementation does not involve special mentioned. A problem is, however, unclear status would sometimes political officials for the period when no longer in power and

go into opposition. Of course, their number being higher risks are many of them remain unemployed. A solution could be to recruit civil servants and policy among public function relationships interruption for the period when they hold political office. This is provided for by law, and would be a solution. There is also the possibility of their activation, during the opposition party that was in government, NGOs in the field, in which the experts they could help improve the governance of their position as representatives of civil society. In conclusion, there would be major changes mentioned. Basically audience would not feel in any way adopting this policy. For changes mentioned bureaucracy could prove beneficial.

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RECESSION AND DEPENDENCE IN SPAIN. SPECIAL REFERENCE TO THE ELDERLY AND CHILDREN

Mª Encarnación Gil PÉREZ*

1. Introduction

The financial and economic recession that is hitting the member countries of the European economic community has been especially hard on the most vulnerable groups of the system, such as people who require special attention because of their level of dependency, as well as their carers. I am referring especially to the elderly and children. In this study we will make special reference to these particularly vulnerable groups.

2. Dependents and the elderly.

In recent years the Spanish population, as in the rest of Europe, due to a result of low birth rate, improvement in living conditions and health and social progress, is increasingly leading to a progressive aging population.

Proof of this is the increase in the ratio of people over 65 in the total population. According to statistics published by the National Statistics Institute (INE), in 2012 there were 8.2 million people over 64 registered in Spain, in a population of 42 million, which represents 17.4 percent of the total population. Likewise, the number of registered people over 79 amounts to 2.5 million, representing 5.3 percent of the total population. If we consider this increase to be the real trend, the INE has indicated a forecast for the year 2052, with 37 percent of the population over 64 and about 16 percent over 79.

If we add the decreasing birth rate, emigration of young people looking for work abroad and the reduction in immigration until now, it leads us to conclude that the aging population will increase in the coming years.

Therefore, one of the main challenges for any social and democratic state of law is to address this situation through social benefits, pensions and healthcare, ensuring a dignified old age and quality of life.

However, the current situation is far from achieving these goals, as the recession in which we find ourselves immersed and the policies of making cuts that have been carried out in recent years have a special impact on the elderly.

This statement is supported by the poverty risk indicator that has affected the entire population including, in particular, the poverty rate for people over 65 is around 17 percent in 2012.

To this we must add the data provided by the Survey of Homeless People from the INE, which states that the number of homeless people over 65 has grown by 45 percent in the past seven years, particularly in 2012 when nearly 900 people were in this situation.

Elderly people's pensions, while being modest, are the backbone of many families as a result of job loss and/or housing and many people and/or families return to their parents'

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house and care in order to survive, a fact that increases the already difficult situation of the elderly. In fact, in the third quarter of 2012, 26 percent of households have a retired person as supporting and in many cases sustaining the family unit.

In addition, we must consider the increase in current spending on household amenities such as electricity, gas and water, among others. All of this expenditure is covered by the average pensions of around 945.52€ per month in 2012, according to the data published by the National Institute of Social Security. Specifically, a third of pensions did not exceed 700€ in 2012.

In this economic climate, the need for a strong social state is greater than ever in order to protect vulnerable members of society through social policies that meet the basic needs of the population. However, now the opposite is happening. It is favouring cutbacks that do nothing but cause greater reductions to the state required coverage and structure of social protection. In this way, the management of social protection outside the state infrastructure is being transferred to the private sector.

The problem increases if we consider that social protection expenditure in the last decade has been below the growth of the rest of Europe, which means that the social protection cover at the time of carrying out the cuts was already at a disadvantage compared to neighbouring countries. Specifically Spanish social spending is below the European average, below by 13 percent.

In 2012, spending in Spain on these policies represented 8.4 percent of the GDP, compared to 11 percent that was recorded in all the 27 countries of the European Union.

The cuts are located mainly in the field of health, pensions and dependency. This situation impedes benefiting from basic rights outlined in the Constitution, such as public health, social security and the right to a decent lifestyle, withdrawing or reducing them.

Regarding pensions, the right to bring them into line has been suspended due to the RDL 28/2012, 30th November, with measures to consolidate and guarantee the social security system, affecting 9 million pensioners taking into account that 70 percent receive less than 1.000 € a month.

All this coupled with the increased cost of living, basic goods and higher indirect taxes seriously affect the economic capacity of pensioners.

The cuts in health do not only affect the health services but also the rising cost of medical treatments since in some regions the personal contribution has been introduced or the so called 1 euro prescription, which has been temporarily suspended by the Constitutional Court in the region of Madrid until a ruling is made regarding the matter.

The health reform of urgent measures to ensure the sustainability of the National Health system and improve the quality and safety of their performance, adopts measures which involve a move away from the public and universal health model to privatizing some of its services.

To this we must add the negative effects of the RD 20/2012 13th June, with measures to ensure fiscal stability and the promotion of competitiveness, which leaves part of the Dependency Law excluded by cutting benefits and collective services for the dependant, once again introducing personal contribution measures, rates or family resources, with the logical consequences of the exclusion of a significant number of dependent people without sufficient financial resources.

This lack of sufficient Budget designated to social assistance continues in the line of action of the legislatures as in the general state budget for 2013, 290 million euros were cut

in terms of dependence which reduces the commitment of co-financing of the autonomous regions through cooperation agreements, established in the Law 39/2006, 14th December.

The topic of co-payments in relation to dependency is between 10 and 65 per cent of the price of the services if they are carried out in the family home. If it is in nursing homes, the price can increase by up to 90 per cent of the dependent person's income.

With the reform introduced by the Royal Decree 20/2012, of July 14, the classification of dependency decreases to three degrees, eliminating the levels, and with them, the people susceptible to be benefited from this law. In addition, the incorporation of persons in a moderate dependency situation is suspended until 2015, and the quantity of the benefits for caring in the family environment decreases by 15 per cent. This creates an added problem to a difficult situation, in the background of a recession and with a high unemployment and poverty rate. To this, we have to add the measure of no Social Security contributions for non-professional carers, so they are the ones who have to cope with the payment of the Social Security fees themselves, specifically concerning female workers if we take into consideration that the caring sector is especially dominated by females. In fact, the great improvement of the law of assistance to persons in dependency situation was to provide clarity to a collective that was performing an unacknowledged job, with the consequent legal defenselessness. This reform stops, therefore, the legal recognition of these women's work and it supports again its invisibility.

In conclusion, the elderly's quality of life is decreasing due to all the cut backs which make it impossible to provide a dignified service if there is a lack of economic resources. It also eliminates a work sector for those who have dedicated themselves to the professional care of persons in dependency situation. Not forgetting the importance, previously pointed out, of the extremely prominent role of the elderly as a support, sometimes the only one, in a lot of Spanish families.

3. Children and their situation in the recession.

Another collective that we must not forget is children, victims of the recession in which we are immersed.

Currently child poverty is not an isolated phenomena restricted to so called Third World Countries, quite the contrary, in countries considered to be developed there is a higher rate of children living in poverty which is closely related to the personal situation of the people they depend on, in particular the situations of job insecurity, low salaries and the high rate of unemployment. This situation is also incremented by the lack of action from the Public Administration to this reality as it leaves this collective unprotected, reducing the problem to a private and personal situation, or in the best case scenario, managed by a non-governmental organization. According to the information provided by UNICEF, child poverty in Spain has not stopped growing since 2008, a result of the economic recession in recent times.

The infant group is hidden behind the dramatic situations of their parents or guardians, who are unemployed and often with no benefits.

If we compare the situation of children to the rest of European countries we can see that Spain holds third place based on the highest child poverty rate in the European Union, behind Romania and Bulgaria.

Chronic child poverty is around 17 per cent, almost six points more than in 2007. The data indicates that between 2005 and 2010, child poverty doubled, from 2007. With this information, we can only assume that the 2010 rates and onwards are equally negative and

even higher, showing the dramatic situation of many households where children share the family environment.

Children therefore, suffer the collateral damage of a recession which they have not caused, enduring the most devastating effects. The job market and the productive model that promotes the increasing trend for temporary contracts, job insecurity, low salaries, redundancy and unemployment, that in Spain has reached its historic figure of 27 per cent, directly affects children in a negative way, in so far as it affects their parents and guardians and therefore everything that surrounds their daily lives.

In our current situation, there are not any specific policies to protect children, which is conducive to this situation which they are having to endure.

In fact, according to the survey's statistics on living conditions, the risk of poverty for those minors under the age of 16 is 27 percent, followed by those above the age of 65. In short, vulnerability and the weakest groups by age are derived from this very poverty.

Equally, the poverty rate is higher amongst single parent families, which is reflected in the results of the survey on living conditions, published by the National Statistic Institute 2012. If we add to this situation the lack of social protection mechanisms for children, we will find ourselves to be in a very difficult situation. The figures support this notion; the poverty risk in single parent homes consisting of one adult and one child or more dependents is an astonishing 52 percent. Similarly, the survey has revealed that for the amount of single parent families where an adult is responsible for one or two dependents and is having difficulty making ends meet till the end of the month has gone up by 44 percent.

Another significant piece of information to keep in mind for those single parent households is that they are mostly run by women who are socially vulnerable. For this very reason, we need to introduce effective employment policies to make their entry into the working world.

These types of families make up the highest proportion of those either unable to afford meat or fish at least once every two days, or can they afford to go on holiday for at least one week a year; or they cannot face everyday costs; or have been late on payments for their rent or utility bills.

These challenges go hand in hand with poor living conditions. For example, according to the figures, those living in a household where there is one adult responsible for one or two children are often the very households, who live in noisy, polluted areas. Moreover, there are frequently issues surrounding vandalism and delinquency in these neighbourhoods.

We should also point out that our social welfare expenditure is lower than the European average. The figures in the 2013 State finances review are not indicating any sort of improvement either. In fact it is the complete opposite; the spending cuts affect those in our target study group in a special way. All the new proposals relating to the funding of social services, education and health are suffering, especially given the implications of the current cuts. In short, this will imply lowered quality and funding to these particular services and the increase in the gap between those above and below the poverty threshold, along with those at the bottom, their dependents in their care.

To sum up, following our current path, our country's considerably reduced expenditure on social services which affect children in a direct way are: childcare and family guidance services, pre-school and primary education, secondary education and higher education, social services, grants and financial aid for students.

Education is a core element of achieving absolute equality. If children are not given the same opportunities, the long term effect will be an increase in unqualified adults without an education facing a greater hurdle when they try to enter the working world to find a stable job.

Several aspects of the current government's spending policy are conducive to this growing poverty spiral; cutting University grants, closing down rural schools, funding for school canteens, reduced school transport, a greater pupil or student to teacher ratio, reducing support staff who tend to specific needs in learning and teaching, a reduction in subsidised extracurricular activities and in textbooks. The repercussions for those minors hit by these cuts are at risk of social segregation and are often from low income families.

A society without an Education or with a precarious educational system is a society doomed to failure, inequality, violence or poverty and will have difficulty growing or progressing. These knock on effects among many others will be ever more evident in the near and upcoming future. Equally, the lack of and reduction in social services highlight this process given that these services detect and tend to examples of inequality and act in a preventative way. They do this via social and educational integration programmes for those socially alienated children and families, whether they are in that situation for cultural or economical grounds.

Impoverished families are especially affected by the cuts in the healthcare system seeing that there is no doubt that the system has deteriorated and that the solution would be privatising the current system. This would limit access to all those who simply could not afford it. A clear group of victims of this change would be those minors who are part of these very nuclear families we have been focussing on.

In addition, this situation also hits immigrants who have faced difficulties making their immigrant status official, because in certain autonomous provinces in Spain the health card allowing access to the public healthcare system has been abolished. Even though it is true that minors are not affected by this move, it does affect their families. This is by no means a problem on a small scale when we consider that approximately half a million people are currently in this unenviable situation,

The tax policy has also failed to generate any improvement in our current situation given that income sources have been reduced firstly by eradicating certain taxes such as the inheritance tax or the reduction in estate taxes for higher rents. Additionally, the decrease in corporation taxes or the reduction in company contributions has also impeded a favourable tax policy to those families below the poverty threshold.

All of these measures undeniably lead us to a large inequality between those families which are below and above the poverty threshold. If the current government continues with their policy of making cuts and austerity measures in social expenditure without introducing public policies to make up for these deficiencies and a tax system based on solidarity and growth then the near and distant future will be a subject of great concern. The most vulnerable groups will be ever more disadvantaged and suffer from the ever growing inequality.

In conclusion, it is time to rethink the type of society we want to build and the future we wish to live in. We know that under the current austerity package and according to the data studied, the situation is becoming more and more unsustainable. Moreover, there are no indications for improvement in the near or distant future. Therefore, it is time to bring stability back to make up for an unsustainable setting by increasing expenditure, investing in public services and passing economic policies which will help us to get out of the current economic disarray. We should favour a system of less disparity and of a better distribution of wealth with a progressive tax system. Our objective is to guarantee that our Constitution's principles are adhered to. To establish a society in which the right to a dignified life is recognised, strengthening the necessary public and social mechanisms to make this vision a reality.

GENERAL CONSIDERATIONS OF THE GOVERNMENT, DISFUNCTIONS AND PARTICULARITIES, ON NATIONAL AND EUROPEAN SPACE

Maria Angela URECHE[1]

Abstract: *The Government holds an especially important place among State authorities. National and European level have revealed some elements that you customize, but also some others which can generate profound failures, with far-reaching effects on both the State and of the governed. The fact that today they relate not only to your space but also to European and global context in which manifests itself, lead us to reconsider the Government's authority and to analyze the possible solutions for identifying disruption and decrease their effect.*

Keywords: *government, authority, particularities, law.*

The Government is today the most reliable component of any public administrative system. The Government has the task to realize the nation's politics, being the initiator, the contractor and the modeler of social policy measures, economic recovery, keeping inflation under control and stabilize the economy. He is responsible for public order, national defense, or relations of State with other States. The basic element of the central administrative apparatus is the Government, even if we are talking about centralized States as France, Ireland, Luxembourg, United Kingdom, Greece, or federations like Germany[2].

In this way, the truth of the present period is that the center of gravity falls on the Government. That explains the presence in the democratic world of protest movements, rallies, strikes and demonstrations which have as their object the fight against governmental measures. Not a few times, such protests have as an effect the resignation of Ministers or Government as a whole. Examples concerning this are numerous and relevant, especially now, especially now, in 2013, as a continuation of what has been in 2012, complaints at European level are multiple and have a deep substrate powered by economic and political difficulties which no longer can be properly managed by authorities.

Organization and functioning of public authorities control and balance, its evolution has been described as being devious and influenced by the period in which it was expressed. The fact is that the history of constitutionalism in the European countries has shown that where the separation of powers was applied and rigorously respected, we are witnessing of an unprecedented development of human society.

The major factor that depends on the way it is managed the State's entire activity is linked directly and decisively to the type of organization and functioning of the public authorities, whether we are referring to the central or local authorities, as well as collaboration and reciprocal control which are established between them.

History never repeats itself because the political factors, economic and cultural that recompensed are not in the same way and because the main political figures enjoy certain independence. However, we can draw some lessons from the recent comparative history.

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[2] Pasquino Gianfranco, *Curs de ştiinţă politică*, Publishing house Institutul European, Iaşi, 2002, pp.32.

Where it is found that is part of the omnipotence of the Parliament, the Government or the President of the State, does not constitute anything other than production of slippage from the functioning of the State in question.

The Constitution of our country takes over, like other constitutions in central and Eastern Europe, two-tier government pattern. President-elect of the nation lies directly in front of a cabinet Chief, validated by the Parliament. Tension arises from the Executive on the way, the repositioning of parliamentary groups and political parties in relation to the President. Although the latter is viewed as being situated in the Centre of public life, he lacks effective levers that can offer a removal from the succession of the constitutional crisis that may arise from tension in relations with the Government in the performance of their duties. Romania from this point of view is unfortunately an example not really positive, this is because often the conflict between the President and the premier has produced negative effects on those governed. It was felt these during Tariceanu's lead, but also we met the same situation under the government of Ponta. These states full of tension which are not benefices to government's act, being rather the results of personal egos, of strong characters who forget their role and position in the State. At this presidential and governmental level, there are not allowed conflicts of personal nature, especially when we talk about the good of the nation, in difficulty moments from an economical and social point of view, both nationally and internationally.

From the point of view of the way in which the role of the Government is the political and State constitutions of various countries, highlights the countries that do not form a specific qualification, the role of the Government being determined as a result of systematic interpretation of the Constitution and countries that make a specific qualification[3]. For example, in the case of Spain and Portugal, it is assumed the role of the Executive under the three palettes, political, legislative and administrative framework, as in the case of France, two political and administrative aspects, with Greece political role is exclusively for executive role in Norway are exclusively administrative[4].

As a general rule, the structure of Central Administration is subject to the principles of specialization, which is at the basis of operation of the ministries, as the main entity of the Governments. The distribution of functions between the ministries responsible for certain objectives. Thus, in a parliamentary system, the number of ministries and their responsibilities will depend to a large extent by policymakers. Weak Governments must contain a large number of ministerial portfolios in order to have the parliamentary majority. Strong Governments, featuring a much more homogeneous, can reduce the number of ministries, but even in this situation, political conflicts are not neglected.

There are, of course, a variety of formulas with regard to how it is set up and operated by the Government, on the understanding that the existence of levels of the hierarchy between the members of the Government, i.e. organizational structures, like cabinet, Executive Office, permanent Office etc... As a general rule, it can be said that the existence of hierarchical levels, i.e. of intermediate functions between the Prime Minister and Cabinet members, leads to the existence of an organ of the Government, composed of the Prime Minister, Deputy Prime Ministers and some Ministers in the manner prescribed by the Constitution.

[3] Tofan Dana Apostol, *Instituții administrative europene*, Publishing house CH BECK, Bucharest, 2006, pp.19.
[4] Ionescu Cristian, *Drept constitutional Comparat*, Publishing house CH BECK, Bucharest, 2008, pp.153.

From the juridical point of view, he outlined the principle that those Governments that are made up of the Prime Minister and members, so no hierarchical level are called intermediate Governments with simple structure, an organ, and those containing such a ranking is called hierarchical structure, Heads and two organ. Most Constitutions deals with a simple structure, for example Italy, Sweden, Denmark and others cover structure of hierarchical, as is the case of Spain or Greece[5].

In Romania, the Government is provided by presidential decree after the vote of confidence guaranteed by the Parliament. The term of Office is four years, but may be terminated ahead of schedule, and, through the adoption of a motion of no confidence or if the Prime Minister loses the status of Member of the Government shall be made by presidential decree after the vote of confidence granted by the Parliament. The term of Office is four years, but may be terminated ahead of schedule, and, through the adoption of a motion of no confidence or if the Prime Minister loses its membership of the Government. A recent, I witnessed the dismissal of the Ungureanu Government by adopting a motion of censure by the Parliament of Romania, which resulted in the investment of a new Government, the Ponta Government in may 2012, having regard to all the constitutional provisions in this way.

In terms of comparison, the appointment of the head of Government of the States where we have, investing the Government is made by the Parliament, after the appointment of the Prime Minister by the head of State, e.g. Denmark, Greece, Italy[6]. In Austria, France, Luxembourg, United Kingdom and the Netherlands, however, the Prime Minister and the Government shall be appointed by the President without the need for a vote of confidence in Parliament. Freedom of choice of the head of State in France is appreciable and freedom in the United Kingdom is practically non-existent. Of course, there are also countries that have specific procedures of investiture. In Finland the Prime Minister is elected by Parliament and appointed by the President. In Spain, the candidate to the position of Prime Minister designated by agreement between the King and the President of the Congress of Deputies became Prime Minister after a vote of confidence in the Congress of Deputies and other members of the Government are appointed by the King on the proposal of the Prime Minister.

Romanian President appoints Prime Minister only after it has received a vote of confidence in Parliament, and not before. Note also the ability of the President to dissolve Parliament if he does not give a vote of confidence after the completion of the legal proceedings. As regards the responsibility of the Government, it is responsible before Parliament, a situation applicable and Romania, which you can remove by a motion of motion of censure.

With reference to the compatibility of the parliamentary government function, the situation is different. We have countries where membership is conditioned by the quality of the Government of the United Kingdom, Ireland[7]. We have countries where membership of Government is incompatible with the parliamentarian, as well as Austria, France, Luxembourg, Sweden. And we of course States that the two qualities are not incompatible, such as Italy, Belgium, Denmark, Netherlands, Spain and Romania.

As regards the composition of the Government, everywhere there is a Prime Minister and Ministers. As for the Ministers without portfolios they are found in many European

[5] Călinoiu, Constanța Duculescu Victor, Duculescu Georgeta, *Drept Constituțional Comparat*, ediția a IV a, Publishing house Lumina Lex, Bucharest, 2007, pp.126.
[6] Arendt Lijphart, *Modele ale democratiei- Forme de guvernare şi funcționare în treizeci şi şase de țări*, Publishing house Polirom, Iaşi, 2000, pp.39.
[7] Armenia Androniceanu, Gabriela Stanciulescu, *Sisteme europene de administrație publică*, Publishing house Uranus, Bucharest, 2006, pp.65.

Governments, so that they do not constitute an exception in the Romanian Government. In all countries the role and power of the Prime Minister will vary from case to case. Some Prime Ministers are responsible only before Parliaments, others have a responsibility in addition and to the Chief of State, which limits their power. In Romania the Prime Minister is responsible only before Parliament which gives the position of the central figure of the national policy. Of course, the events that take place in public life, often may be questioning whether, from the point of view of practical things really are for the purposes of the above theory. Relatively frequent modification of the number of ministries and their leaders would have found extremely unpleasant encounters in many European countries, which reflects dynamic adaptation to reality or an attempt to raise the efficiency of public services, or are the result of error or of some partisan pressures.

One of the most important issues facing the democratic political regimes currently is the formation and functioning of a Government which is supported by a parliamentary majority. When the election results of the different political parties are very close to that ideology and no majority obtains an absolute majority of 50 percent plus one of the votes cast, there are inevitable difficulties in the shaping of a Government formula which enjoy the confidence of Parliament in order to implement the program of Government. To give a few examples later, Germany and Czech Republic were faced with this situation in 2006, Belgium in 2007 and Greece in 2012. To get out of this impasse was needed in these cases of lengthy negotiations between political parties, during which the Government was in Office until elections remained in power and did not have the legitimacy necessary to exercise their constitutional powers. These negotiations had sometimes resulted in the formation of broad coalition Governments, but the risk of this type of Government is the strengthening of extremist parties, since only they will remain in opposition. In other cases, this deadlock occurs during the term of Parliament, which results in a Government which enjoys parliamentary majority but are governed on the basis of an artificial majorities made up equally of parties that declares a formal support and lack of confidence in the party/parties to the Government. Such solution makes parties declared to be in opposition to benefit from government action almost as if it had been in power, and the consequence is the lack of transparency of governmental action.

The Romanian Constitution[8], regulates the incompatibilities of function of Government in article 105. According to this provision, the function of a member of Government is incompatible with the exercise of public authority functions, with the exception of Deputy or senator. Based on the finding that a member of the Government who is at the same time and is part of the default member of both the legislative and executive branches, it may be concluded that the current rule of compatibility between the two functions, violate the principle of separation of powers, constitutional guarantee. In the case of draft laws initiated by the Government, members of the Government who are members or senators and may participate in the vote, thus becoming, by analogy, the judges in their own cause. Such a solution would benefit this and another, beyond the implementation of the principle of separation of powers and of clarifying the nature of the political regime.

[8] Constantinescu Mihai, Iorgovan Antonie, Muraru Ioan, Tănăsescu Elena Simina, *Constituția României revizuită – comentarii şi explicații*, Bucureşti, Publishing house All Beck, 2004 pp. 171.

At the moment, there are two types of procedure[9]: parliamentary immunity for members of Parliament to one that does not have membership of Government and one that the members of the Parliament and the latter quality. In the first case, applies only to the provisions of art.72 with regard to parliamentary immunity. In the second case, an additional condition is imposed: the prosecution[10] is requested by the Chamber of Deputies, the Senate and the President of Romania according to art.109, para.2, condition that was interpreted by the Constitutional Court in the sense that it is not only necessary for the prosecution to the President, needed and the consent of the Board of the Member Government concerned by the prosecution. Ministers parliamentary are so far a enormous immunity in relation to the role and limits of the institution of the parliamentary constitutional immunity. Imposing the rule of incompatibility between the functions of a member of Government and a Member of Parliament would make the procedure described by art.109, para.2 to apply exclusively to members of the Government, and that described by art.72, which corresponds to the majority of constitutional democracies, only members of Parliament[11].

In conclusion, the Government, as a top executive authority must be able to achieve its escrow of the functions with professionalism. There is little work if we think that we referenced:

- the strategy to ensure development of the strategy for the implementation of the program of the Government;
- the regulator, which provides normative and institutional development necessary to achieve strategic objectives, to the position of State program of the Government;
- ensuring the administration of public and private property of the State's well as the management of services for which the State is responsible;
- to the position of representation, which shall, on behalf of the Romanian Government, representation of internally and externally, and
- to the position of State authority, which shall ensure the monitoring and supervision of the application and observance of regulations in the field of defense public order and national security, as well as in economic and social spheres and of the functioning of the institutions and bodies which operate under the control of, or under the authority of the Government.

The particularities which are characterizing the Government in various countries of Europe resides precisely on account of the fact that we speak of Genesis, developments and the different national legislations, traditions and ways of thinking, just different levels of civilization. We cannot relate only to the features but we must look the Government as the national authority for interacting with other national and international authorities. By the way, it performs functions determine the fundamental existence of those, but defines are managing even the existence of the State itself, including the European environment in which it is manifested. Thus, the identification is overwhelmingly malfunctions and reducing adverse effects caused by removal of all of them.

[9] See decision No. 270 of March 10, 2008 of the CCR claims made by the President of the Chamber of Deputies and President of the Senate concerning the existence of a conflict between the legal constitutional nature, the President of Romania, the Ministry of Justice and the public prosecutor's Office attached to the High Court of Cassation and justice, on the one hand, and the Romanian Parliament. on the other hand, as well as on the application of the higher magistrates Council concerning the legal nature of the constitutional conflict between the Public Ministry and the Romanian Parliament-Chamber of Deputies, published in Official Gazette No. 290 of 15.04.2008.

[10] Deaconu Ştefan., *Răspunderea penală a membrilor Guvernului*, in Revista Dreptul nr.1/2007, pp.13.

[11] See and Tofan Dana Apostol, *Angajarea răspunderii Guvernului*, in Revista de Drept Public, no.1/2003, p.11.

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LAW, ETHICAL AND EQUITABLE

Corina Ramona IONIȚĂ*

Abstract: *Both moral norms and legal standards expressed and protects the value of equity. Synthetic equity is the concept of right and justice, landmark Supreme axiological and moral law.Individual has a moral purpose, personal development of man as a social aim, characterized by the idea of social order. There is a sense of moral philosophical gathering behaviors, facts of life with their meanings specific to a given society, thus formed into social morals.*

Keywords: *moral norms, equity, social order.*

Both moral norms and legal standards expressed and protects the value of equity. Synthetic equity1 is the concept of right and justice, landmark Supreme axiological and moral law.

Right not intended to directly benefit, so as not moral aims directly at justice, but each of these regulatory systems are turning to the other, through equity. Equity is defined in objectivist accept, as a set of principles, external background and higher positive law and a subjective acceptance as an immanent concept of law, consubstantial with it.

Equity concept thinking is rooted in ancient Greek and Latin, especially the works of Aristotel and Cicero.

The Greeks have equity value of social justice, the purpose of which was to correct it, where was deficient.

From its origins, the idea of fairness was related to the idea of justice.

In Aristotelian conception, equity is a means of mitigating the rigor of strict law, which, by its nature, correct law to the extent that it proves insufficient, because they generally character. In the same view, fairness requires consideration of the specific features of the case to reach a conclusion is fair and correct application of justice.

Aristotel believes that fair and Equitable are identical, but give preference to the last, because the former can act and error.

This concept reduces the equity in a position to correct the law and thus limit its role in judicial application of law.

Nature of the equity is the correct law to the extent that it indicates insufficient, in the fullness of its general nature. In his,"Etica Nicomahică " Aristotel indicated as stiffness fair justice, law enforcement criteria, allowing to take equity in particular cases, tempered his harshness[2].

The Romans, the word aequitas has acquired a near right, considering that it is the art of good and justice.

For Cicero, equity was moral rule of Roman law, and in his time, there is a distinction between positive law as the last considered broader than the law as encompassing idea of justice and fairness. Cicero says that the law is not law without equity.

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[1] A se vedea, pe larg, termenul “Equité”, în Dictionnaire encyclopédique de théorie et de sociologie du droit, Deuxième édition corrigée et augmentée, L.G.D.J., 1993.

[2] Etica Nicomahică, Cartea a V-a, Cap. 10, Nr. 6.

In Rome, at the time of maximum rise of fairness, its main function was incomplete interpretation of the Law.

In medieval Christianity's moral conceptions substitute Roman and Greco-Roman perception of fairness is resumed, but much impoverished.

Fairness comes down to is placed in the same legal position to those who are in similar situations actually. Statements were not fixed by law so problematized or challenged, they are considered ipso jure as fair.

However, the question: "Do justice part of right or not?" Thoma d"Aquino[3] replies that "legal justice corresponds exactly equity" as how it is understood, it is part of the right or differs from it.

If the right legal means obedience to the law in letter and spirit, then it is part of legal justice.

If only the right means obedience to the rule of law, equity is no longer a part of legal justice, but justice, in the most general sense.

In objectivist sense, equity is intended to guide the development and application of law, and involves tighten links with natural law, justice and morality.

Starting from the premise that positive law is inspired by considerations of fairness, it is concluded that only when positive law loses its inner dynamics, the judge has the opportunity to refer to fairness, place it in the legal system.

Placing the optical objectivist, equity, outside positive law does not require opposition of the former with the latter, but confer a higher status in relation to positive law.

Viewed from the same perspective, equity is a real corpus of rules of conduct - and moral values that transcend positive law and are pre-existing to the judge's decision, and that fuel positive law, the moral commandments.

Fairness is characterized by a subjective optics, as part of the law that leaves revealed in the application of which allows the judge to humanize legal rule by taking into account the particular circumstances of the case for a custom solution, in each case. However, equity is perceived as an auxiliary organic law acting in subsisdiar, but in addition, for the purposes of the law fairer and better realize the general and abstract legal rules to particular cases.

Subjectivist conception of justice differs from objectivist conception, and that the judge does not have a body of unwritten rules, but there injunctions involves ethical and moral values.

Optical subjective operates almost intuitive notion, when referring to equity, or, as stated Francois Geny, regards it as "a kind of subconscious work ethics". Nowadays, English judge may refuse to apply a law issued by Parliament unless it is consistent with case law or violates Equity. Assertion stands in this country complementarity between law and equity, and quality source of law independent equity, arising under the jurisdiction of the Chancellor.

In comparison, there is still that civil law systems, equity, despite its appearance obsolete, becomes a double fundamental importance. First, the legal system, as such, to the extent that the concept of fairness makes the values by positive law and ensures that legal standard to the facts, the correlation between law and social dynamics.

Then, in an ethical concept of fairness, far from being obsolete, is seen as crucial because it provides moral rehabilitation humanities headquarters in positive law to allow you relativization of law and promoting human rights.

Nowadays, equity is considered as an objective of the law, making it appeal to legal solutions to temper the rigor and generality to avoid the consequences of unjust rule.

[3] Toma d'Aquino, Summa theologiae, Ed.Ştiinţifică, Bucureşti, 1997, p.229

Action equity principle for the legislature work and the work of interpretation and application of the law. The notion of fairness is complementary law as a particular case consider the specific circumstances of that case, so as to solve, according to moral requirements. Embraces the ideal of justice and the fairness.

Chaim Perelman[4] considered justified recourse to equity, against the law, the remedy that the judge may, if, rigorous application of the law, according to the rule of justice or just follow the precedent lead to unfair consequences. In this case, the author believes that the judge can avoid unfair consequences, reinterpreting the law by changing the conditions of its application, dissatisfied with the traditional interpretation and correct law - provided to substantiate its decision in order to avoid abuse - and away from the usual judicial practice.

Ch. Perelman concluded that it is an act of justice is not one that is defined by the proper application of rules but through proper application of fair rules.

However, it is emphasized that the moral ideal of justice including equity value, that man is able to understand their neighbors, to put themselves in the place of others, to feel the disadvantages, to help, in particular, seek to understand human community, appealing to dignity.

In connection with equity features also shows that, when perfect equality is impossible, because when she used to take into account two or more conflicting traits in some cases the reduction of inequality principle of fairness.[5]

Most important moral issues revolve around how life develops internalized standards on bad and good, as they formed the necessary self-control skills and the development of moral judgment.

Morality is a form of social consciousness, which reflects the overall concepts, ideas and principles which guide and regulate human conduct in personal relationships, in families, at work, in general, the relations in society.

Morality is a set of rules governing their behavior based on values such as: honesty, sincerity, responsibility, values that are widely shared within a community, internalized and imposed their own conscience. So remember that the rules of law and legal order is autonomous from moral rules and moral order. But this autonomy is relative, since moral influence right, giving moral character, necessarily.

Moral rule is a rule of conduct individual and voluntary, based on justice and equity; sanction is inside - regret, remorse or public opprobrium, marginalization, disrespect one who behaves unfairly, incorrectly.

Legal rule is a rule of social conduct, we must ensure order in society, it is punishable by restraint. Moral right and far from being excluded, make, good and fair are two facets of a higher principle.

Moral ideal of the common good and expressing principles of law and justice, often affecting the right. The obligation and duty food from relatives to help a person in danger is based on the moral duty of charity.

Natural obligation is moral duty, recognized by law.

Law and morality have, as shown by M. Djuvara,[6] common and distinctive elements.

Common elements is the fact that both categories:

a) are intended to express the idea of justice in society;

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[4] Ch. Perelman, Droit, morale et philosophie, Paris, 1968, p. 50 apud Sofia Popescu, "Concepții contemporane despre drept", Editura Academiei, Bucureşti, 1985, p. 168.

[5] A se vedea Marcela Pârvu, The Principles of Law. The Principle of Equity, în Romanian Review of Philosophy of Law and Social Philosophy, Nr. 4/2006, p. 116, 119, 124

[6] M. Djuvara, Teoria generală a dreptului, vol. II, Bucureşti, 1930, p. 568 şi urm.

b) addresses human behavior;

c) are based on the idea of obligation of individuals.

Distinctive elements are addressed moral individual intentions, these intentions exteriorization governing law.

Both legal norms and the moral are required, but their obligation is imposed in different ways.[7]

Object moral rule is different from the rule of law, as moral individuals dealing with debt, compared to their peers and to himself. Law contains rules neutral legal issues requiring statutory obligations.

Individual moral aims, as it tends to improve human rights. Social law aims to achieve social order. For this reason, it is said that morality is more stringent than the right.

The notion of moral includes moral conscience (beliefs, attitudes, values, ideals, norms, principles and moral relations). As a set of general rules of practical conduct personal, moral norms, wrote E. Speranţia "necessary conscience."[8] Failure results in moral conduct prescribed sanctions. These penalties vary as the social reaction to immoral behavior or moral conscience of the subject who understands and regrets his guilt. Social environment reacts to immoral acts by public opprobrium, contempt, marginalization, and the subject was aware may feel remorse, sorrow, etc.

In fact, between the moral and legal norms are closely connected, since:

a) they are part of the same group of subjects;

b) addresses human behavior;

c) are intended to express the idea of justice in society;

d) are based on the idea of obligation to the individual, viewed separately or as part of an organized social group. Moral norms can not be confused with the rules of law. Moral norms are usually written rules, they are not necessarily included in official acts, the product unorganized community.

Rules of law which were gradually separated from moral norms and customs, dress formalized and official from the work of state bodies. Moral compliance is not guaranteed by the government, but the action of social, public opinion, education, etc.

Individual has a moral purpose, personal development of man as a social aim, characterized by the idea of social order. There is a sense of moral philosophical gathering behaviors, facts of life with their meanings specific to a given society, thus formed into social morals.

Moral morality individual requests and incorporating social knowledge becomes a way to act individually.

According to online Romanian Explanatory Dictionary[9] (DEX - Online - Ro.ro) morality is a form of social consciousness which includes certain ideas, concepts, beliefs on norms of human behavior and the relations between them and to society.

Morality is the scientific discipline that deals with the rules of human behavior in society.

"A Moral - think Raymond Polin - is a set more or less coherent, sometimes just a conglomeration of traditions, the customs, the habits, the customs, manners of living, feelings and opinions received, the work accomplished. It results from the accumulation, sedimentation of work accomplished within the community, according to ethics actually lived."

[7] Sofia Popescu, Teoria generală a dreptului, Ed. Lumina Lex, 2000, pp.124-127.
[8] E. Speranţia, Introducere în filozofia dreptului, 1946, p. 254.
[9] Dicţionarul Explicativ Român, DEX – Online-Ro.ro

In morals, manners, rules, norms, explicit or not, are important for the values or purposes, require, with all the weight of the past conduct of obedience obedience. As you can see, right draws its being of human consciousness and social realities. He has developed and evolved as social life.[10]

I think we are accessing a moral conception has implications for the notion of citizenship. There may be a familiar conception of morality, which to some may seem obvious, but it certainly is not the same for everyone. Is what some philosophers called morality in the narrow sense.

In this case, morality is a system of constraints on human behavior, social acting to protect the interests of others, by controlling human inclinations to act in a way that would harm the interests of others (this is not a rigorous definition, but a way to shape an idea). There are other issues that may arise moral conception of others, but which are not captured in this story. When referring to moral narrowly, do not say anything about what should follow in life, how we should live, what kind of person to be not involved some clear constraints on harm others. Role morality is rather similar to the penal code, but its mode of operation is less formal: it is unclear encrypted so no official sanctions. We can say that there is, especially in the form of shared ideas, ideas that are part of the public discourse that is passed from generation to generation and which is mentioned on several occasions.

Moral education in language rules bring to the fore the fact that people are aware of the rules and follow them. She is less interested in the feelings, motivations. It is important that people do not behave violently. Morality, language rules, will try to prevent violent behavior by rules such as "do not be violent," a rule that is expected to be met, although sometimes people are tempted to be violent. A moral virtues using language would be concerned that people are not violent in the sense of not being inclined to be violent, a problem rather feelings and motivation, rather than action.

I believe that language has a certain priority rules, if we talk about morality in the narrow sense. This type of moral functioning in particular, influence, coercion sometimes human behavior.

People in a pluralistic society should agree that the different meanings of different moral implications, at least for the moral, in the sense in which we have referred, there is the phenomenon or social-legal system. Moral ideas there are in public speeches, including education, often in the form of rules (do not lie, keep your promises, do not take what is not yours, do not harm other people and so on) and should be unlikely that reference to such ideas did not mark a difference, at least sometimes in people's behavior, and therefore morality in this sense, is to some extent the same role as law.

Morality as an institution can not exist without consensus in society and can not be changed, without any consensus. But if, if there is legislation formal processes of change, according to a majority vote, there is no explicit process to determine changes in ethics. While there is some consensus on moral norms, they remain in force in the only way they can have power, when there is no consensus, respect for the rule tends to diminish or they are replaced by other rules.

If moral as it is now in a society requires that we should not do something, why should I listen to? Why would I give the dominant norms of respect / authority, whether they are social constructions admit of humanity (at least as expressed, designed and supported)?

[10]Irineu Ion Popa, Substanța Morală A Dreptului,Tomul 6,Editura Universul Juridic, 2009, Bucureşti, p. 222.

I think the answer can be given here should be similar to the answer to the question why a person should show respect for the law? Of course, not everyone will respect the law, and many will violate certain laws, however, in a democratic society (although deficiencies in everyday life) it is possible to see a part of society for which laws are made and process by which they are made. People who feel this way, as citizens, is more likely to take the law seriously.

Why law governing external actions of men? Because each person can be in its own right, each activity which pursues a moral goal.

We showed that the personality is the ability of an activity to follow its moral ideal, therefore, to the entire law must be the idea of tolerance, the idea of an activity consistent with sincere moral ideal of every individual.

Right, in its entirety, not simply embodies moral freedom is the core of his, without it, the right has no purpose or meaning. I understand that the right to protect the immoral deeds of men: the right not to ocrotescă than manifestations of moral personality. Therefore, we and interpreted in this paper as a whole, in light of the moral ideal and I could not get the idea that all legal realities in this regard are logical reality: including the intention and will of the parties.

Since that law covers actions, external actions, while moral feelings which covers internal, that morality requires us to be kind to others and help them to follow their own moral destiny, while the law requires us to leave, others free to pursue their own destiny, not erroneous to conclude that moral character would be positive and the right contrast, negative.

It also should not come to a forecast skeptical regarding future as-moral relationship, because in postmodern society, and not material values prevailing moral values, meaning that in the future there will be a depletion of moral content of law and moral aims of this regulatory system will decrease or will be endangered.

It is true that throughout history, the relationship between law and morality varied in different eras, changes taking place in terms of extent and the means to exercise this influence. Of such a finding does not appear, however, that change will have a negative orientation that vital influence on the right morals, their beneficial interaction that will not continue, it is possible and desirable to intensify social conditioning efficiency law itself.

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WITNESSES AND OATH HELPERS IN THE OLD ROMANIAN LAW. PECULIAR FEATURES, SIMILARITIES AND DIFFERENCES

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Abstract: *Witnesses and oath helpers are two legal institutions that have attracted the interest of historians and jurists throughout time. As evidentiary means in the trials of the time, they were often mistaken for one another. The research undertaken by older historians and jurists evinced the limits of their times, of their capacity for scientific knowledge and philosophical interpretation of the social realities from those periods. In what follows, based on the documents we have researched and studied, and focusing on the social function as a main factor that was scarcely taken into account in previous studies, we shall attempt to show the particular features of these institutions, as well as the similarities and differences between them.*

Keywords: *truth, courts of justice, evidentiary hearing, trial, statement, testimony.*

The notion of witness and, in particular, that of proof by witnesses dates back to ancient times. The word *martor* (witness) entered our language *via* the Christian Church, being derived from the Greek word *martyros*, which initially designated one who made a statement attesting his Christian faith. Gradually this notion acquired a legal meaning, indicating the one who gave a statement in a trial, testifying in favour or against one of the litigating parties.

The ancientness of proof by witnesses is shown by the oldest codes and collections of laws that have been preserved since antiquity, such as the Code of Hammurabi - the King of Babylon; the laws of Apastomba and those of Manu - for the ancient Indians; the Teachings of Moses and the Holy Books of the Jews; the laws of the Assyrians; the laws of Solomon; and various Roman legislations. These reveal that proof by witnesses was one of the most widely used evidentiary means in settling trials, and one of the most reliable means of discovering the truth. Witnesses told the court what they had seen or heard about the matter under trial. The institution of witnesses had particularly great value in the evidentiary process.[1]

As regards the importance of witness testimonies, the laws of Manu state: „But any person whatsoever, who has personal knowledge (of an act committed) in the interior apartments (of a house), or in a forest, or of (a crime causing) loss of life, may give evidence between the parties."[2]

For the Jews, witness testimonies represented ordinary proofs. The Teachings of Moses say that citizens are required to facilitate the work of magistrates by giving a loyal and full testimony whenever they are demanded to do so, in this way fulfilling a duty of conscience because „if one hears of an offense that he has witnessed and does not say what he has seen or heard, he shall bear a sin."

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[1] Alexandru Cazangiu, "Istoricul probei cu martori," in *Justiția Nouă*, XIII, 1957, no. 6, p. 1040.

[2] *Ibidem*, p. 1041.

The Code of Hammurabi includes special articles that speak about witnesses and those who submit false testimonies.

Proof by witnesses was the most common evidentiary means for the Romans and its testimonial force was such that it could be admitted against a document.[3]

Proof by witnesses was also known by our people since ancient times, being used in the trials of the time.

Before witnesses were heard, to ensure that they were telling the truth, they were made aware of their task through curses. Oath-taking was used only if it was requested by one of the parties or by the court and if the witness wanted to submit the oath. If he did not want to swear the oath, the witness declared, „in simplicity," what he knew about the case in which he had been summoned to testify. The documents say that „the best means of sharpening consciousness was the book of curses, in which the one who stepped sideways with the truth was cursed with heavy words like... let his body never rot... or... let the curse enter his bones and all his possessions and savings go to dust."[4]

To emphasise the importance of distinguishing between the two institutions of oath-helpers and witnesses, and how easily they could be confused, we shall present below a trial from the seventeenth century:[5] „In 1655, the boyar brothers Pelin, Grigoraş and Simion came before Prince Gheorghe Stefan with grievance against the Murgeşti family, who had allegedly unjustly dispossessed them of Mihalcea village. After the charters were presented, the prince and his councillors could not reach a solution, and the prince ordered that an on-site inquest should be conducted by the Burgrave of Suceava, telling the latter in the princely writ: *and I held the law unto them in this way that the Murgeşti should bring 24 good neighbourly people, who are written in a document signed by our honest boyar Ionaşcu the great Logothete, to be asked under oath about the state of Mihalcea village*. The burgrave had all the witnesses swear in the church from Siret and they swore their knowledge in favour of the Murgeşti. The divan then drew up a letter signed by the witnesses, which was sent to the prince, who resumed the matter under investigation, saying that: seeing the testimony of those good men, with all our council, I believed it and our boyar Pelin has remained before us and our servants, the Murgeşti, have righted their wrongs." Let us focus a little on this example presented by A. D. Xenopol to highlight the importance of witnesses in trials. From the document we may see that there was originally a first trial between the two parties, with the verification of the documents... the presentation of the charters which could not shed light for the prince and his council... After this examination, orders were given for an on-site investigation and the prince reckoned that under the law they should bring forth 24 good neighbourly people... Although the author says that the document refers to witnesses, its content and the way it was drafted prevent us from agreeing with this theory. Given, among others, the disparity between witnesses and jurors (presented below), I believe the document refers to boundary-setting oath helpers, who were used at the scene of the place under the law of the country. The same confusion is made by Alex. Cazangiu, when he shows that the institution of oath helpers with furrows on their heads was an institution of witnesses.[6]

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[3] *Ibidem*, p. 1042; V. Hanga, *Drept roman*, Cluj-Napoca: Editura Argonaut, 1999, pp. 66 and 85; Idem, *Principiile dreptului privat roman*, Cluj-Napoca: Editura Dacia, 1989, p. 35.
[4] The review *Convorbiri Literare*, Bucharest, 1889, p. 495.
[5] A. D. Xenopol, *Istoria Românilor*, vol. VII, Bucharest: Ed. Cartea Romanească, 1929, pp. 110-111.
[6] Al. Cazangiu, *op. cit*., pp. 1047-1048.

The institution of witnesses is found in almost all the documents issued by voivodes, whereby the latter reinforced boundaries between estates, donated estates, dwellings for Gypsies, gave exemptions from taxes and services, etc. The first document from Wallachia where there appeared a reference to the institution of witnesses dates from 4 September 1389: it is a charter whereby Mircea the Elder extended the boundaries of Cozia Monastery, to which he bestowed the land plot that pertained to the village of Jiblea. The letter was issued „in the town of My Highness called Râmnic, before several witnesses, who are: Fr. Kir Nicodim, Fr. Gavriil and Hieromonk Sarapion and zupans Vornic Vladislav, Bars, Roman, Mândricica, Truță, Vlad, Dan, Oncea, Mogoş, Danciul, Cârstian and before the other boyars of My Highness."[7] Another document which speaks about the institution of witnesses is the letter sent by Mircea the Elder in October 1389, which confirmed that Vîlcu should own Stanciu's plots because Vîlcu had adopted Stanciu's children, who had been left fatherless. The witnesses to this document are listed at the end: „Zupan Vladislav, Ban Radul, Zupan Mudrăcica, Zupan Iacov, Zupan Alaman, Zupan Barbul, Zupan Lucaci, Stoian Golin, Steward Berindei, Treasurer Drăgan."[8] Also, a purchase agreement concluded on 28 March 1412 recorded the presence of witnesses, stating that „Dragusin Orbul, son of Cancio, was present. In the name of God. And I, Constantin, and Archpriest Hariton negotiated the purchase. And the archpriest gave me a horse for 30 *hyperpyrons*. And he presented the witnesses who were there: Zupan Teodor, chancellor, and Smil the blind man, and Constantin from Caliacra and Fr. Radomir, who is from the village of Logothete Baldovin."

"He gave the price of 6 *hyperpyrons* for the buckets and Constantin paid 5 *hyperpyrons*; he gave a saddle, 2 perpers, and gave a blanket for two *hyperpyrons*. He gave 2 *hyperpyrons* for drinks to Dragotă. Both Dragotă and his wife are alive and can testify. Together for the horse and the wheat and for the saddle and the blanket and the wine: 47 *hyperpyrons* and the man counted..."[9]

The institution of witnesses was very well illustrated in the church trials of divorce cases. Ecclesiastical laws demanded that „most of the times, the facts on which the separation claim is based shall have to be proved by witnesses."

In what follows, we shall present the summary of a divorce trial from 1783, which is enlightening in this respect. The trial was heard by Metropolitan Grigorie, since this concerned an application for a divorce. The woman Patrania had filed a complaint with the Metropolitan See back in 1780, asking to be separated from her husband Radu, on account that he was impotent. Under the Nomocanon, the Metropolitan gave her a waiting period of 3 years. At the end of this period, the woman asked again for a divorce and the Metropolitan decided to hear the case, establishing the court composed of three *devout clergymen* and summoning both parties to trial. Only the woman, Patrania, appeared in court at the indicated date, stating that her husband, the defendant, had left the marital home three years before and she did not know anything about him. She was requested to submit the proof of witnesses, who were heard by the court and confirmed that they knew Radu was impotent and had abandoned his domicile three years

[7] *Documente privind istoria României* (D.I.R.), the 13th, 14th and 15th centuries, B. *Țara Românească (1247-1500),* Ed. Academiei R.P.R., 1953, doc. 28, pp. IX, 44.
[8] *Documenta Romaniae Historica* (D.R.H.), B. *Țara Românească*, vol. I, Bucharest: Ed. Academiei, 1966, doc. no. 10, pp. 28-30; doc. no. 11, pp. 30-31.
[9] Ibidem, doc. no. 36, p. 77-78; D.I.R., the 13th, 14th and 15th centuries, B. *Țara Românească (1247-1500)*, Ed. Academiei R.P.R., 1953, doc. 50, pp. X, 50.

before. The witnesses were then also heard under oath by the Metropolitan, who ruled in favour of the woman and pronounced the divorce.[10]

For the clarification of various offences, for finding out about criminal connections, the fate of stolen goods, and other issues that needed to be specified in a criminal trial, the hearing of witnesses was required. The questioning of witnesses, a custom of the seats of judgment in the Transylvanian counties, shows once again the distinction between the two institutions.[11]

The investigation of the scene with witnesses was a feature of trials settling matters of ownership over land or estates. The need to have witnesses in such trials automatically created the obligation of „producing" them. An eloquent example is that in which in order to impress in the minds of the younger generation the boundaries of estates or even the country's borders, children aged up to 12 were when beaten up so that they would remember thereby the whereabouts of the milestones and their surroundings when boundaries were established. We must admit that the effect exceeded intentions. In one witness testimony, found in a document from 1738, it is specified: „as we witnessed in the times of the abbots and our old fathers who took us in those times to the signs, since we were children, and they thrashed us,[12] so that we would remember the boundary signs."[13] As we have already pointed out, witnesses were people who show what they know about the deed itself. Witnesses from any social class could be taken, even without their knowing the parties involved in the trial, and their testimony could favour or disfavour one of these.

Oath helpers differed from witnesses because the oath they took did not prove or disprove the offence under trial, but strengthened the claim of a person. An important feature of oath helpers was the probative power they had in a trial. Through the oath they swore, their support of the statement made by one of the parties could rebut the testimony of the witnesses. „Oath helpers always intervene when sensitive issues are on trial and when the witnesses' account cannot bring the desired justification."[14] We may therefore see that oath helpers were stronger than witnesses in terms of their evidentiary force in the court system.

Oath helpers were the supporters of one of the parties, being connected to the person who had proposed them. This connection was the first difference between witnesses and jurors. An example that supports this assertion is found in a charter issued by Matei Basarab in 1633, expounding on the litigation between Vasile the Spatharios and his wife Maria, the latter being accused of being „a wicked and foolish woman." In order to restore her honour, his wife invoked the law of the land. The charter says „and My Highness could not prevent Lady Maria from taking 12 ladies under the law on princely letters to swear with their souls on the Holy Gospel (...) that Lady Maria was not guilty of those words of misfortune and unjustness."[15] We see from this example that the 12 ladies took the oath together with the accused, merging themselves with her name.

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[10] Paul Negulescu, *Studii de istoria dreptului român*, Bucharest: Tipografia Gutenberg, Joseph Göbl, 1900, pp. 141-142.

[11] Susana Andea, Avram Andea, *Documente privind mişcarea lui Pintea*. 1693-1703, Cluj-Napoca: Ed. Supergraph, 2003, doc. no. 38, 41, 42. These were the interrogation minutes dated 19-22 February 1700, for 53 witnesses, 29 witnesses heard in relation to the deeds committed by Pintea and his associates, his connections, the fate of some goods stolen from the merchants.

[12] They had their hair pulled off (thrashed), in *Dicționarul enciclopedic ilustrat*..., p. 382.

[13] This manner of establishing the boundaries of a place was practiced up until the year 1806. Nicolae Iorga shows this manner in *Studii şi Documente cu privire la istoria românilor,* vol. VII, Bucharest, 1901-1916, p. 45 through an example: "they took him when he was a child and led him to the roots of the oak tree and beat him up so that he would remember."

[14] Ştefan Berechet*, op. cit*, p. 9.

[15] The Direction of Central Historical National Archives, Câmpulung Monastery, LXIII/10; A. D. Xenopol, *op. cit.*, p.115; Gh. Cronț, *Instituții medievale româneşti. Înfrățirea de moşie. Jurătorii*, Bucharest, 1969, p. 163; Valentin Al. Georgescu, Petre Strihan, *Judecata domnească în Țara Românească şi Moldova (1611-1831*). Part I. *Organizarea judecătorească, vol. I (1611-1740*), Bucharest, 1970, p. 99; *Catalogul documentelor Țării Româneşti din Arhivele Statului, vol. IV (1633-1639*), Bucharest, 1981, doc. 449, p. 217.

Another difference between the two institutions was the social class that oath helpers and witnesses had to belong to. For oath helpers it depended on the position and rank of the person who resorted to them, while for witnesses, social class had no relevance. Therefore, a priest who was the subject of a trial could bring only priests as oath helpers, just like a merchant could bring only merchants, a lady only ladies, a boyar only boyars, etc.

Yet another difference referred to their number in trials. Insofar as witnesses were concerned, their number was not predetermined. Oath helpers, however, were always in a fixed number, the smallest being two and increasing according to the matter under trial. There are documents showing the existence of trials with 150[16] oath helpers, 250[17] oath helpers and even 12 villages.[18] Another feature was that the predetermined number was compulsory, the party being forced to provide the exact number of oath helpers. If they could not find the required number or if any of the oath helpers refused to swear the oath, the trial would be lost.[19] In the case of witnesses, this did not have great significance, but their number had to be sufficiently large to form the conviction that the facts were true. Sometimes one witness was enough.

Oath helpers could be brought by the parties involved or, in some cases, they could be appointed by the ruler, under „princely letter."[20]

A similarity between the two institutions was the submission of oaths. Both oath helpers and witnesses swore an oath in solemn circumstances, „on the holy Gospel and the holy cross in the holy church," before the priest who wore liturgical vestments.[21] For oath helpers oaths were compulsory, since this was the essence of the institution, whereas for witnesses, oaths were taken at the request of the parties or the judge, if the witnesses were willing to swear them.

In light of the facts shown above, we may see that the two institutions were different. Although both were fundamental to the judicial process, the institution of witnesses showed the objective truth, while that of oath helpers revealed the subjective truth.

Translated into English by Carmen-Veronica Borbely

[16] D. R. H., B. *Tara Românească*, vol.VI, Ed. Academiei, 1985, doc. 131, p. 165.
[17] *Ibidem*, doc. 198, p. 244.
[18] *Ibidem*, vol. II, Ed. Academiei, 1972, doc. 238, pp. 445-447.
[19] A. D. Xenopol, *op. cit.*, p. 117.
[20] D.R.H., B. *Tara Românească*, vol. VII, Ed. Academiei, 1983. doc. 42, pp. 56-57, doc. 201, pp. 266-267, doc. 222, pp. 297-298.
[21] A. D. Xenopol, *op. cit.*, p. 118.

STABILITY AND CONSTITUTIONAL REFORM NORMATIVE CONTENTS OF CONSTITUTION

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Abstract: *The modification of the fundamental law of a state represents a very special political and juridical act with major significances and implications in the political social system as in the state's one, but also at each individual level. That's why such an approach needs to be well justified, to answer to some juridical and political social needs well defined, but mainly to correspond to the principles and rules specific to a constitutional and state's democratic system providing to the state the stability and functionality it needs. In this study we analyze the necessity of such a constitutional reform in Romania, and also some provisions from the report of the Presidential Commission for the analysis of the political and constitutional regime in our country. We formulate our opinions in relation to the justifying some constitutional regulations. In this context, we consider that there are arguments for the maintaining of the bicameral parliamentary system and an eventual revising of the fundamental law needs to consider the measures needed to guarantee the political and constitutional institutions specific to the lawful state.*

Keywords: *Revising of the Constitution / limits of the constitutional revising / bicameral system/ power excess/ guaranteeing of the fundamental liberties /constitutional norms*

I. Stability and constitutional innovation

One of the most controversial and important juridical problems is represented by the relationship between the stability and innovation in law. The stability of the juridical norms is undoubtedly a necessity for the predictability of the conduct of the law topics, for the security and good functioning of the economical and juridical relationships and also to give substance to the principles of supremacy of law and constitution.

On the other hand it is necessary to adapt the juridical norm and in general the law to the social and economical phenomenon that succeed with such rapidity. Also the internal juridical norm must answer to the standards imposed by the international juridical norms in a world in which the 'globalization" and „integration" become more conspicuous and with consequences far more important in the juridical plan also. It is necessary that permanently the law maker be concerned to eliminate in everything that it is „obsolete in law", all that do not correspond to the realities.

The report between stability and innovation in law constitutes a complex and difficult problem that needs to be approached with full attention having into consideration a wide range of factors that can determine a position favorable or unfavourable to legislative modification[1].

One of the criterions that help in solving this problem is the principle of proportionality. Between the juridical norm, the work of interpretation and its applying, and on the other hand the social reality in all its phenomenal complexity must be realized with an adequate report, in other words the law must be a factor of stability and dynamism of the

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[1] Victor Duculescu, Georgeta Duculescu, „Constitution's revising" „Revizuirea Constituției", Lumina Lex Publishing House, Bucureşti, 2002 p. 12

state and society, to correspond to the scope to satisfy in the best way the requirements of the public interest but also to allow and guarantee to the individual the possibility of a free and predictable character, to accomplish oneself within the social context. Therefore, the law included in its normative dimension in order to be sustainable and to represent a factor of stability, but also of progress, must be adequate to the social realities and also to the scopes for which a juridical norm is adapted, or according to the case to be interpreted and applied. This is not a new observation. Many centuries ago Solon being asked to elaborate a constitution he asked the leaders of his city the question:" Tell me for how long and for which people" then later, the same wise philosopher asserted that he didn't give to the city a constitution perfect but rather one that was adequate to the time and place.

The relationship between stability and innovation has a special importance when the question is to keep or to modify a constitution because the constitution is the political and juridical foundation of a state[2] based on which is being structured the state and society's entire structure.

On the essence of a constitution depends its stability in time because only thus will be ensured in a great extent the stability of the entire normative system of a state, the certitude and predictability of the law topics' conduct, but also for ensuring the juridical, political stability of the social system, on the whole. [3]

The stability is a prerequisite for the guaranteeing of the principle for the supremacy of constitution and its implications. On this meaning, professor Ioan Muraru asserts that the supremacy of constitution represents not only a strictly juridical category but a *political-juridical* one revealing that the fundamental law is the result of the economical, political, social and juridical realities. „It marks (defines, outlines) a historical stage in the life of a country, it sanctions the victories and gives expression and political-juridical stability to the realities and perspectives of the historical stages in which it has been adopted" [4].

In order to provide the stability of the constitution, varied technical modalities for guaranteeing a certain degree of rigidity of the fundamental law, have been used, out of which we enumerate: a) the establishing of some special conditions for exercising of an initiative to revise the constitution, such as the limiting of the topics that may have such an initiative, the constitutionality control ex officio upon the initiative for the constitution's revising; b) the interdiction of contitution's revising by the usual legislative assemblies or otherwise said by the recognition of the competence for the constitution's revising only in favour of a Constituent assembly c) the establishing of a special procedure for debating and adopting of the revising initiative; d) the necessity to solve the revising by referendum; e) the establishing of some material limits for the revising, specially by establishing of some constitutional regulations that cannot be subjected to the revising [5].

On the other hand a constitution is not and cannot be eternal or immutable. Yet from the very appearance of the constitutional phenomenon, the fundamental laws were conceived as subjected to the changes imposed inevitably with the passing of time and

[2] Ion Deleanu, "."Constitutional Law and Public Institutions", Europa Nova Publishing House, Bucharest, 1996, vol. I, p. 260.
[3] Elena Simina Tănăsescu, în Romania's Constitution, Comments on articles, coordinators I. Muraru, E.S. Tănăsescu, All Bach Publishing House, Bucharest, 2008, pp.1467-1469.
[4] Ioan Muraru, Simina Elena Tănăsescu, "Constitutional Law and the Political Institutions" XI th edition, All Bach Publishing House, Bucharest, 2003, p.80.
[5] For the development see: Ioan Muraru,Simina Tănăsescu, quotted works pp.52-55,Tudor Drăganu,, „Constitutional Law and the Political Institutions. Elementary Treaty" Lumina Lex Publishing House, Bucharest,1998,Vol I,pp. 45-47, Marius Andreescu, Florina Mitrofan, „Constitutional Law. General Theory" Publishing House of Piteşti University, 2006,pp. 43-44,Victor Duculescu,Gergeta Duculescu, quotted works. pp.28-47, Ion Deleanu, quotted works.,pp.275-278.

dynamics of state, economical, political and social realities. This idea was consecrated by the French Constitution on 1971 according to which „A people has always the right to review, to reform and modify its Constitution, and in the contemporary period included the „International Pact with regard to the economical, social and cultural rights" as well as the one regarding the civil and political rights adopted by U.N.O. in 1966 - item 1 - is stipulating:"All nations have the right to dispose of themselves. By virtue of that right they freely determine their legal status.

The renowned professor Constantin G. Rarincescu stated on this meaning:" A constitution yet is meant to regulate in future for a longer or a shorter time period, the political life of a nation, is not destined to be immobile, or perpetuum eternal, but on the other hand a constitution in the passing of time can show its imperfections, and no human work is being perfect, imperfections to whose some modifications are being imposed, on the other side a constitution needs to be in trend with the social necessities and with the new political concepts, that can change more frequently within a state or a society". [6] Underlying the same idea the professor Tudor Drăganu stated: „The constitution cannot be conceived as a perennial monument destined to outstand to the viccisitudes of the centuries, not even to the ones of the decades. Like all other juridical regulations, the constitution reflects the economical, social and political conditions existing in a society at a certain time of history and aims for creating the organizational structures and forms the most adequate to its later development. The human society is in a continuous changing. What it is valid today tomorrow can become superannuated. On the other side, one of the characteristics of the juridical regulations consists in the fact that they prefigure certain routes meant for chanelling the society's development in one or another direction. These directions as well as the modalities to accomplish the targeted scopes may prove to be, in their confronting with the realities, inadequate. Exactly for this very reason, the constitutions as all other regulations, cannot remain immutable but must adapt to the social dynamics"[7].

In the light of those considerents we appreciate that relationship between the stability and the constitutional revising needs to be interpreted and solved by the requirements of principle of proportionality[8]. The fundamental law is viable as long as it is adequated to the realities of the state and to a certain society at a determined historical time. Much more – states professor Ioan Muraru – „a constitution is viable and efficient if it achieves the balance between the citizens (society) and the public authorities (state) on one side, then between the public authorities and certainly between the citizens. Important is also that the constitutional regulations realize that the public authorities are in the service of citizens, ensuring the individual's protection against the state's arbitrary attacks contrary to one's liberties"[9].In situations in which such a report of proportionality no longer exists, due to the imperfections of the constitution or due to the inadequacy of the constitutional regulations to the new state and social realities, it appears the juridical and political necessity for constitutional revising.

Nevertheless in the relationships between the stability and constitutional revising, unlike the general relationship stability – innovation in law the two terms have the same logical and juridical value. It is about a contrariety relationship (and not a contradiction

[6] Constantin G. Rarincescu,, « Constitutional Law Course » Bucharest, 1940, p. 203.
[7] Tudor Drăganu, quotted works pp. 45-47
[8] For development see Marius Andreescu „The Principle of Proportionality in the Constitutional Law" CH Beck Publishing House,Bucharest,2007.
[9] Ioan Muraru, "The Constitutional Protection of the Liberties for Oppinion" Lumina Lex Publishing House, Bucharest, 1999, p.17.

one) in which the constitution's stability is the dominant term. This situation is justified by the fact that the stability is a requirement essential for the guaranteeing of the principle of constitution supremacy with all its consequences. Only through the primacy of the stability against the constitution's revising initiative one can exercise its role to provide the stability, equilibrium and dynamics of the social system's components, of the stronger and stronger assertion of the principles of the lawful state. The supremacy of the constitution bestowed by its stability represents a guarantee against the arbitrary and discretionary power of the state's authorities, by the pre-established and predictable constitutional rules that regulate the organization, functioning and tasks of the state authorities. That's why before putting the problem of constitution's revising, important is that the state's authorities achieve the interpretation and correct applying of the constitutional normative dispositions in their letter and spirit. The work of interpretation of the constitutional texts done by the constitutional courts of law but also by the other authorities of the state with the respecting of the competences granted by the law, is likely to reveal the meanings and significances of the principles for regulating the Constitution and thus to contribute to the process for the suitability of these norms to the social, political and state reality whose dynamics need not be neglected. The justification of the interpretation is to be found in the necessity to apply a general constitutional text to a situation in fact which in factum is a concrete one"[10].

The decision to trigger the procedure for revising a country's Constitution is undoubtedly a political one, but at the same time it needs to be juridically fundamented and to correspond to a historical need, of the social system stately organized from the perspective of its later evolution. Therefore, the act for revising the fundamental law needs not be subordinated to the political interests of the moment, no matter how nice they will be presented, but in the social general interest, well defined and possible to be juridically expressed. Professor Antonie Iorgovan specifies on full grounds:" in the matter of Constitution's revising, we dare say that where there is a normal political life, proof is given of restraining prudence, the imperfections of the texts when confronting with life, with later realities, are corrected by the interpretations of the Constitutional Courts, respectively throughout the parliamentary usance and customs, for which reason in the Western literature one does not speak only about the Constitution, but about the block of constitutionality" [11].

The answer to the question if in this historical moment is justified the triggering of the political and juridical procedures for the modifying of the fundamental law of Romania can be stressed out in respect with the reasons and purpose targeted. The revising of Constitution cannot have as finality the satisfying of the political interests of the persons holding the power for a moment, in the direction of reinforcing of the discretionary power of the Executive, with the inacceptable consequence of harming certain democratical constitutional values and principles, mainly of the political and institutional pluralism, of the principle of separation of powers in the state, of the principle of legislative supremacy of the Parliament.

On the other hand, such as the two decades lasting history of democratical life in Romania has shown, by the decisions taken for many times, were distorted the constitutional principles and rules by the interpretations contrary to the democratical spirit of the fundamental law, or worse, they didn't observe the constitutional dispositions because of the political purposes and their support in some conjunctural interests. The consequences were

[10] Ioan Muraru, Mihai Constantinescu, Simina Tănăsescu, Marian Enache, Gheorghe Iancu, „Interpreting of the Constitution" Lumina Lex Publishing House, Bucharest, 2002, p.14

[11] Antonie Iorgovan, „The Revising of Constitution and Bicameralism" in the I the Public Law Journal no. 1/2001, p. 23.

and are obvious: the restraining or violation of some fundamental rights and liberties, generating some political tensions, the nonobservance of the constitutional role of the state's institution, in a single word, due to political actions, some dressed in juridical clothes, contrary to the constitutionalism that needs to characterize the lawfull state in Romania. In such conditions, an eventual approach of the revising of the fundamental law should be centered on the need to strengthen and enhance the constitutional guarantees for respecting the requirements and values of the lawfull state, in order to avoid the power excess specific to the politician subordinated exclusively to a group interests, many time conjunctural and contrary to the Romanian people, which in accordance to Constituion item 2 paragraph (1) of the one who is the holder of the national sovereignity.

In our opinion, the preoccupation of the political class and state's authorities in the current period, in relation to the actual contents of the fundamental law, should be oriented not so for the modification of the Constitution, but especially into the direction of interpreting and correct applying and towards the respecting of the democratical finality of the constitutional institutions. In order to strengthen the lawfull state in Romania, it is necessary that the political formations, mostly those that hold the power, all authorities of the state to act or to exercise its duties within the limits of a *loyal constitutional behavior* that involve the respecting of the meaning and demoratical significances of the Constitution.

Currently, the political and juridical reality in Romania is confronting with an extensive political approach for the revising of the fundamental Law, substantied throughout the results of the referendum organized on 2009 having as objective the reducing of the number of parliamentarians and with the passing to a unicameral parliamentary system, in the „Report of the Presidential Commission for the Analysis of the Political and Constitutional regime in Romania" [12] that was published on April 28th 2010, the initiative of the President of Romania for revising the fundamental law at the Government proposal and the decision no. 799/17.06.2011 of the Constitutional Court targeting the law draft for Romania's Constitution revising[13].

This is up to now the only political initiative that has been materialized in a legislative draft for revising the fundamental law that was submitted to the Parliament. In the present social and political context other proposals, ideas for the modifying of the Constitution are being expoxed by the governing ones yet without being materialized in a new legislative initiative.

Our scientific approach has into consideration, from a critical perspective, mostly the political initiative for the Constitution revising that has already the form of a legislative project, though it is not on the Parliament 's roll for debating. We wish at the same time to underline few important themes which in our opinion need a more serious consideration, included in regard to the normative contents of the Constitution. In this epoch of political class' intense preoccupations for the modifying of the fundamental law it is important to reflect in the light of the political exigencies of the constitutional law, upon the normative content of the Constitution. The establishing based on some scientific criterions to what exactely needs to contain the fundamental law of a state, is essential to avoid that throughout political enthusiasm be ignored the basic aspects regarding the specific of the normative contents of the Constitution that explains thus last one's supremacy.

[12] Published by C.H. Beck Publishing House, Bucharest, 2009.
[13] M.Of. no. 440/23.06.2011.

The proposals for the Constitution's revising have as an obvious finality the passing of Romania's constitution system from bicameral to unicameral and the strengthening of the executive power, mostly of the presidential institution.

The doctrine in specialty underlines the fact that in the unitary states, such as Romania, both the unicameral system, as the bicameral system have advantages and disadvantages [14]. There is no ideal constitutional solution on this meaning. Important is the fact that the Parliament's structure which the Constitution consecrates be adequate to the social, political and economical realities of a country, be functional and to integrate harmoniously within the system of authorities of the state with the observance of the principle of constitutional democracy principles and of the lawfull state. Nevertheless, prestigious authors such as professor Herbert Schambeck remark the importance of the parliamentary system: „From the second chamber of this type, it is expected to emanate *auctoritas*, which in a specific way grants personal fame, in plus to *potestas* or the political power. The second Chamber or the superior chamber has always existed in the area of tensions between the tradition inherited and the present political reality. It represents a part of the basic constitutional organization and a political reality of the state"[15].

Coming back to the essence of the problem, besides other authors[16], we appreciate that in Romania, the bicameralism is adequate to the state and social system at this historical moment, corresponding better to the necessity to achieve not only the efficiency of the parliamentary legislative procedures but also the „norming ponderation" and quality of the legislative act. The bicameralism is a necessity for Romania because the Parliament represents a valid counterpondering against the Executive, in the context of the exigencies and balance of the powers in a democratic state. With good reason the regretted professor Antonie Iorgovan underlined: „ It would have been a very high political risk, in that post revolutionary tension, that in Romania to have designed a unicameral Parliament and such a risk exists still at present, considering that one cannot speak about a political life settled on natural pathes of the democratical doctrines accepted in Occident (the social-democratic doctrine, the democratic-Christian doctrine, liberal doctrines and ecologist doctrines)"[17]. The unicameralism in a semi-presidential constitutional system such as the one of Romania, in which the powers of the head of the state and in general those of the Executive are significant, having into consideration the excesive politicianism of the moment, would have as a consequence the severe deterioration of the institutional balance between the Legislative and Executive, with consequence the increase of the discretionary power of the Executive and the minimizing of the role of Parliament as a supreme representative organism of the Romanian people, as a unique law maker authority of the country, such as the provisions of item 61 paragraph (1) of the Constitution foresee.

The transition to a unicameral Parliament needs not be treated simplistic such as unfortunately comes out from the contents of the Law draft regarding the revising of Constitution elaborated by the Government, it rather needs a general modification of the

[14] For development see Ioan Muraru, Mihai Constantinescu, „Romanian Parliamentary Law" All Beck Publishing House, Bucharest, 2005, pp. 72-79.
[15] Herbert Schambeck, „Reflections on the Importance of the Bicameral Parliamentary System" in the Public Law Review no. 1/2010 p. 3.
[16] Ioan Muraru, Mihai Constantinescu, quotted works., pp. 2-37; Antonie Iorgovan, quotted works., pp. 3-7; Florian Vasilescu, „Questions about Bicameralism" in the Romanian Public Law Review no. 3/2010 pp. 28-51; Ioan Alexandru,,"Reflections regarding the bicameralism and asymmetry of the distribution of competences" in the Public Law Review no.. 3/210 pp. 51-60;
[17] Antonie Iorgovan, quotted works., pp. 18-19.

Romanian constitutional system, a reconfiguring of the role and duties of the state authorities so that the balance between the Legislative and Executive be maintained and not create the possibility of an evolution towards an exaggerated preponderance of the institution of the head of the state in respect to the Parliament.

We underline the fact that all states with a unitary structure of Europe that have a unicameral Parliament have at the same time a constitutional system of parliamentary type in which the duties of the head of the state regarding the governing are being reduced. We do not wish to do a thorough analysis of this constitutional problem, we stress only the conclusion that the unicameralism may have be political and constitutionally justified in Romania and adequate to the democracy values in a lawfull state only if the legitimacy and the role of Romania's President as a constitutional institution, will be fundamentally be changed. The election of the President needs to be by the Parliament. At the same time in case of a unicameral structure of the Parliament it is necessary to reduce significantly the responsibilities of the President in respect to the Executive and the governing ones. In such a reconfiguring of the institutions of the state needs to be increased the role and duties of the Constitutional Court and those of the Justice, these ones being guarantees of the supremacy of the law and Constitution and for avoiding the power excess coming from the other authorities of the state. In one word, in our opinion the unicameralism cannot be associated in Romania other than with the existence of a constitutional system of parliamentary type.

The legislative proposal for the Constitution revising is of a nature to create a disproportion between the Parliament and Executive by the fact that the unicameral structure of the Parliament does not represent a guarantee sufficient to make an efficient counterponderance in respect to the Executive, mainly as the responsabilities of the President are obviously enhanced. The dispute between unicameralism and bicameralism with applying to the conditions of Romania is well characterized by the regretted professor Antonie Iorgovan: „...any bicameral or unicameral parliamentary system can lead into severe disfunctionalities such as professor Tudor Drăganu states, no matter how successful may be the constitutional solutions, if in the parliamentary practice evidence is given of politicianism, demagogy and lack of responsibility"[18].

Does the present Parliamentary system of Romania correspond to the exigencies of the democratic traditions of bicameralism and is it really adequate to the fulfilling of the role and functions of the Parliament? Professor Tudor Drăganu, in a flawless argumenting logic, in an extensive study answered to this question:"The revised Constitution establishes a system that claims to be bicameral but it functions currently like a unicameral system, condemned being to violate by certain of its aspect the most elementary principles of the parliamentary regime and which contains in itself the danger of producing in future of severe disfunctionalities in accomplishing the legislative activity"[19].The illustrious professor had into consideration that the law for the Constitution's revising does not contain references with regard to the number of deputies and senators it sets the matter of legitimacy of substance of the two chambers, because their members are appointed by the same election body and by the same type of system and election ballot; the responsibilities of the chambers in legislative matter are not sufficiently well differentiated; the exercising of the right to the legislative initiative of the senators and deputies, such as regulated, generates constitutional contradictions.

[18] Antonie Iorgovan, quotted works., p. 16.
[19] Tudor Drăganu, Few critical remarks about the bicameral system established by the Law for Constitution's revising adopted by the Deputies Chamber and in the Senate, in the Public Law Review no. 4/2003 pp. 55-66.

Together with other authors[20], we state that in the perspective of a future constitutional revising, to regulate the differentiation between the two chambers also by special types of representation. The law compared offers sufficient examples of this kind (Spain, Italy, France) and even the election law of Romania on March 27th 1926 offers a landmark on this meaning. The Senate may represent the interests of the local collectivities. Thus, the senators may be elected from an electoral college made of the local councils' chosen members. Interesting to underline is the fact that in the Constitution draft on 1991 the Senate was designed as a representant of the local collectivities, grouped on the country's counties and Bucharest municipality.

It is reasonable the critic of Professor Tudor Drăganu according to which the current constitutional regulation does not achieve a functional differentiation between the two chambers. This aspect was also noticed by the Constitutional Court that, referring to the parliamentary legislative procedure introduced in the draft for the Constitution revising, stressed: „The examining in cascade of the law drafts, in a chamber in the first lecture, and in the other one in the second lecture transforms the bicameral Parliament in a unicameral one"[21]. Therefore a new initiative for the modification of the fundamental law should have into consideration this aspect also and should achieve a real functional differentiation of the two chambers.

II. Brief Considerations regarding the normative contents of the Constitution

The Constitution is a law, but in the same time through it juridical force and its contents it distinguishes itself from any other laws. At the same time, the supremacy of the fundamental law grants to this one the quality of a main formal spring for all other law branches. Consequently, there are specific features of the normative contents of the Constitution in respect to the other normative acts, included compared to the existing codes. The normative specific of the Constitution makes an important criterion for explaining scientifically this one's supremacy and the structurant role of the fundamental law, not only by the system of law but also for the entire social, political and economical system of a state. Thus such as it is mentioned in the literature in specialty, the supremacy of the Constitution is a quality of the last one expressed throughout the supreme juridical force but also through its normative contents. As a first observation we specify that the norms forming the content of a constitution have the features of the constitutional law which I analyzed above. This observation is not enough to determine the normative content of the fundamental law because the sphere of the constitutional law norms is wider, including other formal sources specific to this branch of law.

The constitutional contemporary reality that is stressing also the diversity of the normative content removes the idea of general uniform standards valid for the contemporary constitutions. In this regard it is enough to remember that there are some states and constitutions whose provisions are inspired by the religious precepts. The diversity in the normative content is a consequence of the fact that the fundamental law of a state is determined in view of the aspect of the content of the social, political and economical realities, by the characters and attributes of the respective state historically expressed and in the same time by the will of the constituent law maker, in essence the political will, at a certain historical moment.

[20] Dan Claudiu. Dănişor, quotted works, p. 23-24.
[21] Decision no. 148/16.04.2003 (M.Of. no. 317/12.05.2003).

Besides other authors, we consider that the scientifical definition of the constitution is the main criterion for the identifying of the normative content. Such a criterion provides the generality necessary to give a scientific character to the scientific elaborations in the matter and at the same time it explains the existence of the differences between the fundamental laws of the contemporary states. The space allocated to this study, does not allow an extensive analysis of the definitions proposed in the literature in speciality. For the purpose of this scientific approach we bear in mind the essence of any attempt to define the fundamental law, namely „The constitution is the political and juridical fundamental foundation of any state"[22].

In juridical acceptation, the fundamental law is the act through which it is determined the statute of the power and at the same time all the juridical rules, having as regulating objective the establishment of exercising and maintaining of the power, as well as the regulation of the basis of the power, of the bases for power organizing. The juridical concept on the constitution can be expressed in two different meanings, respectively in the material meaning and in the formal one.

In the „material" acceptation, the constitution contains all the law rules, no matter of their nature and form, having as regulating objective the organizing and functioning of state power, the relations between the state's organs and society. Therefore they are part of the constitution body not only the so called constitutional regulations but also the norms contained in the ordinary laws and normative acts of the executive powers if through these are being regulated the social relations specific to state power. In such a conception has preeminence the regulating objective of the constitutional norm and not its form of expression. The theory above stated was accepted by the Constitutional Council of France which elaborated the concept of „the constitutionality block".

In the formal acceptation, the constitution is all the law rules, no matter of their regulating objective, elaborated in a form different from other normative acts, by a state authority namely established (the constituent assembly) following a specific procedure, derogatory from the usual legislative procedure. This way of defining the constitution starts from the correct idea that a certain „procedure" defines a juridical form or a normative category. Consequemtly the categories of normative acts can be differentiated by the adopting procedures.

Analyzed separately, the formal acceptation and respectively the material one cannot be a criterion enough to identify the normative content of the fundamental law. The accepting of the formal criterion has as a consequence the fact that the law fundamental may regulate any kind of social relations, no matter of their importance or regulating objective. [23] The material criterion is also unilateral because it excludes the procedural elements, necessary for a scientific characterization of the fundamental law.

The scientific approach regarding the identifying of the normative content of the constitution needs to have into consideration cumulated both the formal acceptation as the material one to which adds the political dimension to which we referred to above. Therefore, we consider that three critera can be identified in view to establish the normative contents of a constitution:

A. The establishing of the normative content of the constitution is fulfilled depending on the specific, importance and value of the regulated social relations. We concur to the

[22] Ion Deleanu, quotted works p.88
[23] For example the Switzerland Constitution, by item. 25 bis establishes rules for cattle cutting.

opinion stated by the literature in speciality according to which, unlike other normative act categories, the norms contained in the constitution must regulate the fundamental social relations that are essential for the establishment, maintaining and exercising of the power, but also those referring to the bases of the power, respectively the power organizing bases. There are three such categories of social relations, that can form the regulating objective of the norms contained in the constitution that allow their identification such as follows:

- The constitutional norms, some having values of principle, having a determining role in the establishing and functioning of the governing organs and in the establishing of the form of the state, respectively of its characters and attributes;
- the norms for the consecration and guaranteeing of the fundamental righs and liberties and those that regulate the citizens' fundamental duties;
- constitutional dispositions that have no direct connection with the governing process and regulate the bases for power organizing (sovereignity, territory, population) and the bases of the power (economy, social and cultural aspects etc)

B. The form for adopting the constitution or of the constitutional laws have a solemn character and are achieved according to a procedure derogatory from the usual legislative procedure and by a state authority specially established or by the Parliament, that acts as a constituent power and not as a usual legislative power;

C. The significance of the constitution as a fundamental poitical document determines the concrete content of some constitutional regulations, expressing the will of the legislator constituted at the historical time for adopting or as the case may be, for the revising of the fundamental law. The political dimension of the constitution evokes the complex and multiple characters of its exterior determinations, respectively the historical particularities of the society organized at state level, the development degree and corresponding to the political will of the constituent legislator.

It is important to underline the constitutional dynamism. The fundamental law is a dynamic and opened act, in a continuous crystallization process. The constitutionality status is achieved in a continuous and complex process for interpreting and applying by state's authorities of the texts contained in the body of the constitution. A special role in this wide process of interpretation and concrete fulfilling of the constitutional provisions is in the charge of the constitutional authorities. The activity for interpreting the fundamental law texts is justified because in the normative content of the constitution there are categories and concepts whose sphere cannot be defined by the constituent law maker. Thus, the constitutional norms cannot and must not offer definitions. For example in Romania's constitution there are such concepts that are defining by interpretation way and have formed the objective of analysis of the Constitutional Court: „ spirit of tolerance and mutual respect" (item 29, paragraph 3); „identity" (item 30, paragraph 3); „private life" (item 30, paragraph 6), „ the principles of the lawfull state" (item 48 paragraph 2); „public utility" (item 44, paragraph 3); „public and moral proportionality" (item 116, paragraph 4).

The interpreting and applying of the constitutional norms involve what in the literature in speciality is called the „loyal constitutional behavior", namely the authorities of the state have the obligation in the work of interpreting of the constitutional text to respect the spirit and mainly the finality of the juridical norm. That's why the work for interpreting and applying of the fundamental law is not legitimate if by such an activity the finality aimed consists in fulfilling the supporting interests of political nature. The juristprudential interpreting of the constitutional text can reveal new constitutional norms. For example, the jurisprudential interpretation of the Constitutional Court underlined a new fundamental law

that has no express formulation in the Constitution, respectively „the right to one's image".The normative contents of the constitution must be understood and determined with having into consideration the teleological criterion emphasized in the above stated definition. Namely the fundamental law's structuring role for the entire social, political and state system, guarantor of the fundamental rights and liberties.Noticing a political and juridical reality yet present, G. Bourdeau stated:" The written constitution is the work of the theoreticiens preoccupied more by the elegance and juridical balance of the mechanism they construct, than by its political efficiency [24]" Such a finding, we consider valid also for the Constitution, respectively the contemporary Romanian constitutionalism.

The fair determination of the normative contents of a constitution is expressed by its political and juridical efficiency. The fundamental law must achieve the social dynamic balance but also the stability and institutional harmony, the efficient guaranteeing of the fundamental rights, in essence the requirements of a real constitutional democracy based on the values of the state, of the institutional and social balance and of the proportionality[25]. Ion Deleanu noticed very well that: „the success of the constitution and constitutionalism is always a political one as far as it is the result of a transaction, of a relationship between what the constitution offers in a formalizing and objectiving term of the political matters and what the political actors ask or search for at a certain time in order to fulfill their own objectives. [26]

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[24] George Bordeau, Traite de science politique, LGDJ, 1969, p.59.
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[26] Ion Delenu, quotted works p.89.

CONSIDERATIONS CONCERNING THE RIGHT TO DIGNITY

Izabela BRATILOVEANU*

Abstract: *The rights of the personality are those rights inherent to the characteristic of human being, that is they belong to each individual for the simple reason of being human. The new Civil Code stands as the first normative act that expressly consecrate under this terminology the rights of the personality in Chapter II called „The respect owed to the human being and to her inherent rights", from Book I, Title II „Physical person", being righted: the right to life, to health and to the integrity of physical persons, the right to free speech, the right to private life, the right to dignity, the right to one's self reputation. From the vast spectre of the rights of the personality we shall analyze the right to dignity and the judicial ways to protect it in the context of adapting new codes, noticing novelty elements brought, including by the express provision of the solution to indemnify moral damage.*

Keywords: *the Civil Code, the rights of the personality, the right to dignity.*

1. The rights of the personality

In the legal doctrine, the rights of the personality represent a relatively recent judicial category, the first theory of the notion lasting since the end of the 19th century[1].Generally speaking, the rights of the personality are defined as „the rights inherent to the human being, who lawfully belong to any natural person (born and unalienable) for the protection of its primary interests"[2], or, in another rephrasing, as „native prerogatives" for the simple fact of being a person[3].

Until the present moment no agreement was reached regarding the exhaustive delimitation of the progressively shaped concept, being insistently highlighted the difficulty to systemize this subject, as well as to characterize, take an inventory of the component rights.[4]

Thus, the catalogue of the rights of the personality indicated by article 3 of the Civil Code in Québec has the characteristic of being open, including in this category the right to life, the person's inviolability and integrity, the right to have one's name, reputation and private life respected. Article 35 stipulated the right to the respect of the reputation.

Within the East-European space, the Polish law giver chose, in 1964, also a declarative-like enumeration, stipulating, in article 23 of the Civil Code: „The goods inherent to the human personality, and especially the health, freedom, honour, freedom of consciousness, name and pseudonymous, image, secret of correspondence, inviolability of the domicile, scientific or artistic creation, invention and rationalization remain under the protection of the civil law, independently of the protection foreseen by other provisions". The Polish jurisprudence dismissed the concept of general right of the personality and it categorically pronounced in favour of the plurality concerning the rights of the personality[5].

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[1] See the work of Perreau E. H., *Les droits de la personnalité*, R.T.D.C., 1909.

[2] Malaurie Ph., Aynes L., *Droit civil des personnes. Les incapacités*, Defrénois, 2007, 3 ed, p. 280.

[3] Sudre F, *Le droit au respect de la vie privée au sens de la Convention européenne des droits de l'homme*, Bruylant, 2005, p. 311.

[4] For details in this sense, see Malinvaud Ph., *Introduction à l'étude du droit*, LexisNexis, 13 ed, 2011, p.303, Lindon R., « Les droits de la personnalité», Dalloz, 2 ed, 1983.

[5] See Lewaszkiewicz- Petryknowsa B., *Le principe du respect de la dignité de la personne humaine*, Actes du Séminaire UniDem, Montpellier, France, 1998.

It is useful to show that the German jurisprudence allowed the existence of such a right „as right of an individual against another individual to respect the dignity and development of his own personality".[6] The solution of a general right of the personality was also sent forward in the Romanian doctrine, this right finding its grounds in the provisions of 30 line 6 of the Fundamental Law.[7]

After having analysed the Romanian and foreign doctrine the conclusion is no deep agreement was reached concerning the criteria suggested so as to classify the rights of the personality and the content of each category of such rights, thus we shall limit only to the presentation of a part of them. In the French law, a first classification founded on the object of rights delimitates the real rights, the claim rights, the intellectual property and personality rights; the latter are characterized by the fact that they have as object their holder's person itself and should be limited to „the rights concerning the guarantee and development of the person itself"[8]. Some authors keep a classification of the rights of the personality in two categories: rights regarding a person's physical aspect (the right of the person over his/her own body and the right of that person to have his/her body respected) and rights regarding a person's moral aspect (the right to an image and to have his/her private life respected, the right to be considered innocent, the right to the domicile inviolability, the right to secrets, the right to honour, an author's moral right over its work)[9]. In another opinion, they split into: the rights of the personality tending to the protection of physical integrity and the ones tending to the protection of the moral integrity and to the protection of private life.[10] In the Swiss law there is generally made a distinction between the rights of the physical personality, of the affective personality and the rights of the social personality[11]. In the Romanian doctrine, depending on the content of the rights righted by the law giver, it is believed to be a part of the rights of the personality both those rights protecting the human body and its biological functions (the right to life, the right to health, the right to physical and psychological integrity, as well as those rights protecting moral values (the right to dignity, the right to free speech, the right to a private life, the right to an image, the right of the deceased to be respected).[12] In conclusion, it was believed to be more exact to try to establish several categories of rights of the personality, but not depending on the aspects of that personality but depending on their specific nature and the applicable legal practice[13].

Starting from the provisions of article 54 from the Decree no. 31/1954 enumerating the main non-patrimonial personal rights, namely: the right to a name or a pseudonym, to honour, reputation and the non-patrimonial personal right of the author of a scientific, literary or technical work, in the Romanian law, until the issue of the new Civil Code in

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[6] See Tricot-Chamard I., *Contribution à l'étude des droits de la personnalité*, P.U.A.M., 2004, p. 247.
[7] For details in this sense, see Ungureanu O., *Dreptul la onoare şi dreptul la demnitate*, P.R., nr. 2/2006, p. 136.
[8] Ghestin J, Goubeaux G, *Traité de droit civil. Introduction générale*, L.G.D.J., 1977, p. 164.
[9] Malinvaud Ph., *Introduction à l'étude du droit*, LexisNexis, 2011, 13 ed, p. 302-333. Also see M. de Juglart, *Cours de droit civil. Tome 1. Premier Volume. Introduction. Personnes. Famille*, ed. Monthchrestien, p. 105; the author makes a distinction between the rights resulting from the physical aspect of the personality, category which includes the right to the protection of bodily integrity and the rights resulting from the moral aspect of the personality, category which includes the right to respect one's image, intimacy and the moral right of the author. In the same line, Weill A., *Droit civil,* Tome 1, Dalloz, 1972, vol.2, p. 22.
[10] Terré Fr., Fennoillet D., *Droit civil. Les personnes. La famille. Les incapacités*, 6 ed, Dalloz, 1996.
[11] Bucher A., *Personnes physiques et protection de la personnalité*, 5 ed, Helbing Lichtenhahn, p. 96.
[12] See Chelaru E., *The rights of the personality in regularizing the New Civil Code*, Right, no. 10/2011, p. 34. Also see Jugastru C.,*Reflections over the notion and evolution of the rights of the personality*, History Institute Annals «G. Barițiu», Cluj-Napoca, Tom V, 2007, pp. 325-340.
[13] For details, see Lindenbergh D.S., *De positie en de handaving van persoonlijkheidrechten in hen nederlandse privaat recht*, T.P.R, 1999, p. 1673.

which there are expressly stipulated under this terminology in article 58; the concept of right of the personality first appeared in the speciality literature and were included in the category of non-patrimonial personal rights[14]. It was showed that this institution has the purpose to insure a precise and clearly delimitated legal context to protect a human being's bio-psycho-social entity[15].

In an opinion with majority at the present moment it is believed that the rights of the personality are absolute subjective rights, but in foreign literature there isn't a deep agreement concerning this aspect, other perspectives being exposed, as well. Thus, according to J. Ghestin and G. Goubeaux, the rights of the personality are „at the limit" of the concept of subjective right, this characteristic being recognized more often to certain rights of the particular personality, such as the right to an image[16]. Other authors believe it is about freedoms as being their limits in the competing freedoms of the other subjects or about legitimate interests[17].

The Civil Code[18] regularizes as rights of the personality the following rights: *the right to life, health and integrity, the right to dignity, the right to one's image, the right to have one's private life respected*, the law giver highlighting it is also about an exemplifying enumeration, in consequence, this category also includes „other such rights mentioned by the law"[19].

2. The right to dignity

In the international law and in the national legal systems, the dignity of the human being appeared after the traumatizing experiences caused by the fascism, National Socialism and Japanese imperialism. These events had a powerful impact, generalizing a feeling of rejection of anything affecting the human being in its essence. In this context, the idea of dignity was poached in the international documents as meaning the fact that the human being has an intrinsic value, an irreducible greatness each and every one should respect[20], being about a non-derogable, egalitarian principle, applicable in all circumstances and to any individual, regardless of his/her deflection from the legal, social, biological or mental norms.[21] It can be also added that dignity is a complex notion that can have several dimensions (forms, types).

In what the judicial definition of the concept in concerned, in the speciality literature there are shaped two positions: a part of the authors believe dignity cannot be defined[22], while others tried to find a definition for dignity by giving definitions in axiological terms

[14] For a classification of non-patrimonial personal rights, see Beleiu Ghe., Calmuschi O., *The Romaniann Civil Law. Persons*, Bucharest, 1992, p. 23, Stătescu C., *Civil Law. Physical person. Legal entity. Real rights*, Didactică şi Pedagogică Publishing House, Bucharest, 1970, p. 101, Dogaru I., Popa N., Dănişor D.C., Cercel S., *Bases of the Civil Law*, Vol. I. General Theory, CHBeck Publishing House, p. 399 and the following.

[15] Mihai Ghe., Popescu G., *Introduction into the theory of the personality rights*, Academiei Române Publishing House, 1992, p. 16,

[16] Ghestin J, Goubeaux G., *Traité de droit civil. Introduction générale*, L.G.D.J., 1977, pp. 164-165,

[17] Leleu Y-H, Genicot G., Langenaken E., *La maîtrise de son corps par la personne*, J.L.Renchon, *Les droits de la personnalité*, Bruylant, 2009, p. 99.

[18] Law no. 286/2009 published in the Gazette, Part I, No. 511/2009. The New Civil Code came into force on October 1st 2011.

[19] Line 1 of art. 58 was changed by law no. 71/2011 of applying law no. 287/2009, the Gazette, Part I, no. 409/2011. Before the change, the text was formulated as follows: "Any person has the right to life, health, physical and psychic integrity, *to honour and reputation*, the right to have his/her private life respected, as well as the right to one's own image".

[20] See Grabarzyk K., *Les principes généraux dans la jurisprudence de la Cour Européenne des droits de l'homme*, P.U.A.M., 2008, p. 212.

[21] Delmas-Marty M., *Criminalité économique et atteintes à la dignité de la personne*, Vol. I, ed. De la Maison des sciences de l'homme, Paris, 2000, p. 486.

[22] For details in this sense, see Gimeno-Cabrera V., *Le traitement jurisprudentiel du principe de dignité de la personne humaine dans la jurisprudence du Conseil Constitutionnel francais et du Tribunal Constitutionnel espagnol*, L.G.D.J., 2004, p. 183.

and granting it a multitude of meanings and acceptations[23]. Nevertheless, the Romanian law giver didn't try to give it a definition, limiting himself to consecrate each person's right to have his or her dignity respected in article 72 of the Civil Code.

The dignity's content is uncertain, evolutionist, varies from a geographical space to another and in accordance with the historical stage, not being able to be determined a priori. The most frequent reproach was that it was too vague, which leaves room for a huge margin of appreciation to the one deciding in a concrete case if any damage was brought or not[24].

In the absence of a definition, the German Constitutional Court held a negative delimitation of the human dignity protection field by means of the prejudice that can be brought, thus: „This cannot be ascertained for good, we must always have a concrete case. General expressions, such as: the human being must not be reduced to an object submitted to the state power" can only draw a general line of the framework where there can be found the breaches of the human dignity. It is not unusual for the man to be reduced to being the object of relationships and social evolution, but also of the right, meaning that he must be subjected without taking into consideration his interests. It is not enough to be about the breach of human dignity. It is necessary that the treatment put into discussion his quality of a subject or of it is about, in the proper sense, about an arbitrary non-compliance with this dignity"[25].

The French Constitutional Council identifies „an assembly of principles among which the primacy of the human being, the integrity and the absence of the patrimonial character of the human body, the integrity of the human species"[26] as being principles insuring the compliance of the constitutional principle of the protection of the human dignity and the French penal code incriminates as felonies against dignity the discriminations, human being traffic, pandering, the resort to the prostitution of minors and of vulnerable persons, the exploitation of beggary, labour and living conditions against dignity, baptism and prejudice brought to the respect for the dead, while insults and denigration are considered felonies against honour. Nevertheless, the Charter of Fundamental Rights of the European Union includes in Title I „Dignity": human dignity, the right to life, the right to physical and psychic integrity, the forbiddance of torture and inhuman or degrading punishments or treatments, the forbiddance of slavery and forced labour.

One can say that, first of all, the Romanian law giver foresaw and punished as dignity prejudicing only those deeds considered insult (article 205 of the Criminal Code) and libel (article 206 of the Criminal Code). By adopting the Constitution in 1991, according to article1 line 3 the human dignity became a supreme value for the Romanian state, next to the citizen rights and freedoms, the free development of the human personality, justice and political pluralism.

It is important to highlight that in foreign literature there are debates concerning the risks of judging the concept and the idea of the existence of a subjective right to dignity

[23] For the French Law, see Guillen S., *La dignité de la personne humaine et police administrative. Essai sur l'ambivalence d'un standard*, in the work *Ethique, droit et dignité de la personne. Mélanges Christian Bolze*, by Pedrot Ph., Economica Publishing House, 1999, p. 75.

[24] For instance Béchilon D., *Porter atteinte aux catégories anthropologiques fondamentales*, R.T.D.C., no. 47/2002, p. 60, C. Neirink, *La dignité humaine ou le mouvais usage juridique d'une notion philosophique*, in *Ethique, droit et dignité de la personne. Mélanges Christian Bolze*, Economica, 1999, p. 46.

[25] Theory of the object (Objektformel), for details Laure J., *Le principe de dignité en droit allemand*, in the work C. Girard, S. Hennette-Vauchez, *La dignité de la personne humaine. Recherche sur un processus de juridicisation*, P.U.F., 2005, p. 172.

[26] D. Nr. 94-343/344 DC, regarding "Bioethical laws", J. Of., July 27th 1994, p. 1124.

remains extremely controversial[27]. Furthermore, there isn't any agreement concerning its including in the list of the personality rights[28].

Taking into consideration the information mentioned above, we shall subsequently show the provisions of the new Civil Code referring to the right to dignity. Article 72 of Book I - „About people", Title II - „Physical person", Chapter II called „The respect owed to the human being and his/her inherent rights" stipulates: *„(1) Any person has the right to have his/her dignity respected. (2) It is forbidden any prejudice brought to a person's honour or reputation without his/her consent or without complying with the limits foreseen by art. 75"*. Before the new Civil Code, the right to honour and reputation were foreseen as non-patrimonial personal rights in article 54 of Decree no. 31/1954 regarding physical and legal persons.

The right to dignity can be limited in the conditions foreseen by article 75 of the Civil Code which stipulates in line 1 that the international law, conventions and treaties the Romanian state is a part of can allow limitations. In addition to that, according to line 2, it is not a limitation of this right a person's carrying out his/her own constitutional rights and freedoms in good faith and by complying with the international agreements and conventions Romania is a part of.

As per article 58 of the Civil Code, the right to dignity is one of the rights of the personality (non-patrimonial personal rights) and holds the legal characteristics of this category, respectively: it is an absolute right, thus opposable erga omnes, all the persons being obliged to not commit deeds that could intangibly, untransferably[29], imprescriptibly extinctive and acquisitively prejudice him/her, with a strictly personal characteristic, that can not be exercised by general representation and with an universal character, that is it belongs to everybody[29].

In the Romanian doctrine[30], especially the penal one, it is admitted in a way long consecrated that dignity has two aspects: a subjective aspect corresponding to honour[31] and

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[27] Denies the existence of a subjective right to dignity Revet Th., *La propriété de la personnalité*, Gaz. Pal., 18-19.05.2007, p. 51, Molfessis N., *La dignité de la personne humaine en droit civil*, in the work *La dignité*, coordinated by Revet Th. and Luce Pavia M., Economica Publishing House, 1999, p. 107, Fabre-Magnan M., *La dignité en droit: un axiome*, Revue interdisciplinaire d'études juridiques » nr. 58/2007, pp. 1-31.

[28] See Tricot-Chamard I., *Contribution à l'étude des droits de la personnalité*, P.U.A.M., 2004; the author believes that the protection of the personality contributes to the insurance of the respect for dignity, next to the provisions regarding the non-discrimination, public freedoms and human rights, but dignity is not an attribute of the personality and does not appears with the characteristics of a legal notion because "nobody knows what it is about… not the lowest rest of abstract definition". It is showed that in certain circumstances, apparently with no reason whatsoever, dignity loses its transcendental dimension, the one allowing it to rash the most delicate principle situations to take an individual dimensions, which is even more serious in the matter of protecting the personality as it conditions the application of other norms and, especially, the existence of a responsibility. I. Tricot-Chamard shows that the border separating honour of the attributes of the personality shape around the subjectivity of honour as, unlike it, in the case of the right to private life, image and voice it is about data any individual has because they are based on criteria which have a certain mentality and are, thus, easy to be identified. In consequence, while the attributes of the personality refer to the moral integrity of the man protecting proper characters identifiable objectively, honour targets the more subjective aspect of moral integrity, making appeal to the individual's sensibility.

[29] For developments, see Cercel S., Olteanu E.G., *Considerations concerning the rights of the personality*, Legal Science Magazine no. 4/2009, p. 52.

[30] In this respect Dongoroz V., *Theoretical explanations of the Romanian Penal Code. Vol. III*, Academiei Române Publishing House, 2003, p. 390 and Păvăleanu V., «Special Penal Law», U.J., 2010, p.140, Basarab M., Paşca V., Mateuţ Ghe, Medeanu T, Butiuc C., Bădilă M., Bodea R., Dungan P., Mirişan V., Mancaş R., Miheş C., "Codul Penal comentat", vol. II.Special Part, Hamangiu Publishing House, 2008, p. 342, Toader T., *Penal Law. Special Part*, AllBeck, Publishing House 2002, pp.162-163, Nistoreanu G., Boroi Al., *Penal Law. Special Part*,, AllBeck Publishing House, 2002, p.168, Beleiu Ghe., *Romanian Civil Law.. Introduction into civil law. Subjects of the civil law*, « Şansa» S.R.L Publishing House, Bucharest, 1992, p. 75.

[31] For an analysis of the complex proportions between dignity, reputation and honour, see P. Berger, *On the obsolence of the concept of honor*, Archives européennes de sociologie, XI, 1970, p. 342, R. Post, «The social foundation of defamation law: reputation and the Constitution», California Law Review, vol. 74: 691/1986.

an objective one corresponding to reputation. Honour and reputation are strictly tied concepts, they have close meanings, even if they are not synonyms and in jurisprudence they are usually cumulatively used. Reputation refers to the appreciation, good name, respect and consideration a persons enjoys from the ones he interacts with, the positive public opinion which is concretely gained with qualities, features and personal merits, that is the image others hold about somebody and has an acquired character. About honour it was said that it is „personal dignity reflected in the consideration of thirds and in the feeling of the person itself"[32] and has two parts: internal honour (honour *stricto sensu*) consisting in the feeling of cherish each person has for himself, acquired by birth and the external honour that has a social connotation and corresponds to reputation[33].

The right to dignity refers to a person's moral image, to the feeling of appreciation each individual has for himself and to the public cherish he enjoys, so it depends more on the public field, the new Civil Code standardizing it as an autonomous right, other than the right to private life (article 71 of the Civil Code) and the right to one's own image (article 73 of the Civil Code) which targets the person's physical image[34]. As a right inherent to the quality of human being, the right to dignity corresponds to any individual and disappears once this person is dead.

It might be useful to remember that in a distinct article, namely article 79 of the Civil Code the memory of the deceased is protected „in the same conditions as the image and *reputation* of the person alive".

3. Means of defence

The Civil Code brings elements of novelty regarding civil juridical means of protecting non-patrimonial personal rights in Title V-„Protection of non-patrimonial rights", of Book I-„About persons", articles 252-257, provisions that also apply to the right to dignity, in the meaning of consolidating the protection granted to these rights according to the provisions of articles 54-56 of Decree no. 31/1954 regarding physical and legal persons.

Thus, according to article 253 of the Civil Code, depending on the moment the illicit deed was committed, there can be legally taken the following measures: 1) if the illicit action is *present*, the court can rule to cease its breaching and to forbid it in the future and 2) for a deed *that took place in the past*, but which lets the trouble subsist (for instance, if an article including slander statements prejudicing a person's reputation, after having been published in a newspaper, can be seen anytime on the Internet), the court can ascertain its illicit character.

Moreover, it can be decided that the author of the deed publish the conviction resolution on his own expense and can take any other necessary measures to cease the illicit deed or to set right the damage caused.

Furthermore, article 253 line 4 of the Civil Code expressly and explicitly stipulates that the holder of the right can obtain the indemnification of the non-patrimonial damage, when the right to action is subjected to the extinctive prescription. The provisions of the new Civil Code confirm the present jurisprudential and doctrinal orientation that admits,

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[32] A. De Cupis, *I diritti della personalità*, A. Giuffré Publishing House, Milano, 1959, p. 93.

[33] See in this respect Bucher A., *Personnes physiques et protection de la personnalité*, Helbing Lichtenhahn Publishing House, 5 ed, 2010, p. 103 and Rătescu C., *Carol al II-lea ad noted Penal Code*, Vol.III. Special Part, Bucharest, 1937, p. 314.

[34] For developments, see Mihai Ghe., Popescu G., op. cit., p. 79 and Jongen F., *Le droit à l'honneur*, in the work J.-L Renchon, *Les droits de la personnalité*, Bruylant, 2009, p. 121.

standing as principle, the possibility to grant compensations in money for the moral damage so as to ease the suffering caused with the illicit deed.[35]

It would have been desirable that, so as to strengthen the protection granted to a person's dignity, the Civil Code included provisions regarding the right to reply and redeem, conceived not as a general right to truth but also as the right of a person which considers itself hurt with the presentation of unreal facts in the media to expose his/her own version on them, to correct the inexact information and to bring amendments he/ she considers necessary for a correct understanding of the situation.

As per article 255 of the Civil Code, by virtue of presidential ordinance the court can rule the taking of provisory measures, namely: forbidding the breach or its provisory cease and taking the necessary means to insure the preservation of the evidence (line 2). The plaintiff must prove his right makes the object of an illicit, present or imminent action and that it risks causing him damage hard to repair (article 255 line 1of the Civil Code). Sometimes, he can be forced to give a bail in the amount set by the court if these measures are considered to determine damage to the defendant (article 255 line 5of the Civil Code). The plaintiff is also forced to introduce the trial action in 30 days at the most since the date provisory measures were decided, under the sanction of its rightful cease (article 255 line 6 of the Civil Code).

The court can rule the provisory cease of the damageable deed, committed by press, only if the following conditions are cumulatively complied with: 1) the damage caused to the plaintiff are serious, 2) there is no justificatory motive of the ones enumerated by article 75 of the Civil Code and 3) if the measure ruled by the court does not appear as being disproportionate with the damage caused (article 255 line 3of the Civil Code).

Because taking provisory measures can cause a damage to the defendant, if found unjustified and the trial action was overruled, the court can force the plaintiff to fix the damage. It can be refused to grant compensations or their amount can be reduced if, according to the concrete circumstances of the cause it is proved that he had no fault or only a slender one (article 255 line 7of the Civil Code).

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[35] For details, Albu I., *Considerations regarding the Romanian jurisprudence's return to the practice of repairing moral damage with money*, Right no. 8/1996, p. 13-22, Vintilă Ghe., Furtună C.,*Moral damage. Study of doctrine and jurisprudence*, AllBeck Publishing House, 2002, p. 46 and the following, C. Jugastru, *Repairing non-patrimonial damage*, Lumina Lex Publishing House, 2000, p. 57-65, Stătescu C., Bârsan C., Civil Law. *General Theory of obligations*, AllBeck Publishing House, 1995, pp. 137-141, Boar M., *Assessment methods and criteria for moral damage compensations in money*, Right no. 10/1995, p. 47, Boar M., *Moral damage compensations in money in some West-European state law.*, Right nr. 8/1996, pp. 22-32.

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THE ESTABLISHMENT OF ASSOCIATIONS UNDER FRENCH LAW OR ABOUT LEGISLATIVE TRADITION OF UNQUESTIONABLE ACTUALITY

Magdalena CATARGIU[*]

Abstract: *Traditionally, the state has the responsibility to comply with the needs and requirements of the society. In most of the cases, the procedures of implementing social policies reduce the state's flexibility and ability to adapt as quickly as possible to the new demands. In order to overcome these deficiencies and the limited financial resources, but also from the desire to meet the social needs of every day life, non-profit entities were created. Through this study we aim to analyze the legal framework regarding the establishment of associations under French law, with reference to Romanian. Nevertheless, for a better understanding of the associative phenomenon, we intend to identify the factors that have led to the increasingly number of associations in France.*

Keywords: *association, French law, comparative law, Act of 1901.*

In France, since the 19th century, most associations were established out of philanthropic reasons, under the influence of republican egalitarianism. A main premise of the flourishing of non-profit collective entities had been the consecration of the freedom of association in the French Constitution of 1848. Unfortunately, two years later it was abolished.

The incorporation of a group having more than 20 members was achieved through an administrative procedure. The legal capacity of the newly entity was, actually, the main effect of the prefect's decree of recognition.

In 1901, through the Act of the 1st July, supported by the President of the Council of State, Republican Pierre Waldeck - Rousseau, the association has been legally established. The bill had been submitted for approval in 1882, and reiterated in 1883. Therefore, more than two decades were needed for the Parliament to adopt it. Consequently, the new regulation has represented a moment of undeniable importance.

The delay with which the law was voted is not surprising. Given that the Church had played an important role in France until the 1900, adopting regulations that limited the power of the clergy gathered many opponents. The 3rd Title of the Act, the largest in fact, consecrated two obligations that animated many debates. They were the recognition of congregations endorsed by the Council of State and their obligation to draw up each year a report on the previous financial year and the inventory of all movable and immovable owned property.

On the other hand, the regulations regarding the association were meant to ensure equal treatment for collective entities, whether they were of religious purpose or not.

The social and political context of the early 19th century had been a good time for the Parliament to adopt the associations` law of 1901 as the Dreyfus business temporarily diminished the power of the Church.

After the resignation of Pierre Waldeck - Rousseau, a year later, his successor, Émile Combes, refused to authorize any religious associations. Thus, during his tenure, many

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Catholic schools were closed. As a result of the law enforcement, a considerable number of priests went into exile in other European countries (Belgium, Spain) and in the U.S.A. [1]

In France, more than a century after the adoption of the Law of 1901, over 1,100,000 associations are active in the social life, in which more than 1,050,000 people are full-time employees and more than 14 million volunteers (which would equivalent to 935,000 people employed full - time) contribute to the associations` activities. Their cumulative budget is around 59 billion euros[2].

French associations are, even nowadays, governed by the Law of 1 July 1901. According to the 1st article, an association is defined as „a contract by which two or more people put together, in a permanent matter, their knowledge or their work in fulfilling a purpose different from profit sharing" *(la convention par laquelle deux ou plusieurs personnes mettent en commun, d'une façon permanente, leurs connaissances ou leur activité dans un but autre que de partager des bénéfices)*. Therefore, in order to create an association it is not required to comply with any administrative or judicial formalities. Newly created entities do not benefit from legal personality. Hence, they can not have procedural capacity, can not receive donations, and manage contracts or the membership fees. Associations established under the Law of July the 1st 1901 are *de facto* entities. In most cases, these are leisure clubs.

An *a priori* control of the unincorporated association is nonexistent. Moreover, the French Constitutional Court, in Decision 77-44 of the 16th of July 1971, held that „the validity of the establishment of associations may not be subject to prior action by the administrative authorities or even by the judicial authorities, even if they would appear to be invalid or would have an unlawful object" (*la constitution d'associations, alors même qu'elles paraîtraient entachées de nullité ou auraient un objet illicite, ne peut être soumise pour sa validité à l'intervention préalable de l'autorité administrative ou même de l'autorité judiciaire*). Otherwise, the freedom of association enshrined in the fundamental French law – The Constitution - is to be infringed. The interpretation of the decision should not lead to the idea that the Court is banned from any type of control. The judge may examine the legality of the joint entity's object whenever the resolution is required, for example by someone who had been suffering a prejudice caused by the entity's actions.

The Italian legislation also recognized associations without legal personality, as *de facto* entities. In this particular case, either the legal status has not been required or it had been denied[3]. In other words, the mere expression of the members` will is sufficient to create an unrecognized association, which is thus the closest juridical form to the contract of *societas* known in Roman law. Through the recognition by the state, associations gain asset autonomy, independence in inner organization and in legal proceedings[4]. Hence, *de facto* associations may hold a mutual fund to which the personal creditors of the members do not have any rights. Unrecognized associations can not own property, but they have this vocation, if they achieve legal capacity. Nevertheless, unrecognized associations may acquire real property by adverse possession[5].

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[1] Stephen Schloesser, *Jazz Age Catholicism: Mystic Modernism In Postwar Paris, 1919-1933*, University of Toronto, Toronto, 2005, pp. 52-53.
[2] Viviene Tchernonog and Association pour le développement de la documentation sur l économie sociale, *Les associations en France Poids, profils et évolutions*, p. 4.
[3] Vincenzo Roppo, *Diritto privato*, G. Giappiachelli Editore, Torino, 2010, p. 165.
[4] Cesare Ruperto, *La giurisprudenza sul codice civile coordinata con la dottrina*, dott. A. Giuffre Editore, Milan, 2012, p. 646.
[5] Katia Mascia, *L'usucapione. La casistica giurisprudenziale di acquisto della proprietà di beni mobili e imobili e di altri diritti reali attraverso il decorso del tempo*, Harley Editrice SRL, Matelica, 2007, p. 74.

According to the Romanian legislation - Article 5 paragraph (2) of Ordinance 26/2000 on associations and foundations, associates may establish a joint entity whenever the means of achieving the goal allows it. However, the Romanian legislator does not confer specific legal rights to the collective entity thus formed. It merely states that this prerogative is an effect of the constitutional right of association. We believe that there is an obvious discrepancy between the association's definition as subject of law laid down in the Ordinance and the provisions of Article 5 paragraph (2) of the same law which enshrines unincorporated associations. Due to the lack of legislative harmonization and to the legal formalism of the Romanian legislator, *de facto* entities remain, after all, only a legal text without application.

Returning to French law, the founders may choose to establish an association with legal capacity. In this regard, they must follow an administrative procedure. On the other hand, in Romanian law, the acquisition of legal personality is the consequence of a judicial procedure. In other words, only the Court is competent to admit or reject the request of legal personality. The French administrative procedure is undoubtedly based on tradition, as the establishment of legal persons has always been the prerogative of the state and not of the judges. Therefore, the Court is invested with less juridical applications. Taking into account that in Romania, for-profit entities are created throughout administrative proceedings, we believe that, on grounds of similitude, associations should be, as well, submitted to an administrative procedure whenever legal personality is required.

In order to establish an association, the founders sign a contract. According to French legislation, it takes at least two members in setting up an association. As an exception, in the province of Alsace, the minimum number of associates is seven. The contract is known as *bylaws* or *statute*.

We mention that in Romanian legislation, the agreement is called *constitutive act* and it is a separate document from the bylaws of the association. We consider that the solution adopted in French law - the uniqueness of the bylaws - is preferable as it prevents the unnecessary repetition of contractual clauses in two separate legal acts. Moreover, we can not agree with the opinion according to which the statute is needed as it contains, in detail, the internal organization of the association, as long as, in most cases, these particular aspects are included and developed in the Regulation on Organization and Internal Functioning.

In what *de facto* associations are concerned, the statute can take any form. The parties can freely choose the means of externalizing their agreement. Therefore, the bylaws can be a document under private signature or an authentic act. However, if the association is intended to gain legal personality or to preserve a particular statute such as agreed associations or associations of public interest, the members` freedom of deciding upon the form of the statute is limited by the administrative exigencies that are applicable. Agreed associations are, under French law, situated at the confluence of simple associations and those declared of public interest. Their peculiarity consists of an agreement with a ministry. The association renders public services of general interest that are traditionally the responsibility of the state and, in compensation, it benefits from fiscal facilities (grants, tax cuts).

The bylaws must contain references regarding the following:

- the object or purpose of the association. It ought to be lawful, moral and it must not affect the territorial integrity of the Republic or its form of government. Failure to comply with these requirements is sanctioned with nullity. In this case the resolution is passed by the *tribunal de grande instance*, either in appeal or as a result of the request of the Public Ministry;

- the name of the association;
- the headquarters;
- the period of time for which the association was created, which can be limited or undetermined;
- the concrete objectives or means of achieving the purpose (e.g. public debates, performances);
- the membership of the association (categories of members, conditions in which a person acquires or loses the status of associate). Founding members or those who have duties in the management of the association must have reached the age of sixteen. The minor of 16 or 17 years old can settle administrative agreements only with the written consent of parents or legal guardians;
- the internal organization of the association including the decision-making bodies;
- the patrimony of the association, which may consist of money (membership fees, donations), human resources, organizational and financial accounting bodies with their powers, duties and rights. Minor members can not become a party of a contract whose object is the creation, modification or transmission of the association`s patrimony;
- how to adopt the modifications of the bylaws. The changes that regard the management of the association must be published in the Official Journal within three months from the time that they occur and must be also mentioned in the bylaws. The amendments produce juridical effects from the day in which they had been made public. Changes must also be recorded in a special register that must be presented to the competent authorities, either administrative or judicial, whenever it is requested;
- the dissolution of the association. The association is terminated by voluntary or statutory dissolution, pronounced by the Court. Assets will be liquidated under the provisions of the bylaws and, in the absence of statutory provisions in this regard, according to the rules established by the General Assembly.

In order to acquire legal personality, the association must undergo two legal stages. The first is the submission of a declaration to the competent authority, while the final stage consists in the publication of the existence of the association in the Official Journal. Thus, according to Article 5 of the Act of 1901, the association must be made public by the members. In other words, they must submit a statement of intent to the prefecture or

sub-prefecture of the district where the legal entity will be located. If the registered office is situated in another state, the declaration shall be submitted to the competent institution of the headquarters.

The declaration of incorporation must include:

- the name of the association as set out in the statute and the logo;
- the purpose of the association;
- the address of the headquarters;
- the name, profession, address and nationality of the managers;
- a copy of the bylaws signed by at least two members responsible for the management of the association;
- a minute of the Constituent Assembly signed by the person responsible for managing the association;
- the address of the administrative office, if it is distinct from the headquarters, as well as the address of the secondary offices.

The declaration must be signed by a person responsible for managing the association or by an agent authorized in this regard. Within 5 days from the date when the dossier is complete, the prefecture will issue a receipt which will be communicated to the applicant.

In order to obtain legal personality, the association shall require the publication of the declaration, indicating the scope and the headquarters. Publication is done by the prefecture or sub-prefecture, which transmits the necessary information regarding the association to the Official Journal. After publication, the collective entity will receive a copy of that edition of the Journal.

Publication costs must be covered by association and the payment is being made after publication based on the receipt issued by the Directorate of Legal and Administrative Information (which is a service subordinated to the Prime Minister).

After the publication, the entity is assigned a number and it is, therefore, recognized as a being a moral person[6].

The association that has gone throughout this administrative procedure acquires legal capacity in the sense that it has procedural capacity, both active and passive, can receive manual gifts, can buy or sell assets, can administer grants and membership fees, and may hold immovable goods necessary to achieving the purpose for which it had been established. The entity can receive donations or legacies, as it is laid down by the Decree of the Council of State, both by *inter vivos* and *mortis causa* acts only if the sole purpose of the association is assistance, beneficence, scientific research or healthcare.

The Act of 1901 contains provisions relating to acquisition, maintenance and the loss of public utility status of the association. The sphere of rights of the beneficiaries of such status is extended. Therefore, the legal person receives the so called full legal personality, enjoying certain tax incentives[7].

This status is granted throughout the Decree of the Council of State. The procedure's duration is usually three years. This period may be reduced if the predictable resources for the following three years implied by the recognition are likely to ensure the financial stability of the association. An association must also have an objective of general interest, to be useful to the community or the society. It can not have political, religious, economic or professional interests of the members[8]. The association must address to an extended number of beneficiaries and the number of members can not be less than 200. These are the necessary premises to achieving the purpose.

Public associations may conclude all civil acts permitted by the statute, but they can not hold property other than the assets used to achieve the aim. They can get both for consideration and free, forests and land to be afforested, donations and legacies regardless of the object. Movable assets should be placed in registered securities.

The activity of the collective entity is placed under administrative guardianship. For example, if an association intends to mortgage immobile property, to contract a loan or to transfer goods from the patrimony of the legal person, it is ought to apply for and obtain the prefect's authorization in that particular matter.

[6] The administrative procedure is available on the official site of the French administration, at http://vosdroits.service-public.fr/associations/F1119.xhtml#N10078, viewed on 20.02.2013.

[7] An association of public utility can be fully or partially exempt from paying certain taxes and people who make donations to the association can benefit from taxable income deduction.

[8] Dominique de Guibert, *Créer, animer, gérer, dissoudre une association*, Maxima, Laurent du Mesnil Editeur, Paris, 2007, p. 31.

Both the statute of public utility and the agreement with a minister may be withdrawn according to the same procedure by which they were acquired. It should be noted that granting an association with a special statute is discretionary for the administrative authority.

The Act of 1901, however, is not applied all around France, as we mentioned earlier. In the province of Alsace, associative life is governed by the provisions of the local Civil Code. It entered into force on January the 1st, 1900, prior to the Act of 1901. Its application is imperative. Legal rules consecrate two types of associations, unregistered and registered. The first benefits from limited legal capacity, its organization and activities being drawn out in the statute. The law does not require the insertion of certain clauses in bylaws. Therefore, it is very flexible. Registered associations, on the other hand, are subject of several restrictions regarding substance, form and procedure.

A registered association can be created by the will of at least seven founding members. The bylaws must include the prescriptions of by law. The creation of the association requires the inscription of the entity in the Associations` Register kept by the *tribunal de instance* where the association has its headquarters.

The inscription is subsequent to a dualist control. The judicial examination is conducted by the judge, while administrative control is carried out by the prefect. The first regards the compliance of the statutory provisions with the mandatory rules of civil and criminal law, verifying the existence of mandatory clauses in the statutes, as well as all the documents required by the law. The aim of the administrative control is to analyze the association's object. If it is contrary to the rules of criminal law or affects the territorial integrity or the form of government of France, the prefect may refuse the registration of the association. We believe that the French application process is rather complicated, in the sense that either the judge or the public official can achieve full vetting, checking all relevant aspects in order to create the association. Taking into consideration the fact that the process of acquiring legal personality is juridical, the role of the public officer seems to be unjustified.

The registration of the collective entity confers extended legal capacity than that of the associations governed by the Act of 1901 and recognized as being of public utility. For example, we see that local associations are not obliged to respect the principle of specialization of their object. In other words, they can sign legal acts that exceed their activity.

In order to establish an association, the legal provisions of the Act of 1901 require founders to contribute to the patrimony of the association. The contribution consists of knowledge or activities. In other words, the associates shall not participate in the formation of social capital through material contributions. They are basically of extra-patrimonial nature. However, a member may bring a particular good in the association, provided that at his withdrawal from the association or in case of dissolution, that good shall be returned. Minors under the age of 16 can become members of an association, as they can contribute with knowledge. For the activities they can provide, according to the Act of 1901, the written consent of the legal representative is imperative. The minor may sign acts of administration, but he can not dispose of the assets.

The purpose of the association is of non-patrimonial nature. Therefore, the members do not seek to divide the profit that may result from the activity of the legal person. As such, they do not participate in covering the losses. The financial responsibility of associates is limited. The aim must be lawful and must not affect the good morals, the territorial integrity or the government form of France. In case of disregard of the legal requirements, the sanction is absolute nullity. As the effect occurs *ex tunc*, it is considered

that the association had never existed. This leads to the cancellation of the contracts signed by the legal entity.

In conclusion, the French legislation concerning associations, as it is consecrated in the Act of 1901, has been applied for over a century. Despite the long period of time, we note that the legal rules are characterized by an unquestionable actuality. We believe that this is justified by the fact that, in 1901, the French legislator had chose to create a general framework for non-profit legal persons, in the disadvantage of regulating in detail, which might not have passed the test of time. Thus, the stability and predictability of the legal system are the prerequisites of the development of non-profit sector in France. Therefore, the French model must be taking into consideration by both scholars and the Romanian legislator as well.

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BRIEF CONSIDERATIONS ON THE THEORY OF UNPREDICTABILITY ACCORDING TO PRESENT REGULATIONS

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Abstract: *In compliance with the provisions under art.1270 in the Civil Code, the amendment or termination of a contract can occur only with the parties' agreement or due to causes regulated by law. Under such circumstances, the amendment or termination of a contract due to causes regulated by law shall be regarded as an exceptional situation, likely to occur only when the law allows. One of the exceptions to the principle pacta sunt servanda consists, as well, in reviewing the effects of certain legal acts following the occurrence of one major contractual asymmetry caused by an extraordinary change in the circumstances being considered by parties on the date of its conclusion, that is when applying the theory of unpredictability (also known as the rebus sic stantibus rule). This article aims at providing a thorough analysis on the theory of unpredictability both in theory as in the practical consequences likely to be determined by the regulation of this institution.*

Keywords: *contract, theory of unpredictability, asymmetry between the parties' contractual statements, adjustment of contract*

1. Brief historical approach on the theory of unpredictability. Concept

The theory of unpredictability finds its origins back in the canon law, namely in the dostrine of the medieval Western church, as reflected in the work of St. Thomas Aquinas, in the 14th century. It assumes that if the execution of a mutually binding contract becomes too onerous for one of the contracting parties, then the contract should be revised ratio legis to restore the value equilibrium of parties' performance. This theory was not greatly welcomed among the lawyers of that time.

In the European law, this theory was applied only after the First World War, when the severe economic changes caused by the World conflagration claimed the need for certain contracts, especially those with successive performance, to be reviewed.

Currently, in Europe there is not any consistent theory and regulatory approach on the theory of unpredictability, so that legislative solutions are quite different. Laws that accepts contractual unpredictability are influenced by German law (Austria, Denmark, Finland, Sweden) while the law where one can talk about an almost total rejection is that in Spain, Belgium, Switzerland, France.

In our country, up to 1989, most of the doctrine and jurisprudence rejected this theory. Due to changes occuring after 1990, due to the rapid growth of inflation in this period, the theory of unpredictability has become a debated topic in many papers in the field.

The regulation operating before the coming into force of the current Civil Code[1] did not contain general provisions on unpredictability, but a number of particular applications.

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[1] Civil Code - Law no 287/2009 republished in the Official Gazette, Part I no. 505/15.06.201; modified by Law No. 71/2011, published in Romanian Official Gazette, Part I, No. 409 from10.06.2011;

Thus, art. 43 of Law 8/1996 on copyright and related rights[2] with subsequent amendments provides that, in cases of obvious disequilibrium between the remuneration of the work's author and the benefits of the individual receiving the assignment of the economic rights, the author may request the competent judicial authorities to review the contract or increase the remuneration."

Similarly, art. 54 of Ordinance 54/2006, on the regulation of concession of public assets[3] provides that, „The contractual relationships between the grantor and the grantee rely on the principle of financial balance of the concession of rights that are granted to the latter and the obligations imposed. The grantee will not be required to bear the increasing of tasks related to the execution of its obligations, if such an increase is the result of: a) an action taken by a public authority, b) an event of force majeure or an unforeseeable circumstance.

Moreover, aarticle 14 of Law 195/2001 updated [4] on volunteering provides that „If during the execution of a voluntary agreement such a situation likely to cumber the fulfilment of obligations of the volunteer occurs, independently of the parties' will, the contract will be renegotiated and if the situation makes impossible the further execution of the contract, then the contract is terminated by operation of law."

Concerning the application tof this institution, the national courts have proceeded to apply it to the matter of the lease agreement, providing at the request of the rented property's owner the increase of the rent under the former art.970 par. 1 and especially under art. 970 para. 2 on equity[5].

Regulated as an exception to the principle of binding force of the contract expressed by adage pacta sunt servanda and provided by art. 1270 Civil Code, paragraph 1, unpredictability is generated by a socio-economic reality arising from major changes in the conditions the contract is to be executed, changes made after the conclusion of the act, unforeseeable and beyond the control of the parties, in relation those planned at the time of its conclusion. Contractual unpredictability is inextricably linked to the economic circumstances, especially currency fluctuations, occurring during the period of the contract.

In theory, contractual unpredictability was defined as "The damage caused to one of the contracting parties as a result of a serious value imbalance occurring between his performance and the counter-performance of the other party during the execution of the contract, imbalance caused by the economic situation, especially currency fluctuations, which often consist of an open or galloping inflation"[6].

2. Legal regulation and the scope of unpredictability

In the current Civil Code, the institution of unpredictability finds its origins in art. 1271 Civil Code immediately after the regulation on the binding force of the contract. In its current meaning, unpredictability is an exception to this principle and represents an imbalance between the parties' performance produced after the conclusion of the contract, due to which an obligation of one party „becomes excessively onerous. The cause of imbalance is the result of „an exceptional change of circumstances "and the debtor has not assumed the risk of imbalance and neither „could he be reasonably considered to have taken that risk".

[2] Published in the Official Gazette, Part I no.60/26.03.1996.
[3] GEO 54/2006 on the concession of public assets, published in the Official Gazette no. 569 of 30.6.2006
[4] The Law of volunteering. Act 195 of 2001 updated and republished in the Official Gazette no. 276 of 25 April 2007
[5] Gheorghe, Piperea (2012), *Drept comercial. Întreprinderea*, Ch. Beck Publishing House, Bucharest, p.75.
[6] Liviu, Pop (2009), *Tratat de drept civil, Obligațiile, vol. II. Contractul.* Universul Juridic Publishing House, Bucharest, p.534.

This article establishes thus a rule and an exception concerning the execution of the contract when the circumstances the parties have considered on the conclusion of the contract have changed and execution of the contract under such circumstances becomes an excessively onerous task for either party.

In paragraph 1 of art. 1271 there is stated the rule according to which „Parties are bound to perform their obligations, even if their performance has become more onerous, either due to increased costs of performance or to lower value of counter-performance``. According to the first paragraph, each party is bound to perform the obligationa taken under the terms of the contract, even when it has become more onerous than it seemed to be on the conclusion of the act, disrupting the initial equilibrium, presumed, between mutual benefits.

The exception is provided in paragraph 2 of the above-mentioned article, according to which, in the case when „the execution of the contract has become excessively onerous due to an exceptional change of the circumstances whichi could have rendered completely ufair the debtor' liability in fulfilling his obligation" there is the possibility of turning to justice for reconfiguring the contract or they can provide the termination of the contract.

Concerning the scope of this theory of unpredictability, it is represented, as a rule, by contracts with onerous title for successive execution or by those affected by a standstill period which may be exposed during their existence, to unpredictable changes in economic conditions that have been completed, provided that the obligations taken have not been fulfilled so far.

This constant changing of the economic circumstances calls for the need to adjust the contract to the new realities, because the parties, when concluding the contract, could not foresee the changes ocuring in their economic life, concluding the contract considering the situation existing at the moment of making the agreement of wills. This change in economic circumstances can have serious consequences, consisting in serious imbalances between the parties' performance, likely to cause severe injury to the one contracting party and the enrichment of the other.

The above-mentioned authors[7] consider that the institution could be applied in contracts uno ictu, to the extent that breaking the contractual equilibrium interferes before the fulfillment of the parties' contractual obligations, as well as in the case of some unilateral contracts when the obligation becomes excessively onerous for its debtor.

As far as liberalities are concerned, whether they are gifts or related, there is the possibility to review tasks and conditions. Thus, art. 1006 Civil Code provides that „If due to unforeseeable situations and not attributable to the beneficiary, arising after the acceptance of liberality, the fulfillment of conditions or of taks affecting the liberality became excessively difficult or onerous for the beneficiary, he may request the review of tasks or conditions ". the court hearing the application for review may decide either for quantitative or qualitative changes in the conditions or tasks of liberalities, or group them with similar ones from other liberalities, or even alienate the object of liberality, the price being used according to the decider's. moreover, according to art. 1008 Civil Code, in case of the disappearance of the reasons which led to the review of tasks and conditions, the person concerned may request the removal of the effects of future review.

[7] Gabriel, Boroi, Liviu, Stănciulescu (2012), *Instituții de drept civil în reglementarea noului cod civil*, Hamangiu Publishing House, p 151.

3. The premises and conditions of the contractual unpredictability

Their determination involves deciding upon the importance of the imbalance created, analysing the conditions to be met so that a given situation should be considered unpredictable, as well as of the moment when this imbalance needs to arise so that one can speak about an unpredictability.

Regarding the importance of the imbalance created, according to the legal provisions cited above, there must be a serious and clear imbalance between the performance the parties have taken, that is this imbalance should be so poignant that to place the debtor in question in an extremely disadvantageous situation likely to make manifestly unfair his ordering to the performance of the contract entered into. Law speaks in this case of an obligation which has become excessively onerous (or ridiculous related to its value at the time of conclusion), the only situation in which a party may invoke the theory of unpredictability. To give greater importance to this notion, the legislature expressly states that an obligation which has become onerous only (not excessively onerous) can not constitute grounds for a party to invoke unpredictability.

We can mention that, in the lack of an abstract appreciation in abstractio of the legislature on the criteria establishing the „excessive" character of the onerous judicial act, the difference between the rule application (concerning the clear execution of obligations under the contract) and the application of the exception (which means adjusting the contract by intervention of the court) is quite difficult, the task belonging to the court to discriminate the situations in which the obligation of one party has become not only „more onerous" or „excessively onerous".

For the court to review the effects of the contract, a number of substantive and procedural conditions should be met.

The basic conditions are set out in art. 1271 par. 3 letter. a) - c) respectively:

a) The change of circumstances occurred after the conclusion of the contract;
b) The change of circumstances and the extent thereof have not been and could not be considered by the debtor reasonably when concluding the contract;
c) The debtor has not taken the risk of changes in circumstances and could not reasonably be considered to have taken that risk;

The letter d) of the same text adds a procedural requirement, instituting a preliminary procedure and mandatory referral to turn to the court, consisting of the debtor's obligation to try, in a reasonable term and with good faith, to negotiate the fair and reasonable adjustment of the contract, and in case of failure of negotiations, the possibility of recourse to the courts shall apply.

The moment when the disproportion occurs between the parties' performance, as a basis for invoking the contractual unpredictability, is particularly important, being the distinction between unpredictability and other legal institutions. It is important therefore that the source of this event which attracts the disproportion of performance to arise after concluding the contract.

4. Underlying the theory of unpredictability

The literature in the field includes several theories for underlying the theory of unpredictability. According to one of the theses expressed[8], the foundation of unpredictability is located on the domain of the parties' will interpretation that would contract in considering the existing conditions on the conclusion of the act. The conclusion and good faith interpretation of the contract requires the existence of a clause according to

[8] Liviu, Pop (2000), *Teoria generală a obligațiilor*, Lumina Lex Publishing House, Bucharest, p.66.

which the obligations of the parties remain unchanged as long as the conditions envisaged by the parties on its conclusion remain unchanged. Where these conditions undergo a radical change, obligations of the parties cannot remain unchanged, then the contract adjustment to the new economic circumstances becoming necessary. As economic conditions change was unpredictable, it can be concluded that the revision of the contract is consistent with the parties will. It is thus assumed by the parties when the contract was concluded, a certain existing economic stability throughout its execution, presumption existing as an implied condition,, as a constructive clause on which the parties have based their willingness to contract. This clause is referred to as the clause rebus sic standibus.

Another theory expressed[9] to justify contractual unpredictability is the theory of good faith and equity. According to law, the obligations must be performed in good faith and in accordance with equity. In these circumstances, that creditor who claims his debtor a performance which has disproportionately high due to unforeseen causes, beyond the parties' control, violates the principle of good faith.

In the opinion of other specialists, contractual unpredictability is explained through the theory of force majeure. The circumstances giving rise to serious imbalance between performance are objective, unpredictable, unavoidable and are beyond the control of the parties, so that they can be considered as cases of force majeure, likely to lead to termination of the contract due to the impossibility of fulfilling the obligations by one of the parties.

Other supporters have justified this theory either by cause (whether the balance of performance was broken, one of the performance will not have a cause, as the performance is not equivalent) or the unjust enrichment of one party[10], or by the theory of abuse of rights (ordering the debtor to execute a performance that would lead to its ruin is an abuse of rights by the creditor).

Another theory expressed in the literature in the field is that which underlies unpredictability on the social usefulness of the contract[11]. Although the contract is the law of parties, the will of the contracting parties cannot be isolated from the social and economic context in which it was issued, and if it changes, the will has no longer the original basis, requiring thus the revision of the contract according to the theory of unpredictability. They considered it an economic necessity primarily because the economic ruin of one attendants in the economic cycle can only have negative consequences.

5. The effects of unpredictability. Solutions likely to be given by the court

As we have shown above, the application of the theory of unpredictability requires the court intervention to restore contractual balance affected by the imbalance cause, after the failure of negotiations by the parties in order to adjust the contract fairly and reasonably and in the absence of certain provisions providing for the possibility of its revision.

Unpredictability will be mainly invoked by the party affected by the occurrence of an unpredictable event. Depending on the contracting party affected by an unforeseeable event, unpredictability, the outcome of admitting the unpredictability shall be represented either by the the debtor's situation that will not be bound any longer to fulfillingthe obligation which has become too onerous, or by the creditor situation that will not be

[9] Jacques, Ghestin, Christophe, Jamin, Marc, Billiau,(2001) *Traite de droit civil. Les effects du contract*, 3e édition, L.G.D.J., Paris,p.314.
[10] P., Voirin (1991) - *Droit civil*, vol. I, edi\ia a 23-a, Librairie Generale de Droit et de Jurisprudence, Paris, p.363.
[11] G, Anton (2000) - Teoria impreviziunii în dreptul român şi în dreptul comparat, în *Dreptul* nr. 7/2000, p.30.

obliged to accept the counter-performance which has become ridiculous, because of the drastic decrease of its value.

In both cases we are talking, mainly, about the lack of effect of those those contractual clauses containing the excessively onerous obligation, respectively the diminished counter-performance. The inefective contract affected by the unpredictable makes room for discussions on the solutions required in connection with the fate of the contract for the future: maintaining or abolishing it, because one of the difficulties in accepting unpredictability was driven by the vision of its effects on the contract, considering that the application of unpredictability would lead to the extinction of obligations[12].

Once invoked and proven, unpredictability, pursuant to the provisions contained in Art. 1271, paragraph 2, the court may, according to the possibility of reaching the purposes for which the parties contracted:

a) adjust the contract to distribute equitably between the parties the losses and benefits resulting from a change in circumstances;
b) terminate the contract at the time and under the conditions laid down.

6. Differences in relation with other law institutions

The literature in the field includes many dicussions on the difference between unpredictability and other law institutions.

Regarding the distinction between unpredictability and lesion, the moment when the imbalance between performance occurs becomes highly relevant. In case of lesion, the obvious disproportion between the two performances is assessed when setting the agreement of will, while in case of unpredictability, such a moment is assessed on the fulfillment of contractual obligations. Unlike lession, in case of unpredictability, when concluding the agreement of will there is not any imbalance between the parties performances, but this imbalance occurs later.

A further distinction shall be made between unpredictability and force majeure. Concerning the force majeure, we witness an event which could not be either predicted or avoided by the debtor, while in case of unpredictability, the obligation is not impossible to be fulfilled, but only it becomes excessively onerous, and if the debtor fulfilled it then he would go bankrupt. Force majeure could not lead, as in case of unpredictability, to adjustment of contract, but only to the suspension or termination of its effects.

Contractual unpredictability clause differs from indexation clause. Indexation clauses are clauses which seek to maintain the value of a long-term contract by avoiding the difficulties that may arise as a result of price variation, as it is related to a standard. They operate automatically, without the intervention of the parties, according to the fluctuations of the established standard. As established by the will of the parties to reduce or eliminate the risk of changing circumstances, they differ from unpredictability which occurs when the borrower has not taken this risk, nor could he reasonable be considered to have taken such a risk.

[12] Cristina Eisabeta, Zamsa (2006), *Teoria impreviziunii. Studiu de doctrină şi jurisprudență*, Hamangiu Publishing House, p.171.

7. Conclusions

The coming into force of the Civil Code caused the introduction in our legislation and the regulation of new institutions including contractual unpredictability, as an expression of a radical change of vision in Romanian legislation corresponding to existing realities.

Under the current circumstances, determined by the global economic crisis, characterized by instability and uncertainty, contractual unpredictability becomes particularly important institution and its certain regulation in our legislation is an important step towards the alignment of the Romanian private law to the European one, allowing the adjustment of a contract to the contemporary conditions of its execution.

The practical importance of this institution, supported by both the generating causes and by the effects it has on contractual relations, is obvious as the crisis we undergo nowadays has caused such a situation to many debtors, the matter of reconfiguration of their contracts being an issue which must be solved by the Romanian courts, each case having its peculiarities. Without mentioning the binding force or its further execution, the adjustment of the contract to the initial situation under which the parties have contracted, is based on both good faith and fairness in executing the contract.

Beyond its necessary and innovative character, the current regulation of this institution, however, may be criticized for the lack of appreciation in abstractio by the legislature of the criteria for establishing the „excessive character" of the onerous legal act, on the one hand, and for the practical impossibility of the debtor to negotiate reasonably and equitably the adjustment of the contract, on the other hand, provided that at the time, the two parties are on opposite positions.

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DOCTRINE, SOURCE OF LAW BY THE LAW EFFECT, IN THE FIELD OF DIVORCE

Laura CETEAN-VOICULESCU[*]

Abstract: *In the last period is noted a revival of the role of legal doctrine, interpretative as the source of law, in a number of areas in which we have been referring on another occasion. This paper aim is to analyse the theories that have become source of doctrine by the law effect, following the entry into force of the new Civil procedure Code. Over the time, legal doctrine specialized in the field of family law formulated a series of theories on the divorce: the divorce-remedy, the divorce by fault and theory joint venture. The Civil Procedure Code validated these theories, distinct covering the divorce-remedy and culpably, but we believe that a series of legal classification need to be analyzed and improved.*

Keywords: *Divorce-remedy, divorce by fault, guilt, source of law, doctrine.*

The divorce opinions or theories. Reasons for divorce

Divorce-remedy theory assumes that the situation while awaiting divorce is not subject to the contributory negligence of any of the spouses, but also of the impossibility of continuing the marriage for at least one of them.

Divorce by fault or sanction is the design that divorce is a penalty for culpable act of one of the spouses.

According to the combined conception, the first two theories are combined to explain the legal nature of the divorce. In Romanian law, divorce cannot be settled on the guilt of one or both spouses but only on that condition, against the background of this fault, relationships between spouses were seriously injured, so continuing the marriage became impossible for whoever asks for dissolution of marriage.

Although the civil code does not list exhaustively the grounds for divorce, provides that it must be reasonable, that the relationship between the spouses had deteriorated severely, so that continuation of the marriage is no longer possible.

The three categories of conditions regarding the grounds for divorce, namely the existence of reasonable grounds due to these reasonable relations between spouses were seriously injured marriage can no longer continue, must be all meet in order to be pronounced the divorce by fault.

The merit of the grounds is assessed by the Court, but the law also provides three such motives: the separation in fact of the spouses, the request of one of the spouses and the divorce based on the grounds of health. If two of these reasons were provided also by former family code, the civil code refers in addition to the reason of the separation in fact of the husbands that lasted at least two years.

The jurisprudence note as reasonable for the divorce by fault the following reasons: unjustified refusal of one of the spouses to live with each other, leaving unjustified, infidelity, marital violence, serious or incurable illness, the evils of moral order of wearing it, waste of property and so on.

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The current regulation provides four reasons for divorce, which can result in five variants which can loosen the marriage.

Thus, the 373rd article of the civil code provides the following divorce reasons:

- Agreement of the spouses, or at the request of both spouses or of one of them and accepted by the other
- Thorough reasons due to which the relations between the spouses are seriously injured and continuation of the marriage is not possible
- Separation in fact of the spouses for at least 2 years
- The health of one of the spouses, which make impossible to continue the marriage.

Variants of the divorce are:

- Divorce through agreement of the spouses by judicial way
- Divorce by agreement of the spouses by administrative channels
- Divorce through agreement of the spouses through the authentication notary's procedure
- Divorce by fault by judicial way
- Divorce due to health condition of one spouse.

If in time of occurrence of the civil code, wrapping the grounds for divorce as provided by law in the four theories or approaches was not clear, since the entry into force of the Civil Procedure Code, the situation is completely changed. Civil Procedure Code (Sixth Book, first title, 914-934 articles) has adopted the terminology used in the doctrinal concepts, and it has placed very clear reasons or variants of divorce in these concepts.

Thus, a divorce by agreement of the spouses may be obtained administratively, notary or judicially, in the latter case is no statement regarding the contributory negligence of the spouses. Divorce by agreement of the spouses by judicial process corresponds *ab initio* to the design of the divorce-remedy, considered as a unique way of repairing relations between spouses, by both. For this reason, the penalty is non-existent; none of them were not at fault.

Also in the divorce-remedy category is the divorce for reasons of health, and, arguably, the divorce of the defendant's fault, which recognizes the facts that led to the dissolution of conjugal life.

The divorce by fault acted for the contributory negligence of one of the spouses or the long separation.

Divorce-remedy

First, divorce remedy takes place by notarial, administrative or judicial way

Unlike divorce procedure itself, regulated by the provisions of the Civil Code and of the Civil Procedure Code, public notary or registrar not pronounce divorce, but finds husbands divorce by agreement (governed exclusively by the provisions of the Civil Code), releasing them a certificate of divorce.

There are two types of dissolution of marriage by a notary or administrative way, assuming both spouses consent[1].

The first version of the marriage by administrative or notary way is limited by the lack of minor children, whether they were born in wedlock or out of wedlock children, whether natural or adopted children.

A second variant of dissolution of marriage by a notary or administrative way is allowed in the presence of minors, but is subject to the consent of the spouses on all issues related to:

[1] For more details, Laura Cetean-Voiculescu, *Family Law*, *Hamangiu* House of Printing, Bucharest, 2012, pp. 127-149.

- Name they will wear after divorce
- The exercise of parental authority by both spouses
- Establishing dwelling children after divorce
- How to preserve personal ties between parent and each child separately
- Determining the parents' contribution to the costs of growth, education, teaching and training of children.

About notary or administrative divorce, this is not possible if one of the spouses is under prohibition.

Application for a notary or administrative divorce is filed by both spouses. Only in exceptional circumstances, an application may be submitted to the public notary by acting as a proxy authentic.

Territorial jurisdiction of the public notary or the officer of civil status is determined by the place of marriage, or the last common housing of the spouses.

Upon receiving the request, the officer of civil status or public notary records request and give spouses a reflection within 30 days.

After that period, the spouses will be present in person before the civil status officer or public notary, who will check if the spouses insist on divorce and if their consent is free and uncorrupted. If so, the public notary or the registrar shall issue a certificate of divorce without fault of either spouse.

Following the dissolution of the marriage in these ways, husbands will return to the name had before marriage, except when they agree to keep the name given during the marriage. If the spouses do not agree on the name or the joint exercise of parental rights, the officer of civil status or public notary shall issue a provision to reject the application for divorce and will guide the two husbands to address the court for divorce proceedings by agreement between the spouses.

Claim the marriage act, on its dissolution, will be as follows:

- If the divorce petition is filed by the town hall where the marriage ware perfect, officer of civil status, after issuing the certificate of divorce, will mention it in the act of marriage
- If the application for divorce is filed for mayor in whose jurisdiction the spouses' last common housing, civil officer issuing the certificate of divorce and once forwarded a certified copy of it to the place where the marriage hall for make reference to the act of marriage divorce
- If divorce is established by the public notary, it shall issue a certificate of divorce and submit, without delay, a certified copy of it to the place where the marriage were perfect, to make mention of the marriage act.

If the law conditions are not fulfilled, officer of civil status or public notary will reject the application for divorce, and in this case spouses have not an appeal against those decisions, but will be able to ask the court for dissolution of marriage on judicially way.

Divorce records by agreement between the spouses require an application signed by both spouses jointly or by an agent with power of attorney genuine. Court judge divorce by agreement between the spouses in the council chamber and pronounce divorce without making any mention about the husbands fault, considering both parties' agreement on the end of proceedings, as well as accessories.

The judgment on the complaint mainly is final.

Second, divorce remedy may therefore health of one spouse

For health reasons, either spouse may file a petition for dissolution of marriage, if disease makes it impossible to continue the marriage. For this reason, the court will not take other than those necessary to establish evidence of sickness of the husband, but will not give, finally, the fault divorce on sick husband. Is natural to not impute the illness to ill husband, which is why we consider appropriate the view of the legislature to classification the health reasons in divorce to divorce-remedy category.

Third, divorce remedy can be based on the defendant's guilt, if admitted facts that led to the collapse of conjugal life

Framing this ground for divorce in the category of remedy is more difficult to understand, the legislature following completion of guilt of the defendant in the divorce process itself when it recognizes the facts that led to the dissolution of conjugal life. Therefore, recognizing the defendant by the plaintiff is evident forgiven his actions during the marriage, and all the consequences of this fault. Since the applicant may suffer significant damage in this context (which we will analyze in section on the role of fault in the divorce) is quite natural to require consent. If the applicant accepts obtain a divorce more quickly and certainly no fault of the defendant, as the court will pronounce divorce without checking the validity of the grounds for divorce, and without mention of fault in divorce. If the applicant disagrees with the divorce without fault defendant who has pleaded guilty, the court will settle the divorce under fault divorce proceedings.

Divorce by fault

Divorce by fault shall decide whether the three conditions: the existence of reasons, serious injury to relations between spouses, unable to continue the marriage.

Fault in divorce will return the applicant or both, and if the defendant brought counterclaims, divorce may proceed notwithstanding the fault of the defendant husband.

The practical importance of theoretical shootout

First, divorce on grounds of misconduct may give the fault of the defendant, plaintiff, or both, this time without the possibility of divorce without fault of none, as the divorce remedy.

Include reasons and variants of divorce in one category or another is not a merely theoretical significance, but also a practical significance as divorce remedy the fault does not rule either one, although the consequences of this (the role of fault in the divorce will be discussed in the next section). For example, where to pronounce divorce on the grounds of separation in fact for a period of at least two years, the divorce will decide, as a rule, the fault of the applicant, and only by way of exception - if the defendant agrees divorce, he will rule without making any mention of husbands fault.

Second, the legislature considered divorce by fault even that one due to the husbands' separation in fact, for a long time.

It seems at least arguable that classification. Husband, who no longer supports the continuation of a marriage of form, existing only in provisions, whereas the fact is actually split into at least two years, shall be guilty of dissolution of marriage, even if, in fact, the separation may be due to the other husband. This form of dissolution of marriage turns, however, in the

divorce remedy, if the defendant agrees to the divorce, the divorce case will decide not the fault of the applicant, if the defendant's lack of agreement, but without any fault.

Deadlines for divorce

The old regulation (previously mentioned amendment to the Family Code) was set deadlines for conciliation and thinking time (3 to 6 months). Hearing is fixed directly, without giving any thought within or conciliation within where one spouse was mentally ill or mentally deficient, disappeared, and left her husband and settled abroad. Granted within a period of conciliation but not thinking when one spouse has been convicted of attempted murder against the husband or complicity, incitement, serious injury, or failure to disclose offenses against him relating to sexual offenses, or if one of the spouses execute imprisonment and there was no minor children from the marriage.

Also granted by the court so long-term thinking and conciliation when minor children resulted from the marriage.

Former regulated by the Family Code, they do not provide any of these terms. The two month period was considered no thinking, no conciliation period, but was actually a hearing.

Also, under the rule of former Code of Civil Procedure, the trial court set a deadline of two months from the date of filing for divorce.

The new civil code introduced for other types of dissolution of the marriage for a period of reflection, 376th article provides that the justice of the peace or notary public shall submit an application for divorce and will grant a 30-day reflection.

Regarding the period of trial, we emphasize that it can not be considered any cooling-off period or conciliation. Civil Procedure Code in its current form, no longer govern the time of divorce as he did in the old regulation (two months), so we use the general rules of civil procedure prescribed by 201st article of the Code of Civil Procedure (based on submission defense, response to meet the defendant's complaint or fixed by the court unless the applicant answer or response to the defense).

The role of fault in divorce proceedings

Fault of one or both spouses are important and produce legal effects, with the moral, educational or on public opinion.

The role of fault in divorce proceedings became more visible after the new amendment to the Civil Code. Thus, according to 384th article, second paragraph, Civil Code, "spouse against whom the divorce was pronounced lose the rights which the law or conventions concluded with third parties prior to its attributes." Of course, there is about the exclusive fault of one spouse, because these provisions shall not apply in the case of divorce by agreement between the spouses or where either spouse is not considered at fault for the dissolution of marriage or divorce to pronounce the fault of both husbands.

Other rights of innocent spouse:

- Right to compensation: innocent spouse proving injury as a result of the marriage dissolution may be required to indemnify guilty husband
- Compensatory allowance: innocent spouse may receive a benefit from the exclusive fault of the husband to dissolve the marriage which, to compensate for a significant imbalance that divorce would cause in the living conditions of those who so request.

There are also advantages for innocent spouse, or disadvantages which ruled that the fault divorce regarding the maintenance obligation between former spouses. Alimony is due

if the creditor is in need, due to a disability to work, incurred before marriage, during marriage or the inability arises within 1 year after the dissolution of marriage, but only if the failure is caused by circumstances related to marriage. These are exceptions to the principle that on the dissolution of marriage, maintenance obligation between spouses ceases. The difference between the guilty and the regime applied to innocent husband is the duration of the alimony payments between former spouses.

Husband guilty of dissolution of marriage may only receive alimony for a period of one year from the date of the marriage dissolution, when in the case of the innocent spouse, the law did not set a specific duration, so that he will to receive such pension as long as incapacity lasts, but not if it has entered into a new marriage, spousal maintenance obligation being prevailing to the maintenance between former spouses. If divorce was pronounced by both spouses fault, their mutual right to maintenance is unlimited in time.

Some effects occur also relating to the benefit of the lease regarding the family residence or the sharing of a common good or Shares in joint property of the spouses, benefit award marital home having effect until the judgment becomes final for partition. If the spouses have children and their agreement was no to the contrary, this benefit is spouse who obtained a divorce.

Thus, regulating the family home, the law provides that the award of its property leased or owned jointly owned by the spouses at the dissolution of marriage, if it is possible to use the housing by both spouses, and they can not agree on the award will made taking into account, in order, by:

- Interests of minor children
- Fault in divorce
- Possibilities to the residence of former spouses.

Regarding child custody entrust to one or other of the parents, the doctrine established that usually the divorce by fault of one spouse does not discount the possibility that it be entrusted to the care and education minors. Indeed, we can say that a husband is less good and bad parent but at the same time will be relevant the reason for divorce.

In conclusion, the divorce procedure has undergone many changes, made primarily by the provisions of the Civil Code came into force on October the 1st 2011 and, secondarily, by the entry into force of the new Code of Civil Procedure on February the 15th 2013, some of these changes are relevant and consistent with the doctrinal views, others are unsuitable for the reasons given in this paper or for other reasons invoked by legal doctrine. A future analysis will aim to disseminate the preliminary procedure mandatory mediation procedure in all processes, including in divorce procedure, useful in certain forms of procedure but inadequate in others.

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FREEDOM OF EXPRESSION AND PRIVACY PROTECTION

Valentina MIHALCEA (CHIPER)*

Abstract: *The protection of the freedom of expression under the European Convention relies to a great extent on the public audience's right to know. Yet, the focus of journalistic materials on some aspects related to the „purely private" life of individuals, on their emotional life or family photos, notwithstanding the fact that they hold public offices or despite their notoriety, cannot be considered as a contribution in some debate of general concern for the society as this prejudices the rights of another human being. The personality rights protect the most cherished non-pecuniary general moral values of the individual such as the life, dignity, honour and private life. These protected values capitalize on discretion and confidentiality and are regarded as either secrecy of communications and phone calls or discretion or secret of private life or of personal data. Whereas the limitations to the freedom of expression require a highly-guarded interpretation so that a possible prejudice to the very existence of a right cannot be justified by exceptions, this work seeks to analyze the fragile balance which is to be maintained between the two freedoms through both a review of public audience's right to know the private life of an individual (the first part) and its interest in knowing the private life of a public figure (the second part).*

Keywords: *freedom of expression, limits of acceptable criticism, public concern, private life.*

I. Introduction

The protection of the freedom of expression under the European Convention relies to a great extent on the public's right to know: *not only the press has the duty to disclose information and ideas on issues of public concern; the public also is entitled to receive it*[1], „according to paragraph 2 of Article 10, protection is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society"[2].

Journalistic freedom also involves the possible appeal to a certain degree of exaggeration, even only to provoke. In causes like these, the national authorities' margin of appreciation is limited by the interest of the democratic society to allow the press to play its indispensable part as 'watchdog' and by the ability of the press to disclose information on important issues of general concern.

As for the press, understood as both written press and editing, the borderline between public life and private life is often trespassed or made even, the commercial nature of information and the indiscreetness being increasingly asserted. One may say that public life

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[1] European Court of Human Rights, Case Handyside, ECHR Decision of 07.12.1976, Cases Lander v. Sweden, Open Door Counselling and Dublin Well Woman Centre v. Ireland.

[2] European Court of Human Rights, by the Decision pronounced on the Handyside case on December 7, 1976. Please see also European Court of Human Rights, Case Tammer v. Estonia, Decision of February 6, 2001, Case Prager and Oberschlick v. Austria, Decision of April 26, 1995.

intentionally maintains the state of confusion between the concept of communication and the concept of information, although both address opposite realities. Information is the disclosure of items of knowledge, opinions and arguments that address the addressee's cleverness and enabling the latter to express his/her own opinions. Per a contrario, communication is synonymous to publicity or propaganda and addresses emotion instead of reason or cleverness, its ultimate goal being the verb ‚to sell'.

Consequently, what information is of public or of general concern? Politically, the general concern is often brought forward in their speeches by government officials as something not requiring further clarifications or details in relation to certain actions, ordinances or other regulations. General concern is therefore a way to establish authority and an instrument to make the action of political power legitimate, but also to reinforce the sense of unity between society members[3].

Under the domestic laws, information of public concern on the free access to information of public concern[4] according to Article 2 (b) of Law no. 544 of 2001, is any information regarding the activity or arising from the activity of a public authority or public institution, irrespectively of the support or format or expression of that information. This definition bears some minuses since it generates confusion between the public authority and the public institution which are independent entities with different legal status. The nearest genre is not delineated and the specific difference is confined only to the public financial resources that actually account for one part of the public estate. It also omits that much of the transactions with public estate are conducted by private legal documents which cannot be said to be of no public concern[5].

In the attempt to make this concept a legal standard, the theory of law says that the information of public concern is that information satisfying a general need or a need of national or local public concern publicly and generally and exceptionally in secrecy[6].

Article 30 (6)and (7) of the Constitution expressly regulates the limits to the freedom of expression in line with the European Convention and international conventions, namely those of not impairing dignity, honour, one's private life and right to self image. The special restrictions set forth in Article 10 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms may be divided in three categories: i) those meant to defend public interests: national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals; ii) those meant to defend individual rights, such as the reputation or rights of others to have a private life, for preventing the disclosure of information received in confidence; iii) those necessary to maintain authority and impartiality of the judiciary[7].

The constitutional value of the right to respect of private life is given in Article 26 (1) of the Constitution of Romania, saying that: „The public authorities shall respect and protect the intimate, family and private life". The connection between Article 1 (3) in the Constitution of Romania regarding the principle of free development of human personality

[3] Guillaume Merland, *L'intérêt général, instrument efficace de protection des droits fondamentaux?*, Cahiers du Conseil constitutionnel n° 16 (Prix de thèse 2003), Maître de conférences de droit public à l'Université Montpellier I, June 2004.
[4] Romania's Official Journal no. 663 of 23 October 2001.
[5] Valerică Dabu, Maximilian Ion Bălăşescu, *Liberul acces la informațiile de interes public*, Studii de Drept Românesc, Seria Nouă, Year 16(49), no. 1-2 January – June 1994, Edit. Academiei Române, p. 118.
[6] V. Dabu, *Dreptul comunicării sociale*, Edit. S.N.S.P.A., Facultatea de Comunicare şi Relații Publice „David Ogilvy", Bucharest, 2000, p. 27.
[7] See D. Bogdan, M. Selegean, *Jurisprudența CEDO-studii şi comentarii*-, INM Bucharest, 2005.

and the private life, regulated by Article 26 (1) of the Constitution has been acknowledged in the Romanian law by the Constitutional Court in its Decision no. 81 of July 15, 1994, according to which Article 26 (1) is „the guarantee of the principle set out in Article 1(3) of the Constitution".

In the US, the right to private life was defined as early as 1890 in the literature as „the right to be left alone", subsequently reiterated in 1965 by the Supreme Court of the United States as everyone's right to make decisions by himself/herself on matters of private life. In Germany, the fundamental law sets out everyone's right to develop his/her personality and the same is enshrined in the constitutions of other European countries such as France, Switzerland and Belgium.

Chapter II entitled „Respect for the human being and its inherent rights", third Section „Respect for one's private life and dignity", recently included in the Civil Code, defines and aims at protecting the right to freedom of expression, one's right to private life[8], right to dignity and right to self image[9]. We cannot refrain from making reference to the constitutional values that the regulator attach to certain rights and freedoms which are part of the fundamental values, probably in the attempt to supplement the constitutional lack of standardization.

A new theory on the patrimonialization of these rights relies on the interferences between the personality rights and the patrimonial rights[10] following the acknowledged validity of some conventions on the personality rights such as the use of the image, voice, name and even private life.

In the French Law, the right to respect for one's private life is enshrined in the law and also in the Civil Code, Article 9 „everyone is entitled to respect for private life". It is not reflected constitutionally, but it acquires constitutional value through the appeal to constitutional backgrounds and inclusion in the sphere of individual freedom protection and later on, in late 90's, in the sphere of personal freedom according to the terms of Article 2 in the Declaration of Human and Citizen Rights.

Article 8 of the European Convention on Human Rights stipulates two distinct rights: the right to respect for private and family life and the right to respect one's correspondence and home.

The expression „protection of private life" is defined in the French literature in a broad sense, like all legal regulations ultimately seeking the protection of personal and family life[11] in order to allow members to enjoy *a normal family life*. Otherwise, one may encroach upon the secrecy of private life. Secrecy is the prerequisite of one's freedom. Personal and family life can only be lived in the intimacy of one's home and domicile.

Indeed, the right to respect for private life is too large to fit definitions, insomuch as it varies in time according to place and civilization. We may say that the object of the right to respect for private life regards both the person's identity and private choices[12].

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[8] Article 71 of the Civil Code: The right to private life: *(1) Everyone is entitled to the respect for own private life.(2) No one must be subject to interferences with either his/her intimate, personal or family life or domicile, residence or correspondence without his/her consent or compliance with the limitations stipulated in Article 75. (3) The use in any way of one's correspondence, manuscripts or other personal documents, as well as of private life information without the consent of such persons and without staying within the limitations set in Article 75 is forbidden.*

[9] Article 73 of Civil Code: *The right to one's own image: (1) Everyone has the right to own image.(2) In practising the right to one's own image, the reproduction in any way of the physical appearance or voice or the use of such reproduction, as appropriate, may be forbidden. The dispositions of Article 75 shall apply accordingly.*

[10] Édith Deleury, Dominique Goubau, *Les droits des personnes physiques*, Editions Yvon Blais, Montreal, 2002, p. 74.

[11] Pierre Kayser, *La protection de la vie privee*, Press Universitaires d"Aix-Marseille, 2e edition, Ed. Economica, Paris 1990, p. 3.

[12] Sonia Drăghici, *Efectele dreptului la respectul vieții private şi al demnității asupra dreptului civil*, Edit. Universul Juridic, Bucureşti, 2011, p. 30.

Private life is not „the biological life of an individual, but the socially-perceived human existence"[13] that we do not want to share with the public. The first attempt to the secrecy of private life is disclosing one's private life, i.e. making known events in one's personal and family life to the public or to an unlimited number of persons. Secondly, the family life needs to stay away from enquiries and from the preservation of documents regarding family life whenever they are obtained upon illegal investigations.

The French law appreciates that social relations and public undertakings may be subject to disclosure and documentation because they are public, but the family life, focused on the person herself, the family members and friends must not be subject to inquiry or disclosure because it prejudices the feeling of shame. The relationship between the protection of the secret and the protection of the freedom of private life join together in the concept of respect for private life which governs the relationships between individuals or between the State and the individuals.

The respect for private life involves the freedom of relationships between two genders, clearly and freely consented to. In other words, sexual freedom, the freedom of marriage is seen as „the assertion of the freedom of private life, residing in this case in making the society aware of a chosen personal situation which is not meant to stay within the boundaries of privacy"[14]. The protection of family life secrecy is subordinated to the existence of a family life, namely the husband, the wife and the children are free to live under the same roof. The inviolability of correspondence involves to the same extent its freedom.

One's right to own image and to dispose of him/her also belong to the sphere of intimate, family and private life[15].

II.1. The interest of the public to know the private life of an individual

Individuals refer to both persons and companies. The Constitutional Court's opinion expressed in Decision no. 188/2005 that the freedom of expression does not apply to legal entities is arguable as long as the constitutional text makes no distinction in this regard and the European Court of Human Rights vests this right in legal entities as well[16].

The French literature[17] appreciates that the distinction between private life and public undertakings was inspired by the theory of the autonomy of will and sets out that one's public undertakings may be subject to inquiries, publication of one's photos during a public undertaking and legal disclosures because a tacit consent is given in one's private life circle. Per a contrario, facts of one's private live cannot be inquired without that person's explicit consent.

The focus of journalistic materials on aspects of an individual's „purely private life", for instance on emotional life, family and intimate photos, although the individual holds a

[13] Frédéric Zenati-Castaing, Thierry Revet, *Manuel de droit des personnes*, PUF, 2006, p. 318.
[14] Annabelle Pena, *Droits de la personnalité, Dictionnaire des droits fondamentaux*, sous la direction de Chagnoullaud D. et Drago G., Dalloz, 2006, p. 590.
[15] Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită. Comentarii şi explicații*, All Beck, Bucharest, 2004, p. 49.
[16] Sebastian Rădulețu, *Libertatea de exprimare şi limitele ei- Comentarii ale art. 30 din Constituția României*, Curierul Judiciar, nr. 5/2007, C.H.Beck, Bucharest, 2007, p. 83.
[17] Pierre Kayser, *La protection de la vie privee*, Press Universitaires d"Aix-Marseille, 2e edition, Ed. Economica, Paris 1990, p. 3 and the following.

public office or despite his/her notoriety, cannot be considered of help in debates of general concern for the society and may prejudice the rights of the other[18].

In line with the French Law, the new Civil Code sets out the need to get the consent of the concerned person, whether public figure or not, in order to avoid any possible encroachment upon his/her private life, according to Article 74 „Prejudice to honour" saying that „interference into private life includes: a) getting in or unlawfully occupying the house or taking out of it any item without the consent of the legal occupier of that house; b) unrighteous intercepting a private conservation by any technical means or using voluntarily such interception; c) capturing or using one's image or voice while in a private space without his/her consent; d) disseminating photos of one's indoors without the consent of the legal occupier of that space; f) disseminating news, debates, inquiries or written or audio-video broadcasts on one's intimate, personal or family life without the prior consent of the concerned person; g) disseminating materials containing images on a person admitted in healthcare units and personal data on his/her condition, diagnosis issues, treatment, circumstances of disease and any other facts, including the autopsy result, without the prior consent of the entitled person; h) ungracefully using one's name, image, voice or resemblance to another person; i) disseminating or using one's correspondence, manuscripts or any other personal documents, including details on the domicile, residence and phone numbers of that person or of his/her family members, without the consent of the holder or of the person entitled to dispose of the same, as appropriate."

However, according to the French law, a person cannot consent to the disclosure of his/her private life other than for past events already consumed or to be consumed and not for future and undetermined events whereby he/she may waive the right to respect for private life. Since private life is a personality right, it is not susceptible of waiver. For instance, the consent of a fashion model to have his/her photo used for commercial purposes may only be given for a limited time.

The French law also provides that the contractual obligation between a media trust to pay a sum to a person for his/her disclosure of a sexual malformation becoming the topic of a press article or broadcast is immoral[19].

As for the protection of private life after demise, the French law stipulates that only critics or historians may study the private life of people who played a higher or smaller part in the history of the country or of the humankind.

We cannot but see again the arguable meaning of our national legislator that domicile and residence are two different things, as compared to the well-thought-out European practice according to which domicile includes residence and external areas and represents the abstract place where one's intimate life goes on. The domicile is part of the private life because as the place of normal life events. In the French law, domicile is defined in Article 102 of the Civil Code as the place where the person has his main establishment, but also as his secondary residence and all other places where the person lives and incorporates several elements of the private life.

The domicile as element of private life also contain outdoor spaces like swimming pool, terraces, indoors and even the grave and these cannot be subject to information or publishing of photos without the prior consent of that person, in order to ensure protection of both public life and personal items, namely of property.

[18] European Court of Human Rights, Case Company y Diez de Revenga and Lopez Galiacho Perona v. Spain, Decision of 12 December 2000.
[19] Paris, 1 ère Ch. Supp., 21 janvier 1972, Dame Thorel c. Ici Paris, 1972.I.375.

Aspects of one's private life which affect the body, health, birth, death and malformations cannot be subject to freedom of expression. Moreover, family life events such as birth, death or marriage cannot be disseminated and disclosed without the consent of the interested person. Private life also includes one's identity (first name, last name, data), her property and professional life, save for public offices, political, philosophical and religious opinions.

The French criminal section decided, in interpreting Article 11 of the Law of 11 May 1868 on the press which required the punishment of a periodical for having published a private life event, that the protection of private life covers not only events happening in one's domicile, but also events happening outdoors, if they relate to inner belied and regard the freedom of conscience[20].

1.1. Right of the public to be informed – disclosure of confidential information, the reproduction of one's image

The domestic law made welcoming attempts over time to limit the prejudice to private life by dissemination or disclosure of confidential information in both Law no. 677 of 21 November 2001 on the protection of persons in regard to personal data processing and free movement and the new regulations of the updated Civil Code, by considering the dissemination and use of correspondence, manuscripts, personal documents, personal data like name, address, residence, health condition, therapy, history and progress of diseases, images and telephone numbers without the approval of the concerned person (Article 74 (g) and the following) as well as other factors specific to his/her physical, mental, economic, cultural or social identity, as prejudice to one's private life.

The right to one's own image is a fundamental yet complementary principle of the right to intimate, personal and family life. The law distinguishes between several types of image: a) own image being the public image voluntarily created or allowed by the natural person, a public image which is both wanted and accepted; b) the own image not meant to become public, also known as 'the image of the self', which must also be respected and protected by the legislator; c) the family image conveyed by all information and specific features of the person, notably those which are part of his/her family life; d) the private image – all information, specific features of the person and notably those attached to the private secret; e) the public image.

According to the type of information underlying that image, the same entity may have different images pro rata the completeness or incompleteness of such information.

The European Court of Human Rights sanctioned the journalistic activity in the case Toma versus Romania in its Decision of 24 February 2009 for the breach of Article 8 of the European Convention through dissemination in the media of images of a person subject to investigations in police facility by the criminal investigation officers, advisably assessing that their dissemination in the media has no informative purpose, was not addressing the respect for the interests of justice and had no legitimate purpose.

As for the publication of child images, the French Law stipulates that parents may authorize the publication of images unless contrary to child's interests and if this neither prejudices the security, health or morals nor aims at exploiting the child (art. 371-2 of the French Press Law of 22 July 1987). Exceptions from the principle of inviolability of the

[20] Crim, 28.02.1874, Verdot, S.1874.I.233.

right to own image, for there being no breach of private life, re-disclosure of facts already made public in a lawful way, of non-harmful information and images related to an event of public current interest.

According to the French law, publishing one's photos made in public are licit when the image of the person is only accessory to the place. The same principle applies to photos from reunions and public events; as long as one or several individuals do not play a particular part or such photos are not transformed by the photographer in a close-up shot of the person.

As for the creation or publication of images of persons attending private reunions, without the explicit consent of the interested person, our law, namely Article 73 of the Civil Code regulating the right to one's own image, fails to set out or itemize such exceptions and this shall lead to many interpretations of this regulation in practice.

II.2. Interest of the public to know the private life of a public figure

The limits of acceptable criticism are larger for persons of special status such as politicians, magistrates and civil servants, in respect to some governmental actions, than for normal individuals, because they are inevitably and consciously exposed to the close scrutiny of their actions and gesture by both journalists and the grand public, as well as to the control of the public opinion, without being however deprived of the right to protection of reputation and dignity in their private life and beyond[21], but the requisites of such protection must not impair open discussions on political matters[22].

For as much as artists, actors, performers and athletes are concerned, the public has the legitimate interest of knowing not only their public activity, but also aspects related to their personality. Their private life is foreign to aspects of private life which made them famous. Therefore no disease, malformation, divorce, matrimonial life and children can be disclosed[23].

The European Court established three groups of information by content: the political expression, the artistic expression and the commercial expression. The political expression is broadly conveyed to include not only the information on elections, politicians and political parties, but also any other information on matters whose clarifications seems the serve the public interest. This political expression is vested in the case law of the European Court of Human Rights with a higher protection than all other forms of expression. In a case of defamation, what matters is to determine the circumstances in which the concerned expression was uttered or published.

The freedom of opinion and information, as to politicians, does not address only their political public activity, but also their private life to the extent that this may interfere with public interest. This would be one of the reasons of property transparency and the need to publicly disclose their wealth.

In the case Krone Verlag CmbH &Co KG v. Austria, by Decision of 26 February 2002, the European Court of Human Rights retains that the person subject to criticism in the articles concerning the financial situation of Mr. Posch, professor and member of the Parliament of Austria and of the European Parliament, is a politician, and that the published articles only referred to the fact that not all his wealth was legally gathered, which is arguable in the eye of the public. In this regard, the Court finds out that the measures taken

[21] European Court of Human Rights, Case Dalban v. Romania, Decision of 28 September 1999, Case Lingens v. Austria, Decision of 8 July 1986.
[22] European Court of Human Rights, Case Lingens v. Austria, Decision of 8 July 1986; Case Oberschlick v. Austria, Decision of 23 May 1991; Case Krone Verlag CmbH &Co KG v. Austria, Decision of 26 February 2002.
[23] Trib. Grande Instance Paris, 1 ère Ch, 28 March 1984, dame Bardot c. Soc. Anon. Ici Paris, 1984, I.R. 330.

by national courts, namely the interdiction to publish the photo of the concerned person in association with asserting describing him as the beneficiary of undue material advantages, is a violation of Article 10 of the Convention. There is no reason to justify the interdiction to use the photo of that person as long as it does not regard a matter of private life.

The politician is entitled to the protection of his reputation, even when he does not act as private person, but the requirements of such protection must not prevent open debates of political issues[24].

The case Castells v. Spain[25] is a corner stone in the European case law. The European Court of Human Rights appreciated that refraining oneself from unjustified attacks or even criticism brought by information media or political opponents is justified by this very position of dominance held in the structures of the State. A government may forbid criticism on the politician only exceptionally in order to protect public order or whenever accusations are lacking grounds or are malevolent. The accusation must be clearly defined in the law and the government must produce 'concise' evidence of the way in which public order or national security was threatened, as well as on the opportunity of restraint.

The US Supreme Court leaves larger room to the acceptable criticism on measures regarding the public domain or on comments on governmental actions, no matter how rough, staying within reasonable limits, compatible with the fundamental law to freedom of speech and of expression, as long as the means to achieve this are peaceful. The communication must not meet the usual requirements of them acceptable[26].

As for claims against the governments when not all facts are checked, which rely on rumours or opinions, as long as it is openly indicated that claims are supported by facts[27]. The protection granted to journalists ceases when the information are not disclosed in good faith and breach the journalist's code of ethics, are neither accurate nor complete or are disclosed for disinformation purposes.

Nevertheless, the use of the press, radio and TV considerably changed the style of political campaigns made by people and by political forces. Access to power is inevitably linked to the access to press and to its use"[28].

Although, as far as the administration of justice is concerned, the European Court said that the press must inform the public opinion in connection to the application of justice, a fundamental institution of general concern in the democratic society, the disclosure of trial information so that the public gives its own verdict before the court does, entails however a risk that may end in the loss of respect and trust in the courts of law and in an enormous pressure on their future decisions.

The definition of limits to the freedom of expression over the authority and impartiality of justice is founded on the ECHR Decision in the case Prager and Oberschlick versus Austria, in the argumentation of which the Court recalled that *the press must communicate information and ideas including on topics addressing the functioning of the*

[24] European Court of Human Rights, Case Lingens v. Austria, Decision of 8 July 1986.
[25] European Court of Human Rights, Case Castells v. Spain, Decision of 23 April 1992. The Court assessed that the dispositions of Article 10 of the Convention are breached if measures to convict a person for strong words against the Government are taken. The European Court also points out that the Government can only use criminal methods against criticism, even unjustified, with many reserves.
[26] US Supreme Court, Case Organization for a Better Austin v. Keefe, 402 US 415, 419/1971.
[27] European Court of Human Rights, Case Thorgeirson v. Iceland: a journalist was excepted from the evidence of credibility since his arguments on increased brutality of law enforcement and demand for better supervision of the law enforcement were partly based on the public opinion, rumours and stories.
[28] R. Cayrol, 1990, p. 573 citat de D.C. Dănişor în *Drept constituțional şi instituții politice. Vol. I. Teori generală, Tratat,* Edit. C.H. Beck, Bucharest, 2007, p. 285.

system of justice that is essential for any democratic society, but only to the extent that such communication can verify that judges are discharging their responsibilities in a manner that is in conformity with the aim which is the basis of the tasks entrusted to them[29].

It is however possible for an agency of the State to criticize another agency of the State or system, just like such value-judgments of personal nature has often come from the President of the State. In these cases, the question of public communications that might be restricted by legal techniques limiting the excess of the public power by the obligation of reserve is at stake.

Thus, civil servants must prove neutrality and equal treatment during their regular working time and exercise of their function and also refrain from manifestations of the freedom of expression. Beyond on-duty time, they become simple citizens and may express themselves within the legal limits.

However, high officials such as dignitaries are under the obligation of certain loyalty, just like the military, law enforcement and magistrates do, even beyond their working time or office being unable to fully express themselves. They assumed this at the time they chose their career path.

In a democratic society under the rule of the law, the judiciary is called to play a central part and to serve as control instruments to those who rule, govern or hold the power, of whatever nature it may be (...). The judiciary was therefore created as a structure including independent and neutral magistrates beyond the reach of political and economic groups[30].

The definition of limits to the freedom of expression over the authority and impartiality of justice is founded on the ECHR Decision in the case Prager and Oberschlick versus Austria, in the argumentation of which the Court recalled that the press must communicate information and ideas including on topics addressing the functioning of the system of justice that is essential for any democratic society, but only to the extent that such communication can verify that judges are discharging their responsibilities in a manner that is in conformity with the aim which is the basis of the tasks entrusted to them[31].

Guaranteeing the authority and impartiality of the judiciary is one of the reasons justifying the interference into the freedom of expression. Although the European Court acknowledged the right to criticize the functioning of the justice system, magistrates however play their part in the smoother operation of justice and need to be trusted by the public and by justice seekers. Therefore, criticism against magistrates must be proved.

Taking into account the impartiality and independence of the magistrate's office, the obligation of reserve prevents magistrates from coming to the fore against verbal or non-verbal attacks, compatible with the freedom of expression. The publication or dissemination in the media of topics under the control of the judiciary in courts may daunt or brings uncertainty and public disapproval on the magistrates involved in the settlement of the litigation.

As for the presumption of innocence, the requirements of the freedom of the press and of the individual may often contradict one another and generate huge media processes called 'media and legal phenomena" in the French literature, with negative consequences on the respect for such presumption.

The „Judgment" or the pronunciation of value-judgments in trials pending with courts of law or criminal prosecution bodies, by media channels, before a final and binding

[29] On the same subject, the European Court of Human Rights, Case Mazăre v. Romania, Decision of 17 December 2004.
[30] Dumitru Cheagă, *Libertatea de exprimare şi limitele criticii admidibile în cazul magistraților şi funcționarilor publici în lumina jurispeudenței Curții Europene a Drepturilor Omului*, p. 209.
[31] On the same subject, Case Mazăre v. Romania, Decision of 17 December 2004.

solution is pronounced, is also a breach of the presumption of innocence principle and of the right to private life, as stipulated in Article 8 of the Convention.

Pursuant to clause 21 in the Resolution no. 1003/1 July 1993 pronounced by the Parliamentary Assembly of the Council of Europe on the ethics of journalism, „in journalism, the information and opinions must respect the presumption of innocence (...) and must refrain from making judgments", while Recommendation no. 1215/1993 of the same recommends to the Committee of Ministers „to see that legislation guarantees effectively the organization of the public media in such a way as to ensure neutrality of information, plurality of opinions and gender balance, as well as a comparable right of reply to any individual citizen who has been the subject of an allegation, to adopt a declaration on the ethics of journalism and promote the implementation of these basic principles in the member states of the Council of Europe".

The so-called „staged justice" uncompromisingly promoted during the recent decades made possible for trials to be practically instructed by the media in „the public marketplace", especially on TV screens, despite the elementary guarantees of fair justice and notably of the presumption of innocence"[32].

In the case Goodwin v. UK, by Decision of 27 May 1996, the European Court of Human Rights believes that „it is time to attach greater importance to the democratic society's interest of undertaking and maintaining the freedom of the press when it comes to determine whether the restriction is proportionate to the legitimate purpose sought". Subsequently, the case law of the European Court is more drastic in containing the drifts of the staged justice by assessing that „however, public figures are entitled like any other citizen to the enjoyment of the guarantees of a fair trial", amending the possibility of the journalist „set up for the judge in the case" to influence the trial. If we get used to the media show of pseudo-trials, we may find out in the long run some negative consequences on the recognition of courts as bodies qualified to determine the guilt or innocence in criminal charges" [33].

In Great Britain, the correction of media excesses over one's presumption of innocence tend to focus on the use of „contempt of court"- a judicial or legislative acknowledgement of an intentional disobedience in order to interrupt the proceedings of a court or to publish information likely to influence the jury to the detriment of the accused, a creation of the common law subsequently taken and further developed in the written law and accepted in the case law of the European Court of Human Rights[34]. Therefore, if the press discloses and distorts the trial, the Court of Appeal may postpone the verdict and order a new trial.

In France, the relationships between the justice and the media have evolved after the assassination in 1914 of Gaston Calmette, director of „Le Figaro", by the wife of the finance minister Joseph Caillaux, following the campaign led by the journal against her husband, the Stavisky affair in 1934, cases Gregorz in 1990. Paragraph 1 in the preliminary article of the Code of Criminal Procedure enshrines the presumption of innocence: „Everyone suspected or prosecuted is presumed innocent as long as his/her guilt is not yet established", and the following paragraph says that its interferences „are prevented, corrected and eliminated according to the terms of law". Articles 434-16 in the Criminal Code incriminate the publication of comments for the purpose of influencing the depositions of witnesses or the decisions of the competent inquisitors or judges". Article 9-1 of the Civil Code regulates the

[32] Mircea Duțu, *Libertatea presei şi respectarea prezumției de nevinovăție în cadrul procesului penal*, Dreptul Year XVII, 3rd Edition no. 1/2006, Bucharest, p. 233.
[33] European Court of Human Rights, Case Worm v. Austria, Decision of 29 August 1997.
[34] Mircea Duțu, *op. cit*., p. 239; ECHR, Case Goodwin v. Great Britain, Decision of 27 March 1996.

action breaching the principle of presumption of innocence. The case law asserted that „the breach of the presumption of innocence for which Article 9-1 of the Civil Code institutes protection is to publicly point out to a criminally-prosecuted person as guilty before conviction" (Cass, 2nd civil section, 29 April 1998). The French law enshrines the principle that any prosecuted person must have the right to defence in the media, to allow the media to publish or disseminate the arguments of defence, the publication or dissemination of information regarding the pending prosecutions.

In Italy, the interdiction to make publicity for a criminal trial also covers photos. The 1988 Code of Criminal Procedure enshrines the principle of secrecy over the investigations carried out by the public minister or the criminal investigation departments until the accused may become legally aware of it.

Conclusions

Paragraphs 6 and 7 of the Constitution establish limitations meant to protect both individual and joint interests. Since such limitations are only exceptions to the rule of strict interpretation and enforcement, great care must be paid to proportionality in case of conflicts between several rights or freedoms equally protected by the Constitution, taking into account our arguable domestic case law in which the limitation of freedom was almost automatically validated by the Constitutional Court without checking first the proportionality for such reasons that the simple stipulation of such limitation is enough for the concerned law to be constitutional[35].

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[35] Constitutional Court, Decision no. 51/1999, Romania's Official Journal no. 262 of 9 June 1999.

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BINDING FORCE OF JURIDICAL WILL IN CONTRACTS

Emilian CIONGARU[*]

Abstract: *The foundation of the legal act is constituted by the juridical will representing the manifestation of will made by parties to produce legal effects for the creation, modification, completion or extinction of a judicial relationship. In the business law, almost all judicial relationships of private law are obligational juridical relationships which are made up of legal acts and facts. The most important legal act is the contract since it is the basis of the social life in any community meaning that it represents the most important economic and juridical instrument for the participants to a contract. The persons are free and equal in society and, consequently, no power is valid and fundamental unless it relies on their consent, namely on a contract. So, the existence of a civil contract relies on the principles o consensualism, a perception based on moral rules to observe one's promises, to have good faith and to observe the interests of your fellow creature. The exterior manifestation, the expression or declaration of the juridical will constitutes the consent of such person in making the structure of contract. The declared will must correspond to the person's real will and the adoption and declaration of the juridical will must take place consciously. Any contract that does not derive from juridical will is null and the civilizing character is inexistent. The principles giving sense to consensualism is the one of agreement between parties so as to produce legal effects by itself and it is enough for the conclusion of a contract, regardless of the form in which it is exteriorized, a principle expressed by the Latin adagio pacta sunt servanda.*

Keywords: *civil legal act, consent, juridical will, contract, consensualism.*

"The law of contracts may justly indeed be said to be an universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal".[1]

Pacta sunt servanda principle, conventions must be observed, a principle relying on keeping one's word lays at the bottom of the entire organized society[2] expressing the rule of consensuality of conventions according to which parties' will is sufficient for the validity of a convention, except when we speak of real or solemn contracts, and the execution of obligations is made as they were assumed. The convention or contract, the legal act having the mission to civilize states, peoples, and persons, represents the basis of life in any community[3].

The word given by exteriorization of will in any contract represents the formation of the legal act, a fact leading to its definition as being the manifestation of will performed with the intention to produce legal effects, namely to create, modify or extinguish a judicial relationship and it contains three notions[4]: it is a manifestation of will which must come from a conscientious person since it is a product of such person's thought; the will must be manifested, namely exteriorized, so as to be efficacious from a juridical viewpoint; the

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[1] W.Addison, *Traite des contrats*, 1847, apud P.S.Atiyah, *Essays on contract*, Clarendon Press, Oxford, 1986, p.17.

[2] A.Supiot, *Homo juridicus*, translation Catalina Teodora Burga, Dorin Rat, Rosetti Educational, Bucharest, 2011, p.138.

[3] L. Josserand, *Le contrat dirige*, Recueil hedbomadaire Dalloz, Paris, 1933, apud Alain Supiot, *op.cit*, p.138.

[4] I.Deleanu, *Legal fiction,* All Beck, Bucharest, 2005, p.249.

manifestation of will is made to produce legal effects[5] to create, modify or extinguish a certain juridical situation.

This definition highlights the fact that the manifestation of will expressed to produce legal effects is the essence of the legal act, this will constituting the fundamental element of the legal act6.

The juridical will is a psychological act[7] and both from the psychological viewpoint and the juridical viewpoint the will is a complex element. The will is complex from the psychological viewpoint because its formation represents a complex psychological process comprising a series of stages. The will is complex from the juridical viewpoint because its structure is made up of two elements: consent and cause and, consequently, the correlation between consent and juridical will is of the part-whole type.

When speaking of a contract, an offence or any legal act, one must take into account the psychological will which really took place in the consciousness of the subject of law in question. But the law has mechanisms that filter it by resorting to a series of extremely accurate juridical concepts and this way the will is turned into completely something else than the de facto will, namely an ideal will that the subject of law should have had and which has a logical nature and not a psychological one.

Will is undoubtedly one of the words having a high frequency in the current language mainly due to the fact that this term is associated to the human being's will to tend to something, to achieve something, to attain certain goals, to obtain the things necessary for the daily life, to fulfill a dream etc.

IN the field of law, the will is met very often in cases such as the will of state incorporated into the juridical norm (the juridical norm being the expression of such will), the individual (unilateral) will that may manifest to achieve some agreements or to exceptionally produce legal effects by itself; the legal effects of human being's actions or inactions differ sometimes depending on the fact whether they are voluntary or involuntary.[8]

The theory of autonomy of will was enunciated and developed in the individualism climate of the 18th century by J.J. Rousseau and I. Kant.[9]

In Rousseau's conception[10], the human being is free by their nature but as they live in the society they freely give up to a part of their liberty so as to achieve social coexistence; this way they have come to a free agreement called social contract.

In the Kantian philosophical system, autonomous will is a categorical imperative which justifies by itself: the most profound aspect of the human being is their free will. In order to have free wills, they must reciprocally limit themselves so as to ensure the social order. This order is the result of a social contract but not of a contract which intervened sometimes in history, as they thought, but of a contract resulted from the human mind itself[11].

The principle of the free will in contractual matter means the liberty to conclude contracts but not in the sense of a perfect free will, but in the sense of liberty conditioned by the social life and the legal norms[12].

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[5] L.Pop, Treaty of civil law. The general theory of obligations, Chemarea, Iasi, 1994, p.60.
[6] T.Ionascu, E.Barasch, *Civil Law Treatise, volume 1, The general part,* Academiei, Bucharest, 1967, p.252.
[7] M.Djuvara, General Theory of Law. Law rational, sources and positive law, All Beck, Bucharest, 1999, p. 228.
[8] I.Dogaru, *Legal valences of will,* Stiintifica si Enciclopedica, Bucharest,1986, p.11.
[9] E.Sperantia, *Introducere in filosofia dreptului*, Cartea Romaneasca, Sibiu, 1944, p. 157.
[10] J.J.Rousseau, *Social contract*, translation H.H.Stahl, Antet, Bucharest, 1997, pp.15 and next.
[11] E. Sperantia, *op. cit.,* pp. 125-126.
[12] C.Statescu, C.Barsan, *Civil law. General theory of obligations*, All, Bucharest, 1993, p.19.

The theory of autonomy of will[13] was considered for a long time as a postulate of the social life. Later on, mainly in the 20th century, they noticed that this theory contains numerous errors and exaggerations such as: the affirmation that the human being was initially free and that they gave up a part of their liberty by a social contract for social coexistence is pure fiction; will may not be autonomous since the human being lives in society and the social life imposes numerous obligations; there are no absolute liberties but only concrete liberties, namely determined by action or inaction.[14]

The contemporary legislation and doctrine based on the ideas, principles and norms of the continental law system identify two qualification criteria of the civil contract, more precisely the consensus and the legal purpose[15]. The latter is considered as a subjective orientation of consensus and is totally subjected to parties' discretion to produce juridical-civil effects. Based on these criteria of uniform qualification of civil contracts, contractual agreement becomes binding for the parties regardless of other objective factors such as the form taken by the agreement or the effective transmission of right based on it, or especially the recognition by the legislator of such case in quality of content of contract sanctioned by the positive law. In other words, the construction of the civil contract relies on the principles of consensualism[16], the perception based on moral rules to keep one's word, to have good faith and to observe the interests of your fellow creature.

To be considered as a source of law, the will must be conscientious and rational. The consent, as an element of exteriorization of will, must be vice-free and expressed in full knowledge of facts. The theory of consent vices reinforces the free character of will. Thus, the consensus lacks the juridical sense where will is not free since it cannot create law.

The real will expressed with the intention to generate legal effects is the only one creating law, the altered or putative will is considered not to have existed upon the occurrence of consent. The sanction of expressing such a will is the cancelation of the likeness of law generated this way[17] (theory of nullity).

Internal will creates law. The exteriorization of will is a logical condition for the creation of contract whereas the interior one may not disclose its valences. In case of contradiction between the real and expressed will, the former prevails because will shall be appreciated as it must (*sollen*) be, and not as it is (*sein*), described. Real will remains the essence and the exteriorized will remains the phenomenon[18].

To manifest in the law and to produce legal effects, the will must be exteriorized either by words, written documents or by any other material means. If it was not exteriorized, psychological consciousness does not mean anything in law. Incontestably, the manifestation of will does not have a juridical significance either unless there is also a psychological will behind it. In the light of this psychological will which was the source, the legal ground resides in the external manifestation in that two parties contracted something after they have thought about it and the volition acts took place from the psychological viewpoint and this is manifested at the exterior by words, sometimes even written words. This external manifestation is the only proof of will: will is intangible without this filtration through the

[13] R.Tison, Le principe de l'autonomie de la volonte dans l'ancien droit francais, Domat, Montchrestien, Paris, 1931, p.15.
[14] E. Sperantia, *op. cit.*, pp. 125-126.
[15] Z.Beniamin, *What is the will?*, Enciclopedica Romana, Bucharest, 1969, p.12.
[16] G.Boroi, *Civil law. The general part. a second ed.*, All Beck, Bucharest, 1999, pp.162-163.
[17] O.Capatana, *Treatise of Civil Law, vol I*, Academia RSR, Bucharest, 1989, pp.234-235.
[18] M.Djuvara, *op.cit.*, pp.234-235.

external manifestation. Consequently, what we must consider as essential in law is not the psychic will but the external manifestation of such will.

The will manifested by the contracting party must not be erroneous or determined by a vice of consent such as an error, an act of violence or by fraudulent maneuvers; the expression of will has to be the result of one's own decision, of autonomy without being influenced in any way or the result of a constraint or dubious methods. Only this way, the will incorporated into a contract really is one's own psychic process, a capacity of the contracting party to propose goals and to attain them.

The rational individual defines liberty by themselves through their will to get engaged judicially thus creating their own juridical reality.19 In the private law this is characterized by the fact that will is the intellectual fundament of the contract and the source of its binding force.20 The role of law is only limited to the guarantee of execution of contract and sanction is the only role of state in a contract. The explanation resides in the fact that the human being is a free individual whose activity may not be limited but by their will (intrinsic element) and not by the juridical norm (extrinsic element). At the same time, will is considered as the unique source of justice. The contract as a paradigm of voluntary self-limitation of individual freedom is not only the source of rights and obligations, but also embodies the idea of justice21 since only the contract, by self-accepted limitation, ensures the liberty of conscious will. The contract is genetically superior to the juridical norm, consequently the juridical norm may not limit individual's liberty but to the extent to which it guarantees the preservation of one's fellow-creature's liberty.

The requirements related to the form or registration of contracts as well as the rules of invalidity of contracts, most of them being an image of public limitation[22] of individual liberty, are tightly correlated and they are present in a large number of juridical norms.

The general conditions regarding the form of contract establish the form that the consensus must have so as to be acknowledged by the public authority[23], regardless of parties' will. In this case, even if the registration of a contract takes place after the conclusion of agreement related to the contractual clauses, the failure to make it shall lead to the nullity of contract from the viewpoint of the public authority and shall deprive the parties of the possibility to defend in court.

The juridical consequence of parties' failure to reach an agreement regarding all the essential clauses of contract differs from the consequences of the principle of formalism, namely the failure to conclude a contract means its inexistence as a juridical fact generating civil rights and obligations.

In the German juridical literature[24] we may encounter the opinion according to which the contract is an agreement between partners to regulate juridical relationships or a consensus between two or more individuals to reach a juridical result. This notion may not be found in a codified act of the German state, and this is why it receives a theoretical development in the doctrine. The idea of approval of this notion within the German scientific circuit consists in going beyond the treatment of the juridical phenomenon only from the angle of the civil legal act which inclined to the formula of the juridical relationship.

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[19] A.Weill, *Les obligations*, Dalloz, Paris, 1971, p.50.
[20] A.J.Arnaud, Les origines doctrinales du Code civil français, L.G.D.J., Paris, 1969, p.197.
[21] A.Fouilée, *La science contemporaine*, Paris, 1880, p. 410.
[22] V.Renouil, L'autonomie de la volonte: naissance et evolution d'un concept, P.U.F., Paris, 1980, p.61.
[23] J.J.Rouseau, *Du contract social*, Flamarion, Paris, 1992, p.126.
[24] M.Djuvara, *op.cit.*, p.231.

The form of expression of will upon the conclusion of a contract is analysed in tight connection with its content conditions knowing that in the Romanian law the rule of consensuality operates according to which parties' consensus25 is sufficient for the valid elaboration of a contract. We may not also overlook the issue of proof of the juridical operation in the sense of negotium juris for which purpose they require the written ascertainment of parties' will (the document is required ad validatem) or the existence of an inception of a written proof which completed by other evidence proves this operation. In the cases when the written form of contract is required under the sanction of absolute nullity (ad validitatem), the will of contracting parties shall be expressed and mandatorily be ascertained in writing.

If the contract represents an adhesion to certain special juridical objects, it creates general situations meaning that when a person concludes such a contract or they become a borrower, seller or buyer they understand to be applied all the dispositions from the juridical norms referring to the specific legal object – loan, sale-purchase, entire chapters from the civil law comprising the provisions related to the specific legal acts as well as other entire chapters of law interpretation that the specialists in the domain constitute in an enormous quantity of information that make up thick treatises of civil law.

The question is whether the individual who concluded a contract and who most of the time does not have juridical knowledge may know all this huge volume of clauses incorporated automatically in their document. Most often, even an experienced lawyer could not provide them all, the more so as most individuals who are profane could not do this. The entire legislative system of a state, and not only, is involved in every manifestation of an act of will of each inhabitant of such state but, of course, not by an act of psychological will. When concluding a legal act, individuals think of a very limited number of conditions and for the rest they understand the law shall apply or they are constrained to obey it. Consequently, the effect of the legal act is, to a very limited extent, the product of the individual's psychological will and much more the product of hypothetical will as the individual had to have it when they consented to the conclusion of the legal act.

Exemplifying for this purpose is the obligation of execution, a case in which will produces future effects even between living persons. Relevant is the situation when a person is lent a sum of money that they undertook to reimburse upon maturity the contract establishing implicitly that if they fail to fulfill such obligation they shall be liable to the rigour of the law. Upon maturity, if they failed to pay, the will that they manifested in their legal act long ago would produce effects upon maturity. Though they no longer want, they must pay the amount due. Thus, the psychological will disappeared much but the juridical will continues to subsist and produce effects. Another example may be given in case of the inexistence of will in infants and mad people, and yet as a person it produces juridical effects by the acts of their representatives since we do not speak of psychological will.

In conclusion, *pacta sunt servanda* requires the entire organized and civilized society to keep their word given in contracts, the observance of juridical will by which any contract is governed by the principle of free will or also known as the principle of liberty of contracts, according to which the parties are free to conclude any convention, to establish any clause by mutual agreement, to modify or to extinguish any obligation.

The principle of free will manifests, in terms of content, by consensualism meaning that the parties are free to adapt the contract pursuant to their juridical will necessary upon the

[25] I.Albu, *Contract and contractual liability*, Dacia, Cluj, 1994, p.27.

conclusion of a legal act and which supposes the fulfillment of two conditions: the existence of a will and the juridical intentionality thereof. According to the principle of consensualism, contracts may be validly concluded and produce legal effects by the simple consent of the parties, regardless of the form in which the consent is expressed. Based on the principle of free will, the parties create by themselves, exclusively by their will, the juridical norm meant to govern their juridical relationships agreed upon and mutually advantageous.

However, mention must be made of the fact that, the state is the guarantor of execution of contracts in that by, the adoption of juridical norms the state contributes to the structuring of any contract before persons' will. The coercive force of state is the one that supervises the execution of obligations of the parties who manifested and exteriorized their will for the creation of the specific legal and by this the contract becomes the engine of the contemporary law. In a wider sense, we may draw the conclusion that the juridical norm, regardless of its origin, is a consensus of the legislator and their beneficiaries as parties of this type of convention.

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BRIEF CONSIDERATIONS REGARDING THE ESTABLISHING OF REMEDIES FOR LIMITATIONS BROUGHT TO THE RIGHT OF PROPERTY RIGHT BY INSTITUTING A RIGHT OF SUPERFICIES

Mihaela Florentina COJAN*

Abstract: *The right of property can be limited by instituting some burdens such as the right of superficies. In this respect, both the regulations of the new Civil Code and the jurisprudence of the European Code of Human Rights consider that, though attributing the privilege of use of land-property of a third part- to the owner of the building, is not the equivalent of an expropriation, the encumbrance of the right of property with such DEZMEMBRAMANT represents an abuse in exercising the property right which would be disproportionate in the situation in which the owner of the land doesn't beneficiate of some remedies for having the right of property restrained. This burden is established in favour of buildings and not of persons. It is constituted for the use a different building, having a different owner and is passed along with the building, having a permanent character and existing as long as the building exists. Therefore, the remedy for limiting the right of property on land by instituting the right of superficies takes the form of compensation owed for losing or limiting some of the prerogatives of property. The remedy has to be reasonable and proportional with the nuisance brought on the right of property of the land, by its encumbrance with a right of superficies, because, otherwise it will lead to enriching without just cause.*

Keywords: *limitation of the property right, right of superficies, reasonable remedy.*

In the Civil Code of 1864[1] the right of superficies, as part of the right of property didn't have an explicit regulation. The regulations existing until October 2011, when the new Civil Code[2] started, only stipulated practical applications of the right of superficies. It was considered that the stipulations of article 492 of the old Civil Code represent the legal ground of the existence of the right of superficies, because this legal text establishes the rule that „any building, plantation or utilities made in or on the ground are presumed to have been done by the owner of that land on his expense and that they are his own" but also, the exception from the rule, meaning that the opposite proof of the right of estate access is in itself the proof of the right of superficies[3]. Other applications of the right of superficies prior to the new Civil Code are to be found in article 11 of the Decree-law no. 115/1938 for unification of the dispositions regarding the Land Register in which are mentioned the land rights and the superficies right, but also in article 22 of the Decree no. 167/1958, which also mentions superficies.

The right of superficies was defined by the doctrine prior to the new Civil Code as being the main real right which is constituted of the property right of person-superficarius -

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[1] The Romanian Civl Code was adopted on November, 26th by the Parliament of the United Principats of Romania and was published in the Official Monitor no. 271/1864, aricles 1-347 and in the Official Monitor no. 7,8,9,11 and 13in 1865, articles 348-1914.

[2] The new Civil Code was adopted by Law no. 287/17.07.2009, published in the Official Monitor no. 511/2009, by article 220 of Law no. 71/2011 regarding the application of Law 287/2009 representing the Civil Code, published in the Official Monitor no. 409/2011 the application of the new Civil Code starting with October, 1st 2011 was established.

[3] V. Stoica, *Civil Right. Main real rights*, C.H. Beck Publishing House, Bucharest, 2009, page 239.

on the buildings, plantations or utilities which are found on a land belonging to another person and on which the superficarius has the right of use[4].

In the new regulation, the superficies right is consecrated in the Third Book, Title III, chapter I, in article 693-702. According to article 693, the first paragraph, superficies is the right to have or build a construction on, above or below another person's land an which the superficarius gets the right of use[5]. The dispositions which regulate superficies are applicable, according to article 702 of the new Civil Code, in the case of plantations and other autonomous constructions with a lasting character as well[6].

From this definition we can tell that the legislator thought of two forms of the right of superficies. A main form, also called in the doctrine the complete form[7] or entire form[8] of the superficies right, consists in the right of the superficarius to obtain- „to have"- the right of property on the building, plantation or construction found on the land of a different person. In this hypothesis, the building exists on the field property of another person, and the superficarius obtains it, fact which means that at the moment of the constitution of the superficies the content of the right is complete, including both the right of property on the buildings and the right of use on the land.

The second form, the secondary one, also called incomplete[9] and incipient[10], consists in the right of the superficarius to „erect" a building, plantation or construction on the land of a different person. This means that at the constitution, the superficies has an incomplete content, because the building does not exist yet, so we can not yet speak of an actual right of property on the building, plantation or construction.

Out of the content of the superficies right derive its juridical features, characteristic for the real rights.

Thus, the superficies right is a real estate right, always having as its object a real estate asset.

It is also an imprescriptibly right under extinctive aspect. Because the right of property on the building, plantation or construction is permanent, and thus, imprescriptibly, this character also extends on the right to use the land, part of the right of superficies which appears as a desmemberment of the property right[11].

Until the new Civil Code appeared, the doctrine and jurisprudence had considered that the superficies right has a perpetual character[12], considering that it exists over the entire existence of the building, plantation or construction. The right of use over the land lasts as long as the building, plantation or construction property of the superficarius exists. The right of superficies doesn't disappear if the superficarius doesn't use the asset. Another possibility was taken into consideration, that when the superficies right is constituted by a juridical act, its duration be determined.

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[4] O. Ungureanu, C. Munteanu, *Civil Right Treaty- The assets. The main real rights*, Hamangiu Publishing House, Bucharest 2008, p. 577. For some other definitions of the superficies right are to be consulted: E. Chelaru, *Civil Right. The main real rights*, second edition, C.H. Beck, Bucharest, 2006, p. 276; V. Stoica, op. cit., p. 238; C. Bîrsan, *Civil Right. The main real rights*, third edition, Hamangiu Publishig House, 2008., p. 299

[5] For a detailed analysis of the content of the superficies right in the new Civil Code, to be consulted C. Birsan, *Civil Right. The main real rights in the regulations of the new Civil Code*, Hamangiu Publishing House, Bucharest, 2013, p. 256-257

[6] According to article 578 of the new Civil Code, The *autonomous constructions* are the constructions, plantations and any other utilities having individual character made on a building

[7] C. Birsan, op. cit. (2013), 257.

[8] V. Stoica, op. cit., p.238

[9] C. Bîrsan op.cit. (2013), 257-258.

[10] O. Ungureanu, C. Munteanu, op. cit., p. 579, V. Stoica, op.cit., p. 238-239.

[11] Idem, p. 241.

[12] L. Pop, L.M. Harosa, *Civil Right- The main real rights*, Universul Juridic Publishing House, Bucharest, 2006, p. 259

The new Civil Code hasn't yet consecrated the perpetuity of superficies; it established that the superficies right is a temporary one. Thus, according to article 694, having the marginal name „the duration of the superficies right", this right can be constituted over a period of 99 years the most. When the term is due, the superficies right can be renewed. This right can be constituted on a shorter period than 99 years. If by the constitution act a longer term than 99 years was established, the superficies right will be reduced to the term written in the law, and if the duration was not determined and the existence of such a term can not be proved, it is presumed to be of 99 years[13]. It was though argued in the doctrine that, although in the new Civil Code, the superficies right is conceived to be a temporary right, the possibility of its renewal *ad infinitum*, leads, at least theoretically, to the perpetuation of the superficies[14].

The encumbrance of the property right on a land with a superficies right represents an interference in the full exercise of the prerogatives of property, the superficies right can be constituted by voluntary settlement or by onerous title. No regulation previous to the Civil Code comprised dispositions regarding the evaluation of damages for this burden imposed to the owner of the land.

The new Civil Code regulates for the first time the right of the owner of the land to benefit from remedies. Thus, article 697, marginally called „the evaluation of the superficarius's activity", stipulates that „in the situation in which superficies was constituted by onerous title, if the parties haven't established other ways of payment of superficarius' work, the holder of the superficies right owes, in the form of a monthly payment, an amount that equals the rent existing on the free market, bearing in mind the type of the land, the purpose of the building, if it exists, the neighbourhood/area in which the land lies, as well as any other criteria which can determine the value of use." This amount will be established by a court decision if the parties can not agree on it.

The legal text mentioned consecrates the principle of freedom of juridical documents and of freedom of will. The superficarius can take the obligation to give or do, but the obligation to give is not excluded as well, he can periodically pay an amount of money, to buy certain goods or to make any other activities for the sole proprietor or for the person designated by the latter[15].

Although admirable, the intervention of the lawmaker regarding the regulations of remedies in the case of the institution of the superficies right, being undisputable that they are owed to the owner of the land, at least theoretically, the way to determine these remedies can arise some commentaries.

First of all, it is to be remembered that even before regulating the juridical status of the superficies in the national law, the European Court of Human Rights constantly appreciated in its jurisprudence that the instituting of the superficies right represents interference in the right of property on the land.

In this respect, in a case against Romania[16], the European Court established that attributing the right of use of a part of the plaintiffs land can equal neither to an expropriation because they haven't lost the right of property on the land nor to a regulation of the use of assets, but to an interference connected to the first statement of the first paragraph of article 1 of the Protocol additional to the European Convention of the Human Rights.

[13] V. Stoica, op. cit., p. 242; G. Boroi, C.A. Anghelescu, B. Nazat, *Civil right course. The main civil rights*, Hamangiu Publishing House, Bucharest, 2013, p. 133.
[14] F.-A. Baias, E Chelaru, Constantinovici, I. Macovei coordinators. The new Civil Code. Commentated articles, C.H. Beck, Bucharest, 2012, p. 756
[15] C. Bîrsan, op. cit. (2013), p. 258.
[16] The case Bock and Palade versus Romania, Decision of 15th of February, 2007, unpublished

In another recent case against Romania[17], the European court stated that, though the superficies right acknowledged by law represents an interference which has an internal legal reason, the establishing of a free superficies has the purpose to destroy the just balance between the defence of the property right and the general interests, so a disproportionate burden would be instituted in the case in which the owner of the right of property on the field doesn't beneficiate of remedies for having his property right restrained.

One can notice that even before the new Civil Code was adopted the land owner's right to benefit from remedies was acknowledged. The disposition of article 697 consecrate in the internal law the principle stated by the internal jurisprudence until then, but also by that of the European Court.

Regarding the nature of these remedies, we believe that the real estate nature of the superficies right is relevant. This means that this right creates juridical rapports between certain persons, in their qualities of owners of the land and of the building, plantation or constructions. Given the real character of the right, from it can benefit both the present owners of the construction and the future obtainers and can be opposed both to the present owners of the land, and to future owners.

This burden is imposed, or established in favour of the buildings, and not of the persons. It is constituted for the use and utility of another building, having another owner and is transmitted along with the transmitting of the construction, having thus a perpetual character and lasting as long as the building or the situation from which it arose exists.

Being a real right, we appreciate that the remedy owed for the limitation of the right of property for the land owner by instituting the superficies takes the form of compensation owed for the loss or limitation of some of the prerogatives of this right.

The duration and exercise of the superficies right are regulated by article 695 of the new Civil Code. Thus, first of all, by the constitutive act, the parties can agree on the limits within which the owner of the building is going to use the land on which the construction will be erected. If these limits are not established, the legislator institutes the rule according to which, the exercise of the superficies right is limited by the surface of land on which the building will be and by the surface necessary for the exploitation of the building or, if the case, by the area necessary for the exploitation of the erected building.

Thus, in the case of superficies, the owner of the land is deprived of the attributes of use and possession on the land on which the building, plantation or construction are erected and of the area necessary for the exploitation of these constructions. Even the European Court[18] decided that, by instituting the superficies right, the loss of the right of property on the land is out of question because the attributing of the right of use on the land of a third party in favour of the building owner doesn't equal to an expropriation.

Regarding the extent of these remedies, we consider that the greatest damage that a proprietor could have is the loss of his right of property. This means that he is entitled to the maximum value of compensation which could equal the value of replacement of the asset object of the right. As follows, in the case of the encumbrance of the property right on the land with a right of superficies, the remedy could not equal the value of replacement of the asset, because the owner of the land doesn't lose the right of property.

Although the new Civil Code establishes in article 697, as main criteria of determining the remedies, the rent set on the free market, bearing in mind the nature of the land, of the

[17] Moculescu versus Romania, Decision of 2nd of March, 2010, unpublished
[18] The case Bock and Palade beforementioned, paragraph 57; The case Moculescu, beforementioned, paragraph 30

destination of the building if it exists, of the neighbourhood as well as any other criteria that can determine the value of use, we appreciate that it is at least disputable this modality which the legislator decided.

The obligation of insurance of the use of an asset is proper to the personal obligatory rapport that is the contract of lease. According to article 1786 of the new Civil Code (article 1420 of the old Civil Code), the owner has as main duty, the obligation to give the asset and to keep it in good function. In his turn, the tenant has as main obligation, according to article 1796 of the new Civil Code (article 1492 of the old Civil Code), the payment of the price of the rent at set terms. Thus, the rent is an institution characteristic to juridical personal rapports, and not the real ones, such as the superficies right.

Likewise, the establishing of a rent supposes the existence of a temporary contractual relationship, the temporary character belonging to the nature of the lease which is, by its nature, a contract with successive execution, as resulted from article 1777 new Civil Code (article 1411 of the old Civil Code).

The maximum period of lease is of 49 years, without possibility of renewal (article 1783).

If, hypothetically, the lease is without term, the legislator regulated some solutions (article 1785). Thus, first of all, the term of the contract is determined according to the custom. If it doesn't exist, the lease is considered to be contracted for a year, in the case of unfurnished houses or of spaces used by a professional. In the case of mobile assets or of furnished rooms or apartments, the contract is considered valid on the period of time corresponding to the unit of time for which the rent was calculated. Finally, in the case of the mobile assets at the disposition of the tenant for the use of a building, the contract is considered valid on the period of the lease of the building.

On the contrary, the superficies right, although having temporary character, is perpetual[19] by nature because its duration is internally connected to the duration of the building the superficarius has as property, lasting during the entire life of the building, or over the duration of the situation which has imposed them. Under these circumstances, in our opinion, the remedies under the form of a monthly payment equivalent to the rent which could be obtained by leasing the land encumbered by this desmemberment are not compatible with the nature of such a right.

We believe that compensation under the form of a monthly payment could be accepted only in the situation of the occupation of the building without any quality, that is when an illicit action has taken place which could bring along the delinquent civil responsibility, which could justify the demand of the owner of the land to establish remedies for the lack of use. As long as the right of use o the land is established in favour of the superficarius by a title acknowledged by the law, the existence of an illicit deed is excluded and it attracts its delinquent responsibility.

On the other hand, the remedy has to be reasonable and proportional with the interference brought to the property right of the owner of the land, by its encumbrance with superficies right, because it could lead to enrichment without just cause at the expense of the superficarius. From this perspective, we believe that the remedies established under the form of periodical payment, with the condition that the payment obligation to exist on the entire material existence of the constructions, and which, most of the times, could not be shorter than 99 years, can no longer be considered an equitable remedy.

[19] V. Stoica, op. cit., p. 241.

On the contrary, it is highly probable that the amount of the rent paid by the superficarius on a considerable period (of at least 99 years, according to article 697), will substantially surpass the market value of the land necessary for the exploitation of the constructions. In this situation, the owner of the land will charge the price of the land which the superficarius uses, but at the same time it still holds the property of the land, which represents enrichment without just cause which surpasses the protection limit of the property, guaranteed both by internal regulations and by the European Convention of Human Rights and the first Protocol additional to this convention. The damage that the land proprietor has suffered and the extent of remedies which the superficarius has to pay have to be equally predictable and reasonable. As previously shown, the greatest damage which the land owner can suffer is the loss of the asset owned. Or, as long as he has the sole property, the charge of a remedy which surpasses the value of the land encumbered with the superficies represents enrichment which can no longer justify its ground in the limitation of his right to exercise the use by the superficarius.

For these arguments, we believe that the just determination of these remedies imposes their reference to the value of circulation of the land and not to the value of use, and the establishing of a remedy representing an amount of money which are to be paid once only represents a reasonable and equitable remedy.

Regarding the actual amount of the remedies, we believe that it should represent a percent from the value of the land. In the case of the superficies, the superficarius has the possession and use of the land, and the owner of the land has the attribute of disposition. Unlike superficies, in the situation of the transmitting servitude for example, the land-vassal fond- is use both by the owner of the dominant fond and by the one of the vassal fond. Starting from this comparison, we believe that amount of remedies could be determined as percent, having as reference the value of the land encumbered by desmemberment under the form of a global amount of money.

Besides these short considerations, we believe that, starting from the real character of the superficies right, the way of establishing remedies with reference to the value of the land and not to the value of use, would better reflect the value of the right which has a limited exercise by the encumbrance of the right on the land by a superficies and which has to be compensated by the remedy owed by the superficarius.

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ARTICLE 11 TAX CODE – THE RIGHT TO APPRECIATE IN FISCAL MATTERS. QUERIES ON LEGALITY AND CONSTITUTIONALITY

Ioana Maria COSTEA[*]

Abstract: *The fiscal body's right to appreciate has its consecration in Article 11 of the Tax Code. Regulatory basis is given by a normative concern to create for tax authorities a tool in reconsideration of the legal and economic operations of business environment in order to correctly reveal their real purpose and fiscal size. Equally, Article 11 provides tools to correct economic transactions completed between tax subjects, with inactive taxpayer position. Thus, the trade report is omitted in fiscal plan, through the effect of unenforceability given by the legislation in question and a series of secondary legislation. In legal terms, for this reason we distinguish between the specific effects of legal relations among the parties and legal effects in tax law report in terms of deductibility. Article 11, in its present form is the result of regulatory developments; the present study takes into discussion the legal formulas that produce effects in terms of the reserve for further verification, namely forms applicable in the general statute of limitation in taxation matters. In doing so, one can see a number of unconstitutionality aspects of Article 11, regarding the legal regime applicable to the inactive taxpayer and to the active contributor, business partner in good faith. Equally there can be raised several issues of illegality in relation to the statutory power of implementing secondary regulations. The study thus provides an analysis of texts in tax matters through filters of constitutionality and legality, observing the normative evolution in this matter.*

Keywords: *right to appreciate, inactive taxpayer, sanctions.*

1. Introductory aspects on Article 11 Tax Code

1.1. Article 11 Tax Code

The current text of article 11 § 1 statues *in order to determine the amount of tax or charge for the purposes of this Code, the tax authorities may disregard a transaction that does not have an economic purpose or reclassify the form of a transaction to reflect the economic substance of the transaction. Where transactions or series of transactions are classified as artificial, they will not be considered part of the scope of the avoidance of double taxation. The artificial transactions means transactions or series of transactions that have no economic content that cannot be normally used within ordinary business practices, their main purpose being to avoid taxation or otherwise to obtain tax advantages could not be granted.* Article 11 § 1 Tax Code (hereinafter TC) enshrines the right of discretion of the tax authority by establishing on optional basis their ability to sanction a transaction unenforceability or to retrain other transaction by highlighting real legal effect different from the apparent ones evidenced by the parties. The text has been recently modified[1] by introduction of the second sentence regarding artificial transactions[2] and

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[1] Article 11 § 1 has been modified by article I point 11 from Government Ordinance (hereinafter G.O.) no. 8/2013, published in Official Gazette (O.G. hereinafter) no. 54/2013.

[2] We consider that the problem of artificial transactions exceeds the sphere of the present study and should be treated in further studies.

defining that concept. Artificial transactions are excluded from the regulation of avoiding double taxation, so legitimating the imposition under Romanian tax laws.

Similar legal formulas are regulated under French law concept of *droit de redressement*, according to article 55-61B of Livre Procedure Fiscale, as a contradictory procedure that allows tax authorities to replace any failure, inaccuracy, omission or concealment relating to the tax base, including its reconstruction[3]. To note, is that the right is not conditioned by the procedural frame of a tax audit, but is itself a prerogative of the tax authority, exercisable whenever facts are met.

The effect of the right of discretion is sanctioning the taxpayer's behavior with illicit connotations; as it is the case, the legal relationship entered into by the taxpayer is an abnormal act of management without economic purpose and with the real purpose in reducing tax liabilities. Finding these circumstances, based on any information (statements of the taxpayer, cross-checks and legal operations sequence) allows resizing tax effects of the legal act by exclusion of the relevant provisions or by qualifying the act in other legal category.

Equally, article 11 § 1^1 and § 1^2 established a sanction for operations carried out by the inactive contributor, a taxpayer in default of its declarative obligations. Under these assumptions, re-qualifying has s subsidiary effect in excluding the transaction's result from deductible expenses.

Consecration of this right in Tax Code is justified by its effect on the imposable base, which is modified by inclusion of additional income, by excluding non-deductible expenses or even by reconstituting it. It may appear as opportune to correlate this text with appropriate procedural provisions tax, being useful to statute a specific adversarial proceedings. By the intervention of the legislature, we consider that the procedural framework of an unannounced control or a tax audit can offer the opportunity for fiscal authorities to re-individualize and qualify tax obligations according to legal facts. The result of the procedure is obviously subject to the common law regarding contesting the fiscal-administrative acts[4].

1.2. Article 11§ 1^1 Tax Code

The text of article 11§ 1^1 has undergone several recent regulatory interventions; the variety of legal forms raises specific problems. The legal formulas were: *tax authorities may not consider a transaction by a taxpayer declared inactive by order of the president of the National Agency for Fiscal Administration* (NAFA hereafter) [text applicable to the entry into force 24.11.2004[5]]; *tax authorities will not consider a transaction by a taxpayer declared inactive by order of the president of the NAFA, excluding supplies of goods made in the enforcement procedure* [text applicable from 23.10.2010[6]]; *tax authorities will not consider a transaction by a taxpayer declared inactive, excluding supplies of goods made in the enforcement procedure* [text applicable as from 17.09.2011[7]]; *taxpayers declared inactive under article 78^1 of G.O. no. 92/2003 regarding the Fiscal Procedure Code (FPC hereafter), (...), with operations in the period of inactivity, are subject to the payment of*

[3] ***, *Code de procedure fiscale,* 13eme edition, Dalloz, Paris, 2006, pp. 297 and next.
[4] See: M.I. Niculeasa, *Soluționarea contestațiilor în materie fiscală*, C.H. Beck, Bucharest, 2009; A. Fanu-Moca, *Contenciosul fiscal*, C.H. Beck, Bucharest, 2006.
[5] Introduced by Law no. 494/2004, O.G. no. 1.092/2004.
[6] Modified by Government Emergency Ordinance (G.E.O. hereinafter) no. 117/2010, O.G. no. 891/2010.
[7] Modified by G.O. no. 30/2011, O.G. no. 627/2011.

taxes under this law, but not entitled to deduct expenses and value added tax (VAT hereinafter) *for purchases made during that period* [text applicable as from 30.09.2011[8]].

Note that the texts in question establishe the regime of enforceability for transactions concluded by a taxpayer and that the regulatory sequence enforces different forms of action for tax authorities: (i) the first form sets unenforceability sanction on an optional basis, (ii) in the second regulatory form, unenforceability sanction is imposed compulsorily setting an exception for procurement of foreclosures[9], (iii) a third form of the text excludes the indication *declared inactive by order of the president of NAFA*, (iv) last regulatory intervention establishes a radical change and specifies a punctual penalty, removal of the right to deduction. This latest reshaping of the text refines the mechanism of enforceability of the transaction and limits the sanction only to the removal of the right to deduct amounts of any deductible expenses and VAT resulting from these operations. The new color of the text is natural for two reasons. On the one hand, the transaction is a bilateral legal act, with two components as effects: one in the patrimony of inactive contributor (sanctioned with inoperable deduction) and one in the patrimony of business partners, relevant according to article 11 § 1^2. On the other hand, the problem of un-opposable transaction is a matter of fiscal material law, regulated by the Tax Code and produces effects on the right of deduction; in the previous formulation, the question appeared as a mere matter of procedure when the tax authority intervenes in subsequent verification, according to article 90 FPC.

1.3. Article 11§ 1^1 Tax Code

The text of article 11§ 1^2 is a corollary text relative to § 1^1 imposing a system of penalties applicable to trading partners that contract with an inactive contributor. Legal forms of this text have evolved correlated with those of the previous paragraph, but also distinctively: *Also there will not be taken into account by the tax authorities the transactions concluded with a taxpayer declared inactive by order of the president of the NAFA. Procedure for declaring inactive taxpayers will be determined by order. List of inactive taxpayers will be published in the Official Gazette of Romania, Part I, and will be made public in accordance with the requirements of the order* [text applicable from the date of entry into force 24.11.2004[10]]; *Also, there will not be taken into account by the tax authorities the transactions concluded with a taxpayer declared inactive by order of the president of the NAFA. Procedure for declaring inactive taxpayers will be determined by order. List of inactive taxpayers will be published on the website of the ministry of public finance* (hereinafter MPF) - *NAFA portal and will be made public in accordance with the requirements set by order of the President of NAFA* [text applicable as from 25.05.2009[11]]; *Also there will not be taken into account by the tax authorities the transactions concluded with a taxpayer declared inactive by order of the president of the NAFA. Procedure for declaring inactive taxpayers will be determined by order of the president of NAFA. The Order and the list of inactive taxpayers shall be notified to taxpayers whom they are intended and those concerned by displaying on the website of NAFA* [text applicable as from 13.10.2009[12]]; *Also, there will not be taken into account by the tax authorities the transactions concluded with a taxpayer declared inactive by order of the president of the*

[8] Modified by G.E.O. no. 125/2011, O.G. no. 938/2011.
[9] A. Ion, "Starea de inactivitate fiscală a contribuabililor", *Curierul fiscal*, no. 12, Bucharest, 2010, pp. 27-30.
[10] Introduced by Law no. 494/2004, O.G. no. 1.092/2004.
[11] Modified by G.E.O. no. 46/2009, O.G. no. 347/2009.
[12] Modified by G.E.O. no. 109/2009, O.G. no. 689/2009.

NAFA, *except for purchases of goods made in the enforcement proceedings* [text applicable as from 30.12.2010[13]]; *Also, there will not be taken into account by the tax authorities the transactions concluded with a taxpayer declared inactive except for purchases of goods made in the enforcement proceedings* [text applicable as from 17.09.2011[14]]; *beneficiaries who purchase goods and / or services from taxpayers after their entry in the register of inactive contributors or reactivated contributors as to article 78^1 of G.O. no. 92/2003, (...), are not entitled to deduct expenses and VAT for purchases, with the exception of purchases of goods made in the enforcement proceedings* [text applicable as from 30.12.2011[15]]. The first three forms of the regulatory text set the unenforceability sanction towards tax authorities for transactions with inactive taxpayers, regulatory interventions at the time were only modifications on the means to make public the list of inactive contributors (originally Official Gazette, later the NAFA portal). Regulatory intervention by G.E.O. no. 109/1999 brings a change of power in regulating the procedure for managing inactive contributors. The fourth form of the text introduced by G.E.O. no. 117/2009 gives the specifications of the form of communication, and change by the O.G. no. 30/2011 rules out the text's references to proceedings for declaration of inactivity. The current regulatory text is a mirror of § 1^1 pointing the penalty to the right to deduct charges and VAT.

The text of § 1^1 supports, from our point of view, a critic of legality and constitutionality in relation to certain forms of legislative text.

2. Aspects of legality as to executing article 11 § 1^1 and § 1^2 from Tax Code

2.1. Regulating competence

The competence to issue rules for the application of the Tax Code is expressly governed by article 5 TC. On the meaning of the term, according to article 5 § 2 TC, rules means methodological rules, instructions and orders.

Article 5 TC with the marginal note *Norms, instructions and orders* provides: (4) *The orders and instructions are issued by the minister of public finances and published in the Official Gazette of Romania, Part I.* (5) *The public institutions subordinated to the Government, other than MPF can not develop and issue rules to relate to provisions of this Code, except as provided in this Code* [text applicable as from the entry into force in 2003[16]] (4) *The orders and instructions for the uniform application of this Code shall be issued by the minister of public finances and published in the Official Gazette of Romania, Part I. The orders and instructions regarding administration procedures of taxes covered by this Code, due to the general consolidated budget, are issued by NAFA President and will be published in the Official Gazette of Romania, Part I* (5) *The public institutions subordinated to the Government, other than MPF can not develop and deliver rules that relate to the provisions of this Code, except as provided in this Code* [text applicable as from 13.10.2010[17]].

The competence to issue orders and instructions for applying Law no. 571/2003 on Tax Code belongs exclusively to the minister of public finance. The competence to issue orders and instructions in management procedures for taxes regulated by TC belong to the

[13] Modified by G.E.O. no. 117/2010, O.G. no. 891/2010.
[14] Modified by G.O. no. 30/2011, O.G. no. 627/2011.
[15] Modified by G.E.O. no. 125/2011, O.G. no. 938/2011.
[16] The Law no. 571/2003 entered into force in 23.12.2003.
[17] Modified by G.E.O. no. 109/2009, O.G. no. 689/2009.

NAFA president. It is observed as a separation of powers between the MPF and NAFA on issuance of rules to implement the provisions of substantive tax law.

Likewise, intervene dichotomously the provisions of Government Decision (hereafter G.D.) no. 208/2005 on the organization and operation of the MPF and NAFA[18]. According to article 3 § 1 G.D. no. 208/2005: *in the realization of its functions, MPF has the following main competences*: (...) *38. develops draft legislation establishing direct and indirect taxes, supervising their settlement's improvement and harmonization of legislation in this area*. According to article 24 § 2 G.D. no. 208/2005: *for the achievement of the objectives referred to in § 1 NAFA has the following main functions: 2. develops and / or approves draft legislation containing provisions on budgetary revenue administration when is competent 10. develops procedures for the administration of taxes, social contributions and other budget revenues, 13. develops and implements procedures for imposing legal entities and individuals, according to the legal provisions, 14. develops and implements procedures for taxpayer records, fiscal management and fiscal record file*. The two institutions have different lawmaking powers; MPF issues regulations to establish direct and indirect taxes. NAFA issues regulations for the management of direct and indirect taxes and other tax liabilities.

2.2. Norms for application of article 11 § 1^1 and § 1^2 from Tax Code

Article 11 Tax Code in its provisions on inactive contributor is doubled by a procedure regulated by Order of the President of National Agency for Fiscal Administration no. 575/2006 (hereinafter O.P.N.A.F.A). O.P.N.A.F.A. no. 575/2006 is given in pursuance of article 11 § 2 and article 33 § 3 G.D. no. 208/2005, as specified in the preamble of the regulatory text and concerns the settling of the terms and declaring procedure for inactive contributors.

O.P.N.A.F.A. no. 575/2006 lays down the procedure for the treatment of inactive taxpayers in the two cases under article 1: *a) circumventing the tax inspection, by declaring headquarters data that do not allow identification by the tax authority*, *b) the tax authorities have found the contributor does not function at the headquarters or tax domicile declared*. According to the specifications of the same article § 2, effective declaration as an inactive contributor of a person who meets the conditions provided by law, shall be made by order of the President of NAFA, published in the Official Gazette. This area of action corresponds to competences regarding taxpayers' evidence attributed to NAFA according article 24 § 2 Section 14 G.D. no. 208/2005.

The provisions of O.P.N.A.F.A. no. 575/2006 are completed by Annex no. 1 O.P.N.A.F.A no. 3347/2011[19] on the procedure for declaring inactive taxpayers according to art. 78^1 § 1 (a) TPC[20]. Note that this procedure is limited solely to the corporate taxpayers or other entities without legal personality, which during a calendar quarter, do not fulfill any declarative obligation prescribed by law. On the basis of regulation, notice that this time, the provisions of O.P.N.A.F.A. are given under article 12 § 3 G.D. no. 109/2009 on the organization and functioning of NAFA and article 78^1 § 1 (a), § 3 and § 6 and of the article 228 § 2 TPC with procedural and not material grounds.

De plano, taxpayer records is an operation in the field of management procedures of taxes, social contributions and other budgetary revenues for which the seat material is the

[18] Published in O.G. no. 269/2005.
[19] Published in O.G. no. 754/2011.
[20] See: Pătroi Dragoş, "Declararea contribuabililor inactivi şi implicaţiile fiscale aferente", *Curierul Fiscal*, no. 8, Bucharest, 2008, pp. 22-25.

Fiscal Procedure Code. In this respect, we mention article 1 TPC: Scope of Fiscal Procedure Code (1) *This Code governs the rights and obligations of the parties in the legal tax rapport regarding the administration of taxes due to the state budget and local budgets under Fiscal Code*; article 78^1 Registry of inactive / reactivated contributors (1) *The legal persons and any entity without legal personality are declared inactive and are applicable to their article 11 § 1^1 and § 1^2 TC if they are in one of the following positions*: (...).

It follows that issue of the legal status of inactive contributors is governed by article 11 § 1^1 and § 1^2 TC on the tax treatment of transactions during the period of inactivity and the issue of administration procedure is governed by article 78^1 TPC. This conclusion is certain in relation to the provisions of article 78^1 § 1 TPC, setting the tax treatment from article 11 § 1^1 and § 1^2 TC for taxpayers who are in the categories mentioned by point (a)-(c).

At normative level there are two sources of secondary regulation[21] for declaring and recording inactive contributors, applying the same dispositions of TPC, developing them in different bases: O.P.N.A.F.A. no. 575/2006 on the basis of article 11 TC and O.P.N.A.F.A no. 3347/2011 on the basis of article 78^1 TPC. Regulatory technique is unusual; a Tax Code text is once implemented indirectly due to division of regulatory competences in the event of failure in reporting obligations (art. 78^1 (a) TPC) for which implementing rules, in compliance with article 5 TC come the procedural pathway coordinated by NAFA President and once directly in the impossibility of identifying fiscal domicile (art. 78^1 (b) and (c) TPC) by the implementation of article 11 § 1^1 and § 1^2 TC under the direction of NAFA President.

2.3. Full illegality

The text of article 11 § 1^1 and § 1^2 TC had a initial form, *that the procedure for declaring inactive taxpayers will be determined by the order*; then a subsequent form specified *the taxpayer declared inactive by order of the President of NAFA* (after G.E.O. no. 109/1999); then finally has waived establish jurisdiction to issuance of the order (by G.E.O. no. 30/2011).

Reading the first form of the text in the light of article 5 § 5 TC, the power to legislate would return, as a rule, to the minister of public finance. If O.P.N.A.F.A. no. 575/2006 is issued pursuant to article 11 TC, the president A.N.A.F. appears to be incompetent to regulate the procedure, only competent to organize and publish the list of inactive taxpayers. In this angle, the text of the O.P.N.A.F.A. no. 575/2006 appears to be entirely illegal, NAFA has no competence to legislate the implementation of article 11 § 1^1 TC. The text of article 11 uses the formula *by order* without indicating the source of this order. By the technique of purposive interpretation, applied to article 5 TC namely that orders are usually issued by the Finance Minister and only by express exception to other regulatory body, show that article 11 TC is not grounds for issuing orders by NAFA. In the second form of the text, the illegality persists. There are two different legal issues: the procedure of declaration and effective declaration. By modifying article 5§ 4 and article 11 § 1^2 by G.E.O. no. 106/2009, President A.N.A.F. only acquires jurisdiction to issue orders to the provisions of Law no. 517/2003 regarding Fiscal Code only on issuing the list of names of taxpayers for which the conditions of inactivity are fulfilled. Per a contrario, the declaration procedure has not been expressly

[21] According to G.D. no. 208/2005.

entrusted to NAFA President and, by applying the general rule of jurisdiction, the power to issue rules pursuant to article 11 TC would return to the minister of public finance.

The foundation of the Order no. 575/2006 on article 11 § 1^2 render unlawful the whole act being violated the provisions of article 5 of Law no. 517/2003 on Tax Code on regulatory jurisdiction.

2.4. Illegality of certain provisions

Article 3 § 1 of O.P.N.A.F.A. no. 575/2006 establishes that *from the date of declaration as inactive taxpayer the contributor no longer has the right to use bills, invoices and other documents or forms with special treatment. (2) The tax documents issued by a taxpayer declared inactive in violation of the prohibition under § 1 produce no legal effects in terms of taxation*.

Article 3 § 1 establishes a penalty for inactive taxpayers, namely the prohibition to use invoices and other special printed forms. The sanction affects the right of deduction and the use of specific documentation. Or, the invoicing provisions are provisions covered by article 155 TC, as a tool for determining the tax liability in VAT.

The establishment of this prohibition by order of President NAFA has a direct incidence in setting direct and indirect taxes. But the power to issue orders to implement the provisions Tax Code derives according to article 3 item 38 of G.D. no. 208/2005 from the regulatory power of the minister of finance.

Article 3 § 2 O.P.N.A.F.A. no. 575/2006 establishes the same penalty for inactive taxpayers and their contractual partners, namely deprivation of legal effect in terms of fiscal operations confirmed by documents issued by inactive taxpayers.

The term *tax documents*[22] names any document that becomes supporting document binding on persons who have issued it, according to the accounting regulations. Tax documents are all documents: contracts, receipts, invoices, etc. These documents are used as evidence to prove the performance of an operation or proof of entry into patrimony of a good or a service. Based on them, the accounting result shall be established for determining taxes owed: corporate tax, income tax, VAT, where applicable.

The provisions of article 3 § 1 and § 2 O.P.N.A.F.A. no. 575/2006 remove the right to deduct invoices from an inactive taxpayer.

Conditions of deduction of VAT are undeniably an issue establishing indirect tax which is governed exclusively by the Law no. 571/2003 regarding Tax Code. In this matter, the power to legislate is expressly reserved, according to article 5 § 4 TC to the minister of public finance.

For these reasons, we consider that article 3 of O.P.N.A.F.A is given with express infringement of the power to legislate being issued by the President of NAFA.

3. Constitutional issues

We appreciate that a constitutional question may rise on related texts, as introduced in 2004, referring to the application regime of the unenforceability sanction. Thus, article 11 § 1^1 TC establishes for the inactive taxpayer: *the tax authorities may not consider* (...), article 11 § 1^2 establishes for the partner of the inactive tax payer: *not to be considered by the tax*

[22] See: D. Dascălu, C. Alexandru, *Explicațiile teoretice şi practice ale Codului de procedură fiscală*, Rosetti, Bucharest, 2005.

authorities (...). From the distinct manner of formulating the texts, it may result in the first case a discretionary act of to the tax authority, unenforceability sanction being optional, and in the second case a mandatory application of sanctions. In this application of the texts in question, we think that the different way of applying the sanction is not justified under article 16 of the Constitution on equal treatment and the prohibition of discrimination.

In the question of grounding the penalty, we understand that the business partner is not a bona fide third party; the inactive taxpayers list is public, this partner has the obligation to check the conformity of the tax regime of any business partner. Consequently, failure to do the verification or ignoring the state of inactivity at the time of contracting is improper conduct, grounds for a sanction that consists in excluding the transaction from the right to deduct, even if the substantive and formal conditions for deductibility are performed according Tax Code.

However, even if the penalty is justified, we can not find justification for the difference in treatment, meaning that the inactive taxpayer is optional penalized while for his partner the sanction is mandatory. Thus, we consider admissible an exception of unconstitutionality in a contentious-administrative procedure regarding a decision to impose additional tax liabilities in charge of the business partner of an inactive taxpayer. Fair treatment would require withholding penalty on an optional basis in both cases, for the period prior to regulatory intervention, which set binding in both cases.

4. Conclusions

The study tries to underline a sinuous evolution of a system of normative text that rule on the sanctions regime for inactive taxpayers and their partners. The normative technique in this case has evolved but still leaves us with a certain number of discussions on legality and constitutionality as to the source and effects of these texts.

Further normative intervention would be advisable in order to unify the secondary norms in this matter and to clarify the distribution of competences between major actors in tax matter.

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VOTING RIGHT – FUNDAMENTAL RIGHT OF SHAREHOLDERS OF COMPANIES

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Abstract: *As far as it concerns the voting right, according to the provisions of art. 101 of Law no. 31/1990, any paid action entitles to a vote in the general meeting, unless it was provided otherwise by deed of incorporation. Therefore, the lawmaker provided this rule by virtue of the principle of equality which must exist between shareholders, each having the right to participate and vote in the general meeting, contributing this way to the management of the company. As it is defined in the doctrine, the voting right is a subjective, absolute, personal, non-patrimonial right accessory to the ownership right over the shares, affected by the condition of organization of the general meeting of shareholders, transferrable only with the assignment of shares. Although the exercise of the voting right is qualified as a discretionary manifestation of will, the shareholder is not obliged to justify the direction in which his vote went, there are situations when the exercise of the voting right has to fall within the limits of good faith and the limit of abuse of law, as in corporate matter there are expressed specific transgressions which the shareholders can commit – abuse of majority and abuse of minority – which are forms of abuse of law and will be sanctioned accordingly. The voting right is considered a fundamental inviolable right of shareholders which they receive in exchange of their contribution to the formation of the share capital of the company1. Inviolability, in our legislation, is extracted from the provisions of art. 128 paragraph (2) of Law no. 31/1990 which provides that any convention by which the shareholder commits himself to exercise the voting right in accordance with the instructions given or the proposals formulated by the company or by the persons with assignments of representation is null and void. By this provision it is assured the possibility of free expression of vote by the shareholder, regardless of the pressure made on him.*

Keywords: *vote, shareholder, fundamental right, representation.*

As far as it concerns the voting right, according to the provisions of art. 101 of Law no. 31/1990, any paid action entitles to a vote in the general meeting, unless it was provided otherwise by the deed of incorporation[1]. Thus, the lawmaker provided this rule by virtue of the principle of equality which must exist between shareholders, each having the right to participate and vote in the general meeting, contributing this way to the management of the company.

As it is defined in the doctrine[2], the voting right is a subjective, absolute, personal[3], non-patrimonial[4], right accessory to the ownership right over the shares, affected by the condition of organization of the general meeting of shareholders[5], transferrable with the assignment of shares[6].

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[1] Î.C.C.J., s. com., dec. nr. 3124/12.10.2007.

[2] C. Duțescu, *Rights of Shareholders*, 3rd edition, Ed. C.H. Beck, Bucharest, 2010, pag. 227.

[3] Î.C.C.J., s. com., dec. nr. 2874/15.10.2008.

[4] This qualification of the voting right as non-patrimonial can create certain discussions. So, to the extent that the voting right represents what the shareholder receives in exchange of his contribution, value brought in the company, and to the extent that the voting right is used by shareholders to defend their (patrimonial) interests in the company, can we speak of the voting right as non-patrimonial?

[5] To the extent that we speak of a means of the legal act, I appreciate that we speak of a term and not about a condition which affects the summoning of the general meeting. This is because the summoning of the general meeting is sure as happening and cannot be defined as future and unsure event as realization.

[6] Î.C.C.J., s. com., dec. nr. 1830/10.06.2009.

Although the exercise of the voting right is qualified as a discretionary manifestation of will[7], as the shareholder is not obliged to justify the way in which he directed his vote, there are situations when the exercise of the voting right must fall within the limits of good faith and the limit of abuse of law, in corporate matter there are specific transgressions which the shareholders can commit – abuse of majority and abuse of minority – which are forms of abuse of law and which will be sanctioned accordingly.

The voting right is considered a fundamental inviolable right of the shareholders, which they receive in exchange of their contribution to the formation of the share capital of the company[8]. Inviolability, in our legislation, results from the provisions of art. 128 paragraph (2) of Law no. 31/1990 which provides that any convention by which the shareholder commits himself to exercise the voting right in accordance with the instructions given or the proposals formulated by the company or by the persons with assignments of representation is null and void[9]. By this provision it is assured the possibility of free expression of vote by the shareholder, regardless of the pressure made on him.

The voting right is also qualified as essential, of social nature[10], without which the shareholders cannot defend their interests and cannot control and supervise the company, the administrators, the directors, the members of the board of directors or the members of the supervisory board[11]. In order to be able to exercise the vote in full knowledge and to be able to freely express their option, the shareholders must be informed correctly and completely in relation to the problems which will make the object of the debates of general meeting[12].

The importance of the voting right is given by its value, through which the shareholders actively participate to the formation of the social will, to the management and control of the company. The vote is important also because once the majority required by the law is convened for different categories of competences, the company can be run through it, appointing the executive management and establishing the strategies which the company will follow in the future. In correlation with this power given by the majority of votes, it is also the responsibility incumbent on the voters for the less inspired decisions they will make, voters who will be obliged to bear potential losses.

The shareholders can establish by the deed of incorporation that the number of votes of shareholders who hold more than one share should be limited[13]. The limitation can be instated either at the beginning of the life of the company, on the drawing up of the deed of incorporation or later by the amendment of the deed of incorporation by resolution of the extraordinary general meeting of shareholders.

Another restriction of the voting right is provided by art. 101 paragraph (3) of the law, which establishes that the shareholders who are not up-to-date with the outstanding

[7] C. Duțescu, op. cit., 2010, page 227.
[8] J. Bussy, *Droit des affaires*, 2e édition, Ed. Dalloz, Paris, 2004, pag. 188. In French legislation, the inviolability of the voting right was reinforced by the repeal of art. L.225-25 para. (1) of French Civil Code which allowed the introduction of the requirement of a minimum number of shares to be able to exercise the vote. The French legislation also allows the protection of the voting right, in addition to the law, by deed of incorporation. See Î.C.C.J., s. com., dec. nr. 1409/27.04.2010.
[9] Î.C.C.J., s. com., dec. nr. 3137/26.05.2005.
[10] Î.C.C.J., s. com., dec. nr. 1973/05.06.2008.
[11] St.D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *Companies Law. Comment on articles*, 4th edition, Ed. C.H. Beck, Bucharest, 2009, pag. 366 (hereinafter quoted *LSC4*).
[12] Î.C.C.J., s. com., dec. nr. 2738/15.09.2010.
[13] Î.C.C.J., s. com., dec. nr. 2736/11.05.2005.

amounts payable have the voting right suspended[14]. It results that once they are to date with their amounts payable, they will regain the voting right. This sanction, as it is formulated by art. 101 paragraph (3), appears as temporary, but if the shareholders do not conform to bring the outstanding amounts payable, the sanction can last a long period of time without existing a limit from the law, however, I appreciate that this suspension cannot last *sine die*, because it would lead to a non-participation of the shareholder to the life of the company, which can equal to the absence of *affectio societatis* from him. It was decided correctly in the doctrine[15] that the suspension of the voting right will operate only regarding the unpaid shares and not globally, for all the shares held by the shareholder[16].

Another situation of suspension of the voting right is inferred from the interpretation of art. 203 paragraph (2) of Law no. 297/2004 regarding capital market, which provides that until the carrying out of the public offer mentioned in paragraph (1), the rights related to securities exceeding the threshold of 33% of the voting rights over the issuer are suspended, and the shareholder and the persons with whom he acts in agreement cannot purchase, by other operations, shares of the same issuer. Thus, the suspension of the voting right only applies to certain shareholders who own at least 33% of the voting rights over the issuer[17].

Thirdly, there is the possibility which the shareholders have to create privileged shares, with priority dividend, but who do not have the right to vote. This limitation, final and not temporary, is justified by the awarding of benefits of economic nature, as the holders of these categories of shares benefit from the right of obtaining dividends with priority compared to the other shareholders. The limitation which the law reinstates refers only to the interdiction to vote in general meetings, these shareholders having the right to vote in special meetings. The purpose of special meetings is to protect the interests of the owners of these titles from special categories[18], but, as it is appreciated[19], the special meeting does not have the right to get involved in the management of the company, is not a social body, the functioning of the company is not influenced by the decisions of these special meetings[20]. The special meeting has right of veto regarding the decision of the general meeting to amend the rights or obligations referring to a category of shares, these decisions do not produce effects until after their approval by the special meeting of the holders of shares from that category.

[14] Any paid action entitles to a vote in the general meeting, the voting right being suspended only for the shares subscribed but unpaid for, the sanction is not valid for the shares held by the same shareholder, but fully paid – Î.C.C.J., s. com., dec. nr. 1693/11/03/2005 in S. Gavrilă, op. cit., page 176 and next. The provisions of art. 101 para. (3) of Law no. 31/1990 are of strict interpretation, referring only to the suspension of the voting right in case of not making the payments at due date, these provisions of the Companies Law will not apply in case of not making the investments mentioned in the privatization agreement, not securing the increase of share capital, overevaluated contributions which were to be checked by an expert etc. - C.S.J., s. com., dec. nr. 3232/30.06.2003. The suspension of the voting right cannot be disposed by the court of law but for the case when the shareholders are not informed of the amounts payable – Court of Law Bucharest, commercial department, commercial sentence no. 7523/2003 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *Companies Law no. 31/1990, bibliographical references, judicial practice, decisions of Constitutional Court, annotations,* Ed. Hamangiu, Bucharest, 2007, page 182.

[15] St.D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *LSC4*, pag. 367.

[16] C.S.J., s. com., dec. nr. 3232/30.06.2003:.

[17] Î.C.C.J., s. com., dec. nr. 1409/27.04.2010.

[18] Also see St.D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *LSC4*, pag. 360; St.D. Cărpenaru, *Tratat de drept comercial român (Romanian Commercial Law Treaty)*, 2nd edition revised and added, Ed. Universul Juridic, Bucharest, 2011, pag. 249 (hereinafter quoted *Treaty 2011*).

[19] St.D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *LSC4*, pag. 419.

[20] I. Adam, C. Savu, *Companies Law. Comments and Explanations*, Ed. C.H. Beck, Bucharest, 2010, pag. 288 (hereinafter quoted *Law*).

From these provisions of art. 101 it results that as a rule, the shareholders have each of them a vote for each share they hold[21]. From here it results the principle of proportionality of the voting right, proportionality which is accomplished in comparison with the shares the shareholders have. This principle can be defeated, the text of art. 101 paragraph (2) allowing the limitation of the number of votes of the shareholders whom have more than one share. There are exceptions from this principle of proportionality, established by art. 95 of Law no 31/1990. According to this article, the company can issue preferential shares, with priority dividend, but the holders of these shares will not have the right to vote in the general meeting. They can vote in the special meeting of those categories of shares they have.

Another situation in which the voting right is suspended is regulated by art. 105 related to art. 103^1 and art. 104 of Law no. 31/1990. According to art. 105, the shares acquired in accordance with the provisions of art. 103^1 and 104 have the voting right suspended for the period of their holding by the company. So, if the company acquires its own shares, in the conditions of art. 103^1 and 104, during the period when these shares are the property of the company, these shares will not give a voting right to the company or another person.

The suspension of the voting right operates also in the case provided by art. 286^1 para. (2) of Law no. 297/2004. According to it, the voting right is suspended for the shares held by shareholders which exceed the limit of 1% of the share capital of financial investment companies because, paragraph (1) of the same article provides that any person can acquire by any title or can hold shares issued by the financial investment companies resulted from the transformation of private property funds, up to the limit of 1% of the share capital of financial investment companies.

According to art. 266 para. (3) of Law no. 297/2004, for the period of application of special administration the voting right of shareholders is suspended regarding the appointment and revoking of administrators, the right to dividends of shareholders, the activity of the board of directors and internal auditors as well as their right to remuneration.

Another restriction of the voting right is contained in art. 283 para. (1) of Law no. 297/2004, according to which in case of acquisition or increase of an equity interest in the share capital of a regulated entity, performed with the violation of the legal provisions and of the regulations issued in the enforcement of this law, the voting rights related to that holding are suspended by law. However, the shares are taken into considerations in the establishment of the necessary quorum at the general meeting of shareholders to prevent the occurrence of blockages in the activity of the company which could determine the impossibility of obtaining the necessary quorum or the majority required for holding the general meeting, respectively for decision-making.

According to an opinion[22], there is the possibility of conventional suspension of the voting right, with temporary character.

On the other hand, opposite to the possible limitations of the voting right, it is likely that a share has two or several votes, being in the presence of multiple vote. This possibility results from the interpretation of art. 101 paragraph (1) of Law no. 31/1990 which provides that a share entitles to a vote in the general meeting of shareholders, unless it was provided otherwise by deed of incorporation. It results that the shareholders can derogate by deed of incorporation from the provisions of the law, deciding that a share gives right to two or more votes in the general meeting. The problem is to establish whether one can decide that

[21] St.D. Cărpenaru, *Treaty 2011*, page 384.
[22] C. Duțescu, op. cit., 2010, pag. 245 and next.

only certain shares benefit from the prerogative of multiple vote. I appreciate that the answer should be negative because the shareholders must be equal between them, should benefit from the same rights for each share held[23]. One can discuss about the incidence of interdiction of leonine clauses in this case[24], because the shareholder who would have more votes for a single share could exert a control over the company, obtaining majority and being able to create advantages compared to the other shareholders[25].

Unlike the companies law which does not expressly provide an interdiction to make the difference between shares of the same class, the Law no. 297/2004 regarding capital market establishes in art. 224 para. (2) that the company has to assure a fair equal treatment for all shareholders who hold shares of the same class. The notion of share of the same class is defined in art. 2 para. (2) letter c) of Regulations 1/2006 issued by National Securities Commission, according to which the class of securities comprises the securities of the same type, which have the same clauses and characteristics (nominal value, voting right, right to pay dividends and preference rights – for shares - and, respectively, nominal value, price, interest, duration/maturity, redemption conditions, repayment plan, conversion rights – for debentures) and are issued by the same issuer. So, as far as it concerns the listed companies, there is an express interdiction to establish multiple voting right for certain shares of the same class, because it would violate the principle of assurance of a fair treatment between shareholders. *De lege ferenda* it would require the supplementation of the companies law with a provision which prohibits differentiated treatment between shareholders who hold shares of the same class, which would represent an implementation of the principles of corporate governance.

Another voting means, which is found regarding listed companies is the cumulative vote. The National Securities Commission regulated this means in art. 124-129 of Regulations no. 1/2006. By the method of cumulative vote, each shareholder has the right to attribute the cumulated votes (votes obtained after the multiplication of votes held by any shareholder, according to participation in share capital, with the number of administrators who are to form the board of directors) to one or several persons proposed to be elected in the board of directors[26].

A clause which would condition the voting right by holding a certain number of shares is unacceptable, this suppression contravenes the law and fundamental rights of shareholders (to participate in the general meeting)[27].

As for the exercise of the voting right by representative, the Companies Law does not provide any provision in this respect. The only provisions in this matter are

[23] For a contrary opinion see I. Adam, C. Savu, *Legea*, pag. 304; I. Schiau, T. Prescure, *Companies Law no. 31/1990. Analyses and comments on articles*, 2nd edition, Ed. Hamangiu, Bucharest, 2009, pag. 274 (hereinafter quoted *Law 2009*). The authors appreciate that the establishment of a higher number of votes than the number provided by the law for one share does not affect the rights and benefits of the other shareholders, being in full accordance with the text of art. 101 para. (1) of Law no. 31/1990. It is also argued that this disproportionality of votes does not affect dividends, as the shareholders collect the benefits depending on the participation quota in share capital. But, if after the vote in the ordinary general meeting it is decided that the whole profit should be reinvested, this decision being made following the higher number of votes which some shareholders have, the shareholders who hold the same number of shares as those who voted against, but do not benefit from multiple vote, can we speak of a limitation of benefits?

[24] In contrary meaning, see I. Schiau, T. Prescure, *Law 2009*, page 274.

[25] C.S.J., s. com., dec. nr. 183/06.10.1992.

[26] For details also see T. Prescure, N. Călin, D. Călin, *Capital Market Law. Comments and Explanations*, Ed. C.H. Beck, Bucharest 2008, pag. 366 and next.; C. Gheorghe, *Capital Market Right*, Ed. C.H. Beck, Bucharest, 2009, pag. 292 and next (hereinafter quoted *Capital*); C. Duțescu, op. cit., 2007, pag. 287 and next.

[27] I.L. Georgescu, op. cit., II, pag. 228.

comprised in Regulations no. 1/2006 and in Regulations no. 6/2009 of National Securities Commission.[28].

The European Regulations, respectively Directive 2007/36/EC paragraph 10 from preamble, establish that a good corporate governance involves a voting procedure by representation, supple and efficient. The existing limitations and constraints which make the vote by representation difficult and costly should therefore be eliminated. Yet, a good corporate governance also involves the reinstatement of proper protection mechanisms against potential abuses of vote by representative. The representative should, therefore, be obliged to observe all the instructions received from the shareholder, and the member states should be able to reinstate adequate measures in view of assuring that the representative does not pursue other interests than the interests of the shareholder, regardless of the reason which led to a conflict of interests. The measures taken against potential abuses can especially consist of regimes which the member states can adopt to regulate the activity of persons who actively engage themselves in the collection of power of attorneys or who actually collected a significant number of powers of attorney which exceed the number established, in order to especially guarantee an adequate degree of reliability and transparency. In accordance with this directive, the shareholders dispose without restrictions of the right to empower these persons to participate and vote in their name in the general meeting. Yet, this directive does not bring prejudice to any norm or sanction which the member states can impose on these persons in case the exercise of the vote took place by the fraudulent use of the powers of attorney collected. Moreover, this directive does not impose the companies any obligation to check whether the representatives vote in accordance with the instructions of the principal shareholders.

A problem which can appear refers to the possibility of exceeding the limits of the mandate by the agent in the general meeting of shareholders.

In the fulfilment of the mandate by which he was invested, the agent has to vote in the general meetings, according to the indications which the principal gave him in the contents of the power of attorney.

In case the agent acted within the limits of the power of attorney, the acts he fulfilled, in this case, the vote expressed in accordance with the directives of the representative are binding on the principal.

In case the agent exceeded the limits of the mandate, but the principal appreciates that they are favourable and do not affect him, he can, according to art. 1546 of Civil Code paragraph (2), ratify these acts, which means that he will be bound, his representative being exonerated from any liability for exceeding the limits of the mandate. The ratification of the vote of the agent can be done expressly or tacitly, being considered that the principal will be bound by the ratified acts of the agent.

[28] Before these two Regulations, the exercise of vote by representative was regulated by the Instructions of the National Securities Commission no. 8/1996, now appealed, which in art. 6 para. (2) provided the content of the power of attorney which would be given to the representative. According to this article, the special power of attorney had to contain the clear precision of each problem subjected to the vote of holders of securities, with the possibility that the holder of securities votes ″for", ″against" or ″abstention"; each candidate for the board of directors, the auditing commission etc. will be recorded separately, as the shareholder has the possibility to vote for each candidate: ″for", ″against" or ″abstention". The special power of attorney could also give voting power at discretion on problems which were not identified and included on the agenda until the date of request. Considering the above, these provisions delimited two categories of mandates: express (the limits of power of attorney were very clearly and explicitly provided) and discretionary (the representative could vote as he liked in case of matters which were not identified and included on the agenda until the date of request for power of attorney). Regardless of the nature of mandate, I appreciate that the representative can have position standings, can make proposals or declarations or can formulate requests in the general meeting – for a contrary opinion see C. Duțescu, op. cit., 2010, page 232.

Following the exercise of the mandate within the limits of the power of attorney or following the ratification of acts committed by the agent with the exceeding of the limits of the mandate, the agent will not have the possibility to contest afterwards these legal acts, respectively the votes expressed in the general meeting.

If the principal claims that the agent exceeded his assignments, by voting in another way than the indications he received by power of attorney, according to common law – art. 2017 of Civil Code – the principal will not be bound for what the representative concluded out of the limits of the mandate[29].

In order to reach this conclusion, the inopposability of acts concluded by the agent with exceeding the limits of mandate towards the principal, one must analyse and establish the limit up to which the representative could replace the will of the principal, what exactly he had to fulfil, how exactly he should have voted, on what matters he should have voted etc.

As a rule, the principal, knowing the agenda, has to communicate the agent in writing, in the power of attorney, how he wants to vote in the general meeting[30]. If he intends to give full freedom to the agent to appreciate the exercise of the vote, the principal has to expressly state this unlimited power which he understands to give the representative.

To the extent that new matters arise, which were not provided, as they could not be anticipated by the principal in order to give indications to the agent, it is presumed that the representative has the freedom to vote according to the interests of the principal which he presumes he knows.

The expression of vote by the agent in another respect than the respect desired by the principal represents an exceeding of the limits of mandate. To reach such a conclusion, the limits traced by the principal for the agent must be proven. These limits must be mentioned in the contents of the power of attorney, so that third parties are informed of the capacity of the person who comes to vote in the general meeting (the capacity of representative), but also the limits imposed to him by the person who empowered him.

Considering that the law imposes the written form of the special power of attorney, I appreciate that the evidence of the limits of mandate must be produced only by this power of attorney, as the provisions of art. 46 Commercial Code[31] regarding the liberty of evidence in commercial matter[32] respectively art. 309 of Civil Procedure Code are not applicable in this case.

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[29] Fr. Deak, *Civil Law Treaty. Special Agreements*, vol. II, Ed. Universul Juridic, 2006, page 239. However, the provisions of art. 2017 para. (2) of Civil Code provide the possibility that the agent can deviate from the instructions received with the consequence of opposability of the mandate towards the representative in case: it is impossible for him to previously notify the principal and it can be presumed that he would have agreed to this deviation if he had known the circumstances which justify it.

[30] According to an opinion, the absence of express note in the special power of attorney of the way in which the representative will vote (for, against or abstention) can be sanctioned with the invoking of the lack of obligatory character of the written form of the mandate – C. Duțescu, op. cit., 2010, pag. 236. In the absence of a special power of attorney in written form, with express notes regarding the exercise of the voting right, can determine the ascertainment of the lack of capacity of representative of the agent and the interdiction of his vote. If the note regarding the way in which the representative will vote is missing in case of one of the points on the agenda, the agent will be able to vote in the other matters if there are express notes regarding the voting method in the special power of attorney. If the note regarding the voting method is missing in all the points on the agenda and if the principal did not expressly give the possibility that the agent votes as he appreciates, the latter will not be able to exercise the voting right in the name and account of the principal, because the proof of the capacity of representative is missing.

[31] According to the provisions of art. 230 para. (1) letter c) of Law no. 71/2011 for the enforcement of Law no. 287/2009 regarding Civil Code, the provisions of art. 46 C.com. applicable to the relations between professionals remain in force until the date of coming into force of the Law no. 134/2010 regarding the Civil Procedure Code, second book "Contentious Procedure".

[32] For a contrary opinion, according to which one can prove the limits of mandate by any means of evidence - see C. Duțescu, op. cit., 2010, page 236.

The exceeding of the limits of mandate must be appreciated in relation to the interests of the principal, the extent that the agent′s vote violates or not the order given by the representative, and if these directives are violated one must analyse the context in which the vote was expressed and if this expressed vote by exceeding the limits of the power of attorney was or was not in the best interest of the principal, if the interests of the representative were protected or not. Therefore, if the agent exceeded the limits of the mandate, expressly traced by the principal, but if by this exceeding of the power, in the context of discussions of the general meeting, he aimed at the protection of the interests of the shareholder, we can speak of a liability of the representative because he succeeded in protecting the patrimony of the principal and the principal has the interest to ratify these acts fulfilled out of the power of attorney[33]. If the agent expresses a contrary vote to the power of attorney expressly given, this vote should not be taken into consideration by the general meeting, considering that the powers of attorney have to be submitted in time, knowing this way the intention of the shareholder. Otherwise, if the contents of the power of attorney are disregarded by the general meeting, the vote expressed this way with the exceeding of the express limits of the power of attorney is absolutely null and void[34]. The vote expressed against the will clearly expressed by the shareholder from the content of the power of attorney will not be taken into consideration in the establishment of quorum or the majority required by the law for holding the general meeting or for decision-making.

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[33] It is considered that in order to determine if the agent exceeded the limits of the mandate by disregarding the interests of the principal, one must analyse the decisions the shareholder took in similar situations or previously identical situations, in other general meetings - C. Duțescu, op. cit., 2010, page 236.

[34] In the same direction see C. Duțescu, op. cit., 2010, page 236.

CONTRACTUAL LIABILITY FOR THE DEED OF OTHER IN THE NEW CIVIL CODE OF ROMANIA

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Abstract: *In our legislation until 1st October 2011, the date of coming into force of the new Civil Code, there was no provision with general character which was dedicated to the liability of the contractual debtor for the deed of persons he substitutes or associates in the execution of contractual obligations he undertook towards his creditor. The idea from which we must start when we analyse the foundation of contractual liability for the deed of other should be that the debtor cannot involve, by his unilateral manifestation of will, another person in the execution of his contractual obligation, which means that he cannot elude his own liability, he cannot reduce it or modify it. It must be allowed that the debtor should be liable for his replacements, for all those he introduced in the execution of the agreement, and this results from the fact that he engaged himself and has to observe his commitments and behave as if the business were his. From here it results that the foundation of this liability must be looked for and found not only in the principle pacta sunt servanda, but also the guarantee normally owed to the contractual creditor, by the debtor who makes a third person act in his place. For the engaging of contractual liability for the deed of other, the following special conditions must be fulfilled: the contractual obligation of the debtor to execute himself through another person; the appointment of third party or third parties who have the task to execute, in whole or in part, his contractual obligation; the absence of exemption from liability of the debtor by his contractual creditor; the default of the main debtor represents an illicit deed of third party or third parties.*

Keywords: *contractual liability, third party, pacta sunt servanda.*

The non-fulfilment of voluntary obligations is a typical and unique cause of engagement of contractual liability[1]. The specific effect of this liability is the generation of a pecuniary obligation which comes under the form of damages, which the debtor owes the creditor as indemnification for the prejudice caused by the non-execution of the agreement.

Article 1350 of the new Civil Code starts with the instatement of the general rule regarding the obligation of execution of contractual obligations: ″any person has to execute the obligations he/she has contracted”. These provisions corroborate with the provisions of art. 1270, the new Civil Code regarding the obligatory force of the agreement by which: ″the agreement validly concluded has power of law between the Parties”. Raised at the rank of law, the agreement is the expression of the free will of the Parties, so it has to be observed by the execution with good faith of all the performances to which they committed[2].

As a general rule, contractual liability is subjective, engaged for own deed[3]. The Law no. 287/2009 regarding the Civil Code[4] regulates for the first time, apart from the personal liability of the debtor for default, the liability for the deed of third parties, which the debtor involved in the execution of obligations.

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[1] L. Pop, *General table of civil liability in the texts of the new Civil Code*, in RRDP nr. 1/2010, p. 203.

[2] L.R. Boilă, in collective work *The New Civil Code. Comment on Articles*, Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), Ed. C.H. Beck, Bucharest, 2012, p. 1409.

[3] P. Vasilescu, Civil Law. Obligations, Ed. Hamangiu, Bucharest, 2012, pp. 532-533.

[4] Republished in Official Gazette no. 505 of 15th July 2011, further amended by Law no. 60/2012 regarding the approval of GEO no. 79/2011 for the regulation of measures necessary for the coming into force of the Law no. 287/2009 regarding Civil Code (Official Gazette no. 255 of 17th April 2012).

In the legislation of other European countries, there are traditionally regulations which define in general terms the liability of the contractual debtor for the deed of a third party[5]. Thus, the German Civil Code (B.G.B.), in art. 278, provides that the ″debtor has to be liable for the fault of his legal representative and the fault of persons he uses for the execution of his commitment, to the same extent as he is held liable for his personal fault". Similarly, art. 101 of the Swiss Federal Code of obligations disposes: ″The person who in the same licit manner, entrusts the auxiliaries who are in household with him or the workers to execute an obligation or to exert a right derived from an obligation is liable to the other party for the prejudice caused in the fulfilment of their work. A previous convention can exclude in whole or in part the liability which derives from the deeds of auxiliaries."

This problem was widely discussed in French law, because the French Civil Code does not comprise general provisions in the texts which regulate the contractual liability regarding the possibility of liability of the contractual debtor for the deed of another person. It was tackled for the first time in a comparative law study having as subject of analysis the provisions in the matter of civil codes from other countries. Following the publication of this article, a few authors declared themselves in favour of recognition of a general and autonomous principle of contractual liability for the deed of persons to whom the debtor entrusted the execution of his contractual obligations. The solution was contested for a long time. From the analysis of works which appeared in this matter, in the French legal doctrine, we can ascertain that the autonomous existence of a contractual liability for the deed of other is more and more recognized, finding acknowledgement in many solutions of jurisprudence[6]. Thus, the debtor has to repair the default when it is owed to the deed of his attorney in fact, or of his subcontractor or for the accomplice third party. As there is no legal regulation, the authors substantiate the rule on the common law: the deed of the attorney in fact or of the subcontractor would not represent a force majeure which exonerates the debtor who is therefore personally bound; by a fault of debtor, guilty for having badly chosen or badly supervised the attorney in fact or the subcontractor; by a representation in action or by the interdiction of assignment of debt without the consent of the creditor[7].

In relation to the silence of the Civil Code of 1864, and in our law, by the example of French law, we questioned the existence of a contractual liability for the deed of other, autonomous compared to the liability of debtor for his own deed. The answer to this matter, in Romanian legal doctrine, came very late, after the passage into the twenty-first century. Thus, in the first study published on this subject it is analysed a special hypothesis of contractual liability for the deed of other, regulated by art. 1434 paragraph 2 of Civil Code. 1864[8]. Then, another author formulated a few general views about this liability circumscribed to the sphere of legal relations which are generated and exist in the group of agreements[9]. Most of the times in the group of agreements there is a main agreement and

[5] L. Pop, *Contractual liability for the deed of other*, in Law no. 11/2003, p. 66.
[6] *Ibidem*, p. 67.
[7] See P. Malaurie, L. Aynès, P. Stoffel-Munck*, Civil Law. Obligations*, translation from French by D. Dănişor, Ed. Wolters Kluwer, Bucharest, 2009, p. 581.
[8] See I. Lulă, *Observation on liability for the deed of other regulated by art. 1434 paragraph 2 of Civil Code*, in Law no. 7/2001, pp. 68-78.
[9] The expression ″groups of agreements" designates a legal figure newly appeared in European law in the last decades. By group of agreements we understand two or more agreements closely connected between them by the fact that they are concluded in view of realization of the same final objective, but each preserves its own individuality. The groups of agreements come in different forms depending on the realities and needs from legal life. For a presentation of the types of groups of agreements, see L. Pop, *Civil Law Treaty. Obligations*, vol. II – *Agreement*, Ed. Universul Juridic, Bucharest, 2009, p. 697; I. Deleanu, *Groups of Agreements and the principle of relativity of effects of agreement – contractual liability for the deed of other,* in Law no. 3/2002, pp. 15-17.

one or several accessory or subsidiary agreements[10]. The group of agreements is the result of connection between the main agreement and the accessory or subsidiary agreements, for the purpose of execution of the object of the main agreement. In other words, the execution in whole or in part of the main agreement is assured by the execution of the accessory or subsidiary agreements. In all the cases of this kind, the debtor from the main agreement is usually liable to the creditor for the deeds of illicit default *lato sensu* belonging to debtors from the accessory agreements. So, we are in the presence of contractual civil liability of the debtor for the deed of other. For instance, the main contractor will be liable to his customer for the deeds of the subcontractors to whom he entrusted in whole or in part the execution of the general contractor agreement; similarly, the agent will be liable to the principal for the non-execution of the mandate by the subagent; also, the main carrier is liable for the deeds of all the successive carriers until the good reaches the recipient; similarly, the dispatcher is liable for the non-fulfilment or the inappropriate fulfilment of the transport obligation by the professional carriers to whom he entrusted the merchandise to be delivered to a certain destination.

Relatively recently, in 2009, in a treaty dedicated to obligations and the agreement, Professor L. Pop reaffirmed the favourable position regarding the admission *de lege lata* of the existence of a contractual liability for the deed of other, as a self-sufficient liability, autonomous and distinctive in our legal system[11]. Moreover, he claimed that the resolution of this problem, regarding the Romanian civil law, should have the same premises and lead to conclusions and solutions identical to the French law. The main argument was that most of the provisions of Romanian Civil Code of 1864, in the matter of agreements, are inspired or faithfully translated from the French Civil Code.

The justification of this liability with value of principle in contractual matter is first of all in the obligatory force of the agreement. A contrary solution would be unacceptable, because it would recognize the debtor the right to elude his contractual liability in all those cases when he resorts to the execution of the agreement by third parties. In current society, the uncertainty of default would significantly affect economic development, so much more as most of the entrepreneurs entrust the execution of contractual obligations to attorney in fact, auxiliaries or subcontractors[12]. In fact, in private law legal security plays a most significant role, being the guideline of all fundamental legal institutions.

Therefore, the principle from where we must start when we analyse the foundation of contractual liability for the deed of other must be the principle by which the debtor cannot involve another person by his unilateral manifestation of will, in the execution of his contractual obligations, which means he cannot elude his own liability, reduce it or modify it[13].

The debtor third party from the accessory agreement is not party of the first agreement, but only of the private norm which the main convention generated, because the private norm generated by the first agreement has the vocation to also apply to other persons than the Parties. The will of the third party who, by the obligation undertaken, adheres in whole or in part to the main agreement, justifies the extension of the obligational content towards this ″newcomer″ in the circle of obligatory effects, to whose formation and initial physiognomy he did not participate[14].

[10] *Ibidem*, p. 12.
[11] L. Pop, *Agreementl op. cit.*, p. 695.
[12] *Ibidem*, p. 70.
[13] D.-E. Sîngeorzan, Contractual liability in civil and commercial matter, Ed. Hamangiu, Bucharest, 2009, p. 173.
[14] P. Vasilescu, *Relativity of civil judicial act: points of reference for a new general theory of private law act*, Ed. Universul Juridic, Bucharest, 2008, pp. 117-118.

We also have to allow that the debtor is liable for his replacements, for all those he introduced in the execution of the agreement, and that results from the fact that he committed himself and he has to observe his commitments and behave as if the business were his own. From here it results that the substantiation of this liability must be looked for and found not only in the principle *pacta sunt servanda*, but also in the guarantee normally owed to the contractual creditor, by the debtor who makes act in his place a third party. For instance, the railway is responsible for the ″mistakes and abuses committed by the agents in its service", as well as for the mistakes and abuses of other persons. The carrier is the guarantor of interests of the victim, consisting of the possibility of obtaining the prompt and integral repair of the non-patrimonial prejudice. The passenger – victim is sheltered from the danger of a potential insolvency of the persons for whom the carrier is responsible. In fact, the contractual responsibility for the other is instated as the task of transporters and by documents at community level. The Directive no. 90-314/13.06.1990 establishes in this respect that the member states will take measures for the detailing in agreements of the obligations of the providers of services and their beneficiaries.

This guarantee derives from and is founded on the fact that the main debtor enjoys legal independence regarding the method of execution of contractual obligations, so, by virtue of this independence, he is free to entrust the actual execution of the work, on his own risk to a third party, unless he was prohibited by the creditor. In fact, some authors from specialized literature[15], by examining the main debtor from the point of view of contractual liability for the deed of other, observed that he is nothing else but ″a legal bail of the creditor", his conduct not being necessarily the component of a complex causal relationship, because he did not contribute by interaction with the illicit deeds of subcontractors to the non-execution of the civil obligation transferred to other persons.

Following in part the orientation of the dominant opinion from the French legal doctrine, before the coming into force of the new Civil Code, L. Pop resolved the problem of foundation of this liability by reporting to the classification of contractual obligations in obligations of result and obligations of means. So, if the contractual obligations whose default is owed to third parties which the debtor associated or entrusted to execute are obligations of result, the foundation of his liability is the idea of objective guarantee, in the meaning that in favour of the creditor it is created a real guarantee of execution, who has the certainty that he will obtain this way the result owed to him. On the contrary, in case of contractual obligations of means, the liability of the debtor for their non-execution by the third parties he appointed has subjective foundation, which means it is founded on the idea of proven fault which is an absolutely necessary condition for its engagement; in case the fault is not proven, the contractual liability of the debtor does not exist, regardless that the default is his personal deed or a deed of third parties engaged in the execution of that agreement[16].

The engagement of civil contractual liability for the deed of other, in the vision of doctrinaire[17] who anticipated the imminence of this regulation, implied the cumulative reunion of the following special conditions:

[15] I. Lulă, I. Sferdian, *Discussions regarding contractual liability for the deed of other,* in Law no. 8/2005, pp. 90-91.
[16] L. Pop, *Agreement*, *op. cit.*, p. 706.
[17] Ibidem, pp. 702-705; D.-E. Sîngeorzan, *op. cit.*, p. 177; I. Adam, *Civil Law. Obligations. Agreement*, Ed. C.H. Beck, Bucharest, 2011, p. 731.

A) The contractual obligation of the debtor should be executed by other person;

The first special condition requires necessarily the existence of another legal relation with that ″other person", in which the main debtor entrusted directly or indirectly the total or partial execution of the contractual obligation of a third party who can have either the capacity of auxiliary or the capacity of attorney in fact, or the capacity of person who substituted the debtor. In the absence of this condition we would be before a liability for own deed.

If he did not commit personally, but only promised the creditor the services of other person, the debtor undertakes the mission of intermediary or porte-forte and is not liable for the non-execution of the obligations undertaken by that third party[18]. For instance, a commission-agent or a service provider who has the mission of organizing a scientific session, a colloquy, a cruise, a voyage and offers his customers the services of transporters, hotel managers, restaurant owners, organizers of shows etc. That person does not take any obligation of this kind towards his customers and it cannot commit his liability for the non-execution of possible agreements concluded between them and those whose services he offered or mediated.

B) Voluntary appointment by the debtor of the third party or third parties who have the task to execute in whole or in part his contractual obligation;

The execution of contractual obligation by other has as major premise the voluntary appointment by the main debtor, without the consent of the creditor, of the third party who has the capacity of attorney in fact (for instance, the Lessee is liable to the Lessor for the degradations of the leased asset, caused by his attorneys in fact), auxiliary (for instance, a surgeon can request and obtain the collaboration of an anaesthesiologist in order to perform a surgical intervention or an architect the collaboration of a technical studies office to do better the work which was entrusted by his customer) or person who substituted the debtor (it is the case of subcontractor or sub-agent) and who acquires the duty to execute the work[19]. This means that the debtor will not be liable when a third party spontaneously intervenes and raises obstacles voluntarily or involuntarily to the strict execution of the contractual commitment of the debtor. Such an intrusion, by fulfilling the conditions of an ″alien cause", excludes the liability of the debtor for default, including the liability for own deed[20]. The condition under discussion is not fulfilled when the third party who intervenes in the execution of agreement was appointed by the contractual creditor himself.

C) The Creditor should not exonerate the debtor from liability for the non-execution by the third party/third parties of the performances which make the object of contractual obligations;

The third condition was considered in the doctrine[21] as a consequence, an effect, being understandable that if the main debtor was exempt from liability by a creditor, there will be no main debtor and no group of agreements. If the creditor agreed that his debtor should not be liable for the deed of the person he substituted himself, not only there cannot result contractual liability for the deed of other, but the exemption of the main debtor from indirect liability means also his exemption from direct liability, because the obligation was transferred in the patrimony of the third party with the consent of the creditor. If the main debtor was

[18] L. Pop, *Agreement*, *op. cit.*, p. 702.
[19] See in this respect the Court of Cassation, civil judgment of 18th October 1960, in the Bulletin of civil judgments I, p. 186.
[20] L. Pop, *Agreement*, *op. cit.*, p. 704.
[21] I. Lulă, I. Sferdian, *op. cit.*, p. 94.

expressly exonerated from liability in relation to the execution of the obligation by other, a change of debtor takes place, which can be interpreted as an assignment of debts with particular title, an assignment of agreement or a subjective novation by change of debtors.

D) The default of the main debtor should be an illicit deed of third party or third parties.

According to the last special condition, the contractual liability for the deed of other will exist only in case the default *lato sensu* has as cause the illicit conduct or/and the illicit conduct of the third party or third parties who were appointed by the debtor to execute the contractual obligations in whole or in part. Some authors[22] considered that it was not necessary to be formulated distinctly, as an independent requirement, because it is nothing ele but a logical direct consequence of the first condition. If it is required that ″the contractual obligation of the debtor should be executed by other person", it means that both the execution and the non-execution of that obligation is a deed of the third party, and not of the main debtor.

The main debtor who is convicted to pay damages to creditors for default owed to the deed of attorneys in fact, auxiliaries or his collaborators or subcontractors, in general, has the right to sue for compensation against the direct author of default. In fact, he has the possibility to call him in guarantee in the trial initiated by the legal action initiated against him by the creditor. In case the author of default is a subcontractor, the right to sue for compensation against him will be substantiated on the clauses of agreement concluded between him and the main debtor. The regress action can be sometimes paralysed if, for instance, it is proven that the attitude and behaviour of the main debtor were not of nature to put the auxiliary or, as applicable, the principal, in the situation of fulfilling correctly the obligations undertaken[23].

In the text of art. 1.519 of the new Civil Code - ″Liability for the deed of third parties – Unless the Parties agree otherwise, the debtor is liable for the prejudices caused by the fault of the person he uses for the execution of contractual obligations" – we find concisely expressed all the previously analysed conditions of engagement of liability for the deed of third parties. By virtue of the principle of good faith which governs the matter of obligations, usually, the debtor is liable in person and in full for default [art. 1.518 paragraph (1) of the new Civil Code]. Only in cases and conditions provided by the law, his liability can have an inferior limit to the damage caused to the creditor by default [art. 1.518 paragraph (2) of the new Civil Code]. When the debtor uses another person for the execution of contractual obligations, he undertakes responsibility for the consequences of non-execution or wrong execution by that person as if he were the contractor himself[24].

Because the situation could look similar to the situation of liability of principals for the deeds of attorneys in fact, P. Vasilescu analysed and delimited the two types of liability[25]:

- in ex delicto matter, the illicit deed of an attorney in fact has to cause a damage to a third party, completely alien from the legal relations established previously between the principal and the agent;
- in case of contractual liability for the deed of other, the damage is caused to a contractor by the non-fulfilment of an obligation to which his debtor was bound, who was substituted himself another person in the execution of this obligation.

[22] *Ibidem*, p. 95.
[23] L. Pop, *Agreement*, *op. cit.*, p. 707.
[24] I. Turcu, The New Civil Code republished. 5th Book. About obligations art. 1164-1649. Comments and explanations, 2nd edition, Ed. C.H. Beck, Bucharest, 2011, pp. 614-615.
[25] P. Vasilescu, Civil Law. Obligations, *op. cit.*, p. 533.

So, when there is an agency relation and the damage is caused to a third party by this relationship, only the liability in tort of the principal can be engaged for the deed of the agent.

The contractual liability for the deed of other knows apart from the dedication with general character from art. 1.519 of the new Civil Code and express regulations in special agreements such as leasing, undertaking, mandate or hotel deposit[26].

Thus, in the leasing matter, art. 1822 paragraph (2) of the new Civil Code it provides the liability of the Lessor for the deed of the third party – member of his family, his Lessee or another person to whom he allowed the use, holding or access to the asset. Also, from the provisions of art. 1.830 paragraph (2) of the new Civil Code it is inferred that the Lessee is liable for the deed of his family members or other persons ″to whom he allowed in any way the use, holding or access to the lodging either have a behaviour which makes impossible the living with the other persons who live in the same building or in neighbouring buildings, or prevent the normal use of the lodging or of the common parts".

In case of the contract for work, art. 1852 paragraph (2) of the new Civil Code expressly provides the liability of the contractor to the beneficiary, for the deed of the subcontractor, liability which will be the same as for the own deed of the contractor[27]; by the terms of the new Civil Code, the subcontractor would be the third party, which means the alien person from the contract for work.

As for the mandate agreement, the agent will be contractually liable for the deed of the sub-agent either when there are conventions in this respect or when he knew or should have known the date of conclusion of the agreement with third parties, their condition of insolvency (art. 2021 of the new Civil Code). This solution adopted by the lawmaker is founded on a presumption of fault in which the agent was regarding the selection of the third party with whom he concluded the act for which he was empowered.

According to the provisions of paragraph (1) of art. 2023 of the new Civil Code, the conditions in which the substitution by the agent is allowed are regulated and if the substitution was not authorized by the principal, the principal is liable for the acts of the person authorized as if he had fulfilled them himself [art. 2023 paragraph (4) of the new Civil Code], which means he is liable from the contractual point of view for the deed of the third party.

In case of hotel deposit agreement as well, from the provisions of art. 2.127-2.130 of the new Civil Code it is inferred the existence of a contractual liability of the hotel manager for the deed of his contractual agents. Thus, according to art. 2.129 of the new Civil Code, the liability of the hotel manager is unlimited for the prejudice caused to his customer ″if the prejudice is caused by the fault of the hotel manager or of a person for whom he is liable". For instance, the hotel manager is liable for the deed of his employees who purloin assets of customers checked in the hotel or similar establishments.

In conclusion, the function of contractual liability for the deed of other person is the function of consolidation of the principle of obligatory force of the agreement, as the debtor cannot deny liability by the indication of third party as responsible for the non-execution of the agreement concluded between himself and the creditor.

[26] See in this respect: M. Ioan, A.-D. Dumitrescu, I. Iorga, *Civil Law. General Theory of Obligations*, Ed. Universul Juridic, Bucharest, 2011, pp. 214-215; L. Pop, I.-F. Popa, S.I. Vidu, Elementary Civil Law Treaty. Obligations, Ed. Universul Juridic, Bucharest, 2012, pp. 250-251.

[27] See F. Moțiu, Special agreements, 2nd edition revised and added, Ed. Universul Juridic, Bucharest, 2011, p. 210.

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THE CHILD'S RIGHT TO DIGNITY

Andreea DRĂGHICI*

Abstract: *Respecting a child's dignity is raised to the rank of a principle of child protection by Law 272/2004, and contributes to reflect the current legal situation of the child within society, establishing it as a subject of law able to take part in social-juridical life. Nowadays, children as seen as distinct people with all the inherent rights granted to every human being. Child dignity is connected to this, given that society must protect and respect it as it would for any adult. Respecting the right of the child to dignity imposes certain obligations which the parents as legal representatives or the state through its institutions are bound to fulfill in order to defend this right. In fact, this right belongs to every human being from birth and it presents certain particularities in the case of children, owing to the fact that in order to become an adult, the child requires an education, a formation both offered by the family and in institutions. Moreover, the particularities are the result of the specific qualities of the subject whose right to dignity is upheld. The right of the child to dignity may not be considered or analysed separately or independently from other rights of personality, as they are exemplarily regulated by the New Civil Code.*

Keywords: *child, dignity, disciplinary action, protection, right to privacy, right to a person's image, education, protection.*

The rights of children, as human rights, are regulated both nationally and internationally. They belong to any human being from birth. By acknowledging the rights of children, we must also admit the fact that the child is an adult to be. Most child rights are practical applications of human rights, i.e. right to religious views, right to petition, right to free expression.

Consequently, the evolution of any society and the world in parallel with the diversification of human needs and aspirations knows a permanent expansion of the fundamental human rights and liberties. Among these fundamental rights and liberties, the rights of children and young people have an ever higher significance de jure and de facto. These two categories of people are more often disadvantaged that any other categories. It is therefore useless to point out the need for action both on a national and international scale in order to ensure material means and a wider and more efficient way of interesting the social factors in order to guarantee ad respect the right of children.

The notion of „children's rights" must first be understood as a right of the child from the moment the specific legislation was outlined and which precisely sanctions the rights and liberties of children, the legal means of protecting them and the authorities responsible for ensuring a child's best interest. Children's rights and the child's right to childhood has always existed, even though at certain times it was made up of legal rules which rather concerned the relations between parents and children through the point of view of rights granted to the parents by the law.[1]

Another way of seeing things would be that the rights of children not only include laws pertaining to children, but also the rights and liberties of the child as a subject of the

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[1] In this context, this "right to childhood", essentially having its own legal framework, must become the object of a distinct discipline in law curricula with a juridical, administrative or social work profile. It is a viable solution for outlining an important doctrine which could also offer solutions for improving the legal framework and implicitely increase protection of the child but also to improve the preparation of legal future specialists.

law. This is sanctioned by international documents such as the Declaration of the Rights of the Child (1959) and especially the UN Convention on the Rights of the Child (1989) which deals with the rights of the child that society must acknowledge and respect. Therefore, the child is seen and considered as a subject of the law, a free person. The Convention acknowledges mostly rights that would qualifies as human rights, in general, it also identifies rights specific to children. This convention is thus qualified as a „fundamental document of contemporary humankind"[2].

In the preamble of the Convention on the Rights of the Child, it is specified that „the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".

Law 272/2004 affirms the obligation of public authorities, authorized private bodies as well as physical persons and legal entities responsible for child protection to respect, promote and guarantee the „the rights pf the child set through the Constitution and the law, in accordance with the stipulations of the UN Convention on the Rights of the Child and other international documents in this field, of which Romania is a co-signatory" and „the main interest of the child".

Just as the UN Convention, the national law manages to cover most of the categories of law. The Law classifies the rights of children on four main categories, i.e. civil rights and freedoms (section 1 of chapter II from Law 272/2004), rights concerning the family environment and alternative care (section 2), rights concerning the wellbeing and education of children (section 3) and the rights to cultural and recreational activities (section 4).

In the same category as civil rights and freedoms, we have the child's right to dignity, protection of his/her public image, the right to protect his private and family life, the right to personality, which have been sanctioned by Law 272/2004 before they were expressly stipulated in the civil law. The current Civil Code clearly sanctions in article 58, entitled rights to personality, „the right of any person to life, health, physical and mental integrity, dignity, self image, privacy as well as other rights recognized by the law". We must specify that, this enumeration of these rights of personality is given as an example, given that other right may come under this category. This fact has led to certain controversies[3] in the literature.

Respecting a child's dignity is an obvious principle stipulated in Law 272/2004, as long as today the legal situation of the child has evolved from the Aristotelian concept that „the child is an incomplete being" to the recognition of the child as a being with permanently evolving capacities, with the prerogative to take part actively in the legal life. Nowadays, the child is no longer seen as „an extension of the parents", but as a distinct person whose inherent rights are recognized as they are to every human being. The child's dignity is attached and society has the obligation to protect and respect him/her as any adult. It is useless to specify that this principle is conceived around that of the child's best interest and may not exit without it[4].

For example, in order to diminish the negative effects, including the abuses which lead to a child requesting asylum, in which case, most countries allow child applicants access to education. Notwithstanding, there are important consequences for schools and school performance is also affected because of increased mobility as well as the lack of any documentation of the educational process of pupils before their arrival at the respective educational institution[5].

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[2] Irina Moroianu Zlătescu, *Drepturile copilului într-o societate democrată,* Revista Dreptul nr.9/1990, p.82.
[3] For comments, please see, Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ion Macovei, *Noul Cod civil, Comentariu pe articole,* Editura CH Beck, Bucureşti, 2012, pp. 62-63.
[4] Florinița Ciorăscu, Andreea Drăghici, Lavinia Olah, *Dreptul familiei şi acte de stare civilă,* Editura Paralela 45, Piteşti, p.184.
[5] Nicolaie Iancu, *Migrația internațională a forței de muncă. Considerații teoretice şi repere economice ale fenomenului migraționist,* Editura PRO Univeristaria, Bucureşti, 2013, p.111.

Article 72 from the Civil Code stipulates that „any person has the right to have their dignity respected". Given that the right to dignity forms part of the category of personality rights recognized at birth, it follows that this right is implicitly granted to the child, no matter what his/her legal situation at the moment of birth or other criteria. There are many aspects to dignity, which is the reason why there are many violations. In other words, we cannot clearly define what the „right to dignity" is, given that there are multiple social manifestations of the person. In this case, the child is active both in and outside the family, specifically in an educational institution. Those who should guarantee the right of children to dignity, i.e. the parents, tutors, educators and teachers, are quite often sadly those who willingly or not encroach upon this right.

One of the aspects of the principle of child dignity refers to „physical punishment". Article 28 from Law 272/2004 stipulates that „the child cannot be subjected to physical punishment or any humiliating or degrading treatment"[6]. Article 2 also states that „disciplinary action towards the child cannot be determined without considering the child's dignity, therefore excluding all physical punishment or any that affects the physical or mental development or the emotional state of the child".

These disciplinary actions may be applied both in the family and at school. In the second case, given that the child may be exposed to the public, i.e. class or schoolmates, during the application of the punishment, the effects on the child's dignity may be deeper, sometimes irreversible. For this reason, the Committee for the Rights of the Child has shown that „the child does not lose his/her rights when they enter the school gates. All education must be given in a manner respectful of the child's inherent dignity… Education must be given in such a way as to respect strict disciplinary limits and promote non-violence in school. Using physical punishment is not mindful of a child's dignity or the strict limits of school discipline. It is therefore necessary that schools be more welcoming and respectful of all aspects of a child's dignity"[7].

Through the stipulations of Law 272/2004 article 48, paragraph 2 all physical punishment in the educational process is forbidden. The child has the right to be treated with respect by his/her teachers. Article 489 from the Civil Code also prohibits physical punishment which could affect the physical, emotional or mental development of the child. The parents must also respect the dignity of their children in disciplining them.

Disrespecting a child's dignity through acts that cause physical pain or affect their emotional state may lead to sanctions such as deprivation of parental rights (article 508 from the Civil Code). Moreover, such an attitude may lead to criminal charges and suits for the ill treatment suffered by the minor.

Humiliation, blows, sexual abuse, neglect are all forms of ill treatment which violate the integrity and dignity of a child even if the effects are not visible. In most cases, following one or more acts of violence inflicted on him/her, the child may develop or present certain problems in his/her general mood, mental and social development. It is therefore necessary to identify the indications of such troubles, such as a tendency to become isolated, nervous or anxious, emotionally unstable, unfocused, overtly guilty or disrespectful of one's self[8].

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[6] In older Romanian laws there was a certain preoccupation of the lawmaker to protect the right to the child's dignity by outlawing corporal punishment. Therefore, the Code Calimach states in article 190 that *"The parents may discipline their ill-mannered, unruly children and those that upset the household, but in a decent way that does not cause bodily harm."*

[7] Committee on the Rights of the Child, Report of the XXVIII session, September-October 2001, CRC/C/111, paragraph 715.

[8] For more information consult Carmina Aleca, Andreea Drăghici, *Particularități ale cercetării infracțiunii de rele tratamente aplicabile minorului*, CKS e-books 2010, p.247.

The Beijing Rules[9] also prohibit the use of corporal punishment in the case of minor detainees, in order to respect their dignity.

Romania is among the European states, which has a legislation prohibiting the use of physical punishment on the child, which is normal if we consider that the Criminal Civil penalizes all aggression of another person, which it qualifies as a crime. Not to prohibit the physical punishment would mean attributing a child an inferior status to any other human being, moreover since children require extra protection because of their vulnerability.

Violence against minors seriously affects stability and relationships within a family[10]. As we have shown, there are situations when a parent must for the benefit of the child act with severity and strictness, however within certain precise limits, i.e. not to endanger the physical, mental or motional health of the minor. Everything that crosses these limits becomes a dangerous act for the minor and should be sanctioned[11].

Ensuring the respect of a child's dignity also aims to defend the right sanctioned in article 22, specifically the child's right to the protection of his/her own public image, intimate or private family life.

The right to his/her own image implies that every person is entitled to refuse the disclosure through any means of elements of their life and the reproduction of their image without his/her consent. This right has two aspects, i.e. a public one and a private one.

Respecting the child's public image implies respecting his/her dignity. These two aspects of the personality may not be separated or excluded one from the other. A child's public image may sometimes be harmed with extremely negative consequences, through subjecting the child to a degrading or humiliating treatment in public, no matter who the person behaving that way is. The European Court of Human Rights qualifies inhumane treatment as „all behaviour which intentionally causes a person physical or emotional suffering of some intensity" and degrading treatment as „behaviour which grossly humiliates an individual before another person and makes them act against their will of conscious"[12].

Certain authors make reference in the literature to a fundamental category of rights the purpose of which is the protection of human beings and their private life against all exterior influence. This category includes rights such as the right to life, physical and moral integrity, free movement, inviolability of home and residence, secrecy of correspondence and of other means of communication, freedom of religion, and right to information.

The fundamental rights in this first category have one thing in common, namely they can be exercises outside the social framework, within which other citizens share a participatory attitude[13].

Therefore, when a child under 14 takes part in public debates, he/she must have the written consent of the parent or legal guardian. Children cannot be used in this way by those who care for them, in order to obtain any financial advantage.

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[9] Resolution 40/33 from 29 November 1985 of United Nations Standard Minimum Rules for the Adminstration of Juvenile Justice.

[10] Before the law was written, Romanian custom gave the parents considerable authority. Both the father and the mother had the right to discipline their child in a way as illustrated by the saying "a mother's blow is as good as a kiss". To read also Ion Peretz, *Istoria dreptului român,* volumul II, *Monumentele vechiului drept român,* Second edition, Bucharest, 1928, p.48.

[11] V. Dongoroz and colab. (S. Kahane, I. Oancea, I. Fodor, N.Iliescu, C. Bulai, R. Stănoiu, V. Roşca), *Explicații teoretice ale codului penal al RSR,* vol. IV, Ed. Academiei RSR, Bucureşti, 1972, p. 576.

[12] Tyrer vs UK, CEHR decision from 25 April 1978.

[13] Elena-Ana Mihuț, *Riscuri asociate regimului juridic şi drepturilor individuale legate de protecția datelor personale şi a vieții private în condițiile noilor generații de tehnologii informatice şi de comunicații* (TIC), published in Program interdisciplinar de prevenire a fenomenelor cu risc major la scară națională, a fundamental programme of the Romanian Academy, 2008, p.3, http://www.ince.ro/cfl.htm

The National Visual Council of Romania is bound to protect and guarantee the right of children to their self image and monitors the way in which audiovisual programmes are presented. Decision 220/2011 on the code of regulations concerning the audiovisual content whose purpose is to protect the public image, private and family life of children in audiovisual programmes, falls into this category. Thus, the decision sets a series of interdictions meant to protect the right of the child to his/her self image[14]. The decision referred also to the child protection services and associations, restrictions in programmes but also ways of warning the public about the content and possible effect the said programmes might have on children.

The same concern for protecting the right to dignity must be granted along side the protection of the right to privacy and in the juvenile justice system. The Beijing Rules establish the protection of the right to privacy during all the stages of criminal investigation in order to ensure a fair trial by protection from too much publicity. Moreover, information from the criminal files of minors is strictly confidential. The International Covenant of Civil and Political Rights states in article 14 that „any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children".

In order to protect a person's dignity, modesty and public morality, Law 196/2003 institutes special measures to prevent and combat pornography[15], sanction as a crime or contravention any act of a pornographic nature which can harm a child's dignity.

Any form of exploitation, irrespective of its nature can bring harm to a child's dignity, whether it be forced labour, sexual favours for material gain, selling or trafficking of children etc. Later on, we will analyse all these forms of abuse.

Both for an analysis of the dynamics of crime as well as in the investigations of actions involving minors, especially in preparing persons for various roles during a trial, specialists will gather information from the social groups that the minor frequents as well as through an informative activity and supervision of persons disposed to bring harm to the minor. For example, the family, the circle of friends or the neighbours of a victim or defendant, the inhabitants of certain areas will offer information on the various habits, occupation, entourage or behaviour of minors which form the respective social group[16].

There is a very interesting, though extremely controversial discussion at the moment about recognizing the right of the human embryo and foetus. In order to settle this matter, we have to establish the legal status of a human embryo or foetus by starting with the jurisprudence of the European Supreme Court of Human Rights, which does not expressly acknowledge the person rights of a human embryo or foetus, yet it does recognise that as it has the potential as well as the possibility of becoming a person in the future, it must assimilate some of the rights of a human being, in the name of human dignity[17]. Here is how the court in Strasbourg acknowledges the importance of a starting point, or the origin or genesis of every human being, in virtue of what it must govern and characterise the complete human being, i.e. dignity, the inherent right of every human being.

The dominant opinion in the literature says that the human embryo or foetus is a being in development, bound to its mother's body until the moment of birth. Without it being a

[14] Published in the Official Gazette nr.174 from 11 March 2011.
[15] Published in the Official Gazette, Part I, nr. 342 din 20.05.2003, modified by Law 496/2004.
[16] Elena-Ana Nechita, *Methodology of the Investigation of the Crime of Pimping*, in Acta Universitatis Danubius. Juridica, Nr.172013, p. 77, http://journals.univ-danubius.ro/index.php/juridica.
[17] Decision of ECHR from 07 March 2006 Evans vs UK.

„person" until birth, the human embryo has no separate legal personality from that of the mother, even though, the law conditionally recognises the Latin adage *infans conceptu pro nato habetur de quoties commodes ejus agitur*, in certain patrimonial or non-patrimonial circumstances[18]. In other words, the human embryo has no actual legal existence and is not a subject of the law until the moment it is born alive.

Several European constitutions recognise the right to life. The German Constitutional Court has decided, by virtue of the Constitution, that the child's right to be born has at least as much merit as that of the mother and that dignity for human life begins right in the period preceding birth[19]. The opinion that the human embryo is „…at the very least a human being from the first cell. This qualification leads to a break on the scale of living human beings and it forcibly imposes the respect owed to all representatives of our human species"[20].

Following this qualification, the human embryo would equally enjoy the right to dignity and would be able to use it, as any human being born alive.

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[19] Decision from 28 May 1993, taken from Geraldine van Bueren's work, *Les droits des l*'enfant*s en Europe*, Edition du Conseil d'Europe, Belgique, 2008, p.60.

[20] Guy Raymond, *Droit de l'enfance et de l'adolescence,* 5 édition, LexisNexis, Paris, 2006, p.38.

ECONOMIC AND SOCIAL INDEPENDANCE OF THE SPOUSES - LIBERTY IN THE PATRIMONIAL UNITY OF THE MARRIAGE

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Abstract: *Primary regime is thus imperative core of public order which can not be derogated from by agreement matrimonial, consisting of a set of rules mandatory and essential, regardless of the spouses' matrimonial concrete effectively represents the basic skeleton of the operation of any matrimonial. An important feature of this type of system is that its rules are designed to ensure a minimum asset cohesion spouses, a marriage protection pecuniary interests, to provide an adequate solution key issues of living together and waging assumption housekeeping tasks. In the primary matrimonial regime, every person may act in an independent manner from economically and socially point of vue, in the exercise of a profession, to enter single legal acts, but an obligation to inform the other spouse on the assets, income and liabilities it s one of the most important duty. Patrimonial independence of the spouses is a new concept in the New Civil Code,not found in the Family Code, and must be understood in conjunction with the unity and specific interdependence of the couple. This is the Swiss inspiration through its enabling spouses to practice freely chosen profession, to have income, noting that should contribute to the expenses of marriage, the possibility to make one bank deposits. All these measures help to ensure minimal independence of the spouses in the communion and unity of interest specific to the institution of marriage. However, the components of the imperative, such provisions shall be applicable irrespective of the matrimonial regime chosen, however, this independence gives rise to controversies and paradoxes in place*

Keywords: *economic independence, primary matrimonial regime, property relations between spouses, professional occupation, bank deposits*

In the primary matrimonial every man may act in an independent manner from economically and socially, in the exercise of a profession, to enter single legal acts, but an obligation to inform the other spouse on the assets, income and liabilities its.

Patrimonial independence of the spouses is a new concept not found in the Family Code, and must be understood in conjunction with the unity and interdependence of the couple specific.

Throughout history, the contracts between spouses were either prohibited or constrained in strict suspected of fraud or suspected to disguise the true intentions of the partners. Family Code did not change the rules laid down in this area in the old Civil Code, so that the sale and purchase was prohibited, and the donation of the spouses was revocable throughout the marriage[1].

Prohibition of legal acts of the spouses had strong reasons which remain today. First, the consent of a spouse may be flawed given the affectionate relationship that supposedly exists between spouses, and secondly married person status requires certain rules of public

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[1] Emese Florian, *Dreptul familiei, cu referiri la Noul cod civil*, Editura CH Beck, 2010, p. 156

policy which may be affected by the conclusion of certain legal acts[2]. Finally, it was considered that the conclusion of legal acts of the spouses may lead to third party rights defrauding creditors of one spouse.

In drafting art. 317 legislature was inspired by art. 168 Swiss Civil Code which has an almost identical wording. (1) removes the traditional rule enshrines freedom of contract between spouses and between spouses and third parties, which means that, increasingly over the status of married person losing their independence at the expense of specificity[3].

Professional independence

As a result of legislative reforms occurred in the last century, which has established the principle of full equality of the spouses, each spouse usually dominant freedom to exercise a profession.[4]. It may be self-employment, separate from the other, or in some cases, not so rare in practice, a collaboration of one of the spouses in work done by other (commercial, freelance etc).

According to art. 327 of the New Civil Code, "Every man is free to exercise a profession and have, under the law, the proceeds received, in compliance with its obligations regarding marriage expenses."

That freedom entails, first, freedom of every man to choose his profession, without any discrimination between male and female (principle of equality of the spouses[5]).

From a legal perspective, consider that it may be prohibited by the court, at the request of one spouse, the other spouse to pursue the chosen profession, even if such an activity seems to affect family interests. Spouses also have to work through disagreements about practice.

If the profession is incompatible with family and spouses to agree, the only legal solution is divorce.

Either spouse has the ability to freely dispose of income received professional development. The category of "earned income" includes all those professional income of a spouse, whatever the origin and nature: not just salary, strictly speaking, but also all its accessories (allowances, bonuses, etc.) and the amounts received as substitute salary (compensation awarded for individual employment contract is terminated, pensions etc). should also be included within the scope of that concept and professional income derived from an activity that is non-employees (fees, royalties and the like)

Given the mandatory nature of this provision, which is included in the primary system is not allowed husbands as in the conventional way (by inserting the contents of the so-called matrimonial convention management clause conjunct) to annihilate or limit the power of each of they benefit directly by law to have income from work.

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[2] Thus, for example, under the old Civil Code regulating the subordination of woman to man devote idea of marital power was considered incompatible with the company contract is tied associates. On the contrary, the current regulation is based on the principle of equality of spouses, therefore, the French legal literature has discussed whether it allows a contract of employment between spouses, given that such a contract involves a relationship of subordination between the parties (Ph. Malaurie others, op. cit., p 62). NCC allows execution of any legal act of the spouses, so that in the absence of express prohibition, the employment may be terminated, equality of spouses remaining principles governing family relations and the subordination principle in labor relations

[3] Marie Gorie- „*La determination du regime matrimonial*",în „*Droit patrimonial de la famille*",sub direcția lui M.Grimaldi, Dalloz 1998,p.83.

[4] See also *Comparative study*, p 79-80, where it is shown that in the laws of the Member States, to pursue a profession, at first, only the will of each spouse, without any interference from the other, subject those activities

[5] Even in the absence of express provision to that effect in the Code family in Romanian doctrine refers to free choice of profession by both spouses. See, for example, I. P. Filipescu A.I. Filipescu, op. cit., p 56.

The freedom to have income from work is not absolute, the text stating that this freedom has to be exercised income "under the law." Thus, in all cases, each spouse freedom to dispose of his earnings from labor is limited by the requirement each spouse to contribute to the tasks of marriage.[6]

The legal nature of wages depend upon the matrimonial regime. in the community of property regime, has the nature of salary charged to a common good, but also has some peculiarities, it can be used both for the acquisition of common property and for the acquisition of own property as joint debt can be paid so and their debt. Instead, in the regime of separation of property, the pay is good only for each spouse.

Furthermore, under Community, a husband can not have one, free from live and common goods. Therefore, the question is whether, after discharged their obligation to contribute to the tasks of marriage, the husband may freely dispose of salary, including acts between living free solution being controversial.

In the French case law and doctrine are considered, rightly, that the rule of the primary matrimonial regime has precedence over the rule of the community of property regime and therein lies its character derogatoriu[7].

Participation to the profession of a spouse by the other spouse

According to art. 328 of the New Civil Code, "husband who actually participated in work of the other spouse can obtain compensation, the extent of enrichment of the latter, if participation went beyond the duty of support and the obligation to contribute to the expenses of marriage. "

From a practical perspective, the text is likely to improve the patrimonial situation of the spouse (usually the woman) that contribute to the professional activity of the other spouse.

However, the application of this text involves some distinctions:

- To the extent that the participation of one of the spouses is part of the general duty of support between spouses, not be an "effective participation" in work of the latter, that spouse is not entitled to compensation;
- The extent to which the spouse who provided work acted as agent for the other spouse, then it will apply the common law agency contract;
- The spouses may enter into an employment contract and when relations between spouses will employment relationship, under which employee spouse is entitled to salary

The right to compensation exists if a husband actually attended a long time to work the other spouse, without claiming or receiving remuneration, exceeded the limits of its supporting material and the obligation to contribute to the expenses of marriage. Right to compensation in this matter is an application of the principle of unjust enrichment.

New Civil Code establishes two texts governing the independence of spouses and reverse its heritage, the right to information in the article. 317 and art. 318

According to art. 317 para. (1) "If the law does not provide otherwise, each spouse may sign any legal documents with the other spouse or third parties."

[6] For the qualification of wages under the influence of the New Civil Code, see the provisions of art. 341.
[7] Alexandru Bacaci, Viorica Dumitrache, Cristina Codruta Hageanu, *Familiy Law, under the provisions of the New Civil code*, VII edition, Editur aCH Beck, 2012, p. 84

The text evokes the idea that marriage, even if it causes changes in the status of the person, not hamper, in principle, the ability of each spouse to the other spouse legal acts or to third parties, and this independently of the matrimonial regime applicable.

Of course, the text does not remove the special rules for the management of the commons, where the legal community of goods as legal documents ending in law.

In light of this text, the spouses may conclude among themselves, in principle, any civil contract (including sale, whose prohibition was not retained in the new Civil Code). Also, they may enter into a contract of employment as can be with a company.

Independence of spouses heritage finds its fullest expression in terms of goods exclusive property management or, where appropriate, spouses own property.

The banking presumption and the requirement of information

The independence of the spouses is established and by (2) and (3) of Art. 317 Civil Code which stipulates that French doctrine called presumption bank. According to these legal texts, each spouse can do alone without the consent of the other, bank deposits, and any other actions in connection therewith.

In relation to the company bank account holder's spouse, even after the dissolution or termination of the marriage, the right to dispose of the funds deposited through enforceable judgment if not decided otherwise.

The text is a slightly modified version of art. 221 of the French Civil Code, in the form that it has received the Law of 23 December 1985 and the reason for which it was established presumption is to simplify the circuit and removing responsibility depositary bank that is exempted from the obligation to make any money check or husband's matrimonial client.

Being a legal provision that keeps the primary imperative regime, the independence of each spouse in relation to bank deposits whatever works matrimonial specifically applicable regardless of the legal nature of the money deposited.

Spouses present needs for establishing bank deposits[8] and any operations related to banking institution or research the legal nature of the amounts deposited and the powers / rights depositor husband would obviously paralyzing nature of the dynamics circuit civil and commercial incompatible with the demands of modern society.

This independence implies that each spouse, regardless of the matrimonial regime applicable, may request opening a deposit account alone, like a single. Also, to the depositary, the depositor is always considered, even after the dissolution of marriage, it has free disposition of funds and securities in storage.

The independence of each spouse is, on the one hand, his ability to use words that can not be limited by the status of being married, and, on the other hand, is an expression of the principle of non-interference in the affairs of the credit institution clients[9]

By convention matrimonial wife could not annihilate the freedom of each spouse under national law, in relation to credit institutions, which does not mean that it could use mechanisms such as joint account (subjunctive) or individuals on certain sums of money or other valuables.

[8] Framework is normative act on O.U.G. No. 99/2006 on credit institutions and capital adequacy (Official Gazette. Nr. 1027 of 27 December 2006), approved with amendments by Law no. 227/2007 (Official Gazette. Nr. 480 of 18 July 2007), as amended and supplemented

[9] New Civil Code governing bank contracts in Chapter XV of Title H <"Various special contracts" - Book V "On duty". Bank account is governed by art. 2184-2190, and bank deposit Art. 2191 and 2192.

Joint account is opened on behalf of several owners, co-owners name. It is characterized by active solidarity of joint holders, which means that each co-owner may carry separate account transactions, payments through this account by any of the holders are liberatorii for the bank to all other co-owners, if the account is in debit co-owners are forced to bank to bank jointly and in case of death, solidarity and indivisibility continues its successors and effects between surviving co-owners.

In this sense, art. 2186 of the New Civil Code expressly regulates the joint holders of a current account hypothesis, stating that "if the current account has multiple owners and it was agreed that each of them is entitled to have one to carry out operations in the account are considered co-owners or creditors debtors liable for the balance. "[10]

Presumption analysis assumes that each spouse is free to open any bank account[11], alone or together with his spouse or with another person, and perform all operations in connection with the possible (deposit, transfer, withdrawal, payment, etc.) without the need the consent of the other spouse and any matrimonial choice.

Independence rule applies current relationship of a husband with the bank, or if the deposit account. The same may not apply to credit agreements that are personalized and involves taking a certain risk by the credit company. Deposit account can have several forms: current account cash on hand, including account debit card, bank deposit funds and securities. However, given that the starting point of the New Civil Code regulating the administration of movable by spouses, regardless of the matrimonial regime chosen, the money going into this category, it appears that, even in the absence of express legislation, either spouse may only open a bank account.

Independence implies that, from the point of view of the credit institution, not the origin and nature of the legal interests of the money deposited, which would belong matrimonial regime, relations between husband depositor and depository institution, the institution of marriage completely foreign and economic effects its about the person and property of the spouses.

When current operations, accessible population, deposits, withdrawals, payments, the bank is not interested in examining the legal nature and destination of the funds, however, having regard to the provisions mandatory and legal obligations incumbent on the fight against economic crime. The credit institution it is impossible, as if these current operations to research the origin or destination of monies therefore can not refuse to open an account belonging to a particular husband in matrimonial regime, or more than that to ask additional information about matrimonial depositor husband in carrying out their marital relationships.

During marriage. Credit institution in relation to a spouse, as depository. It does not matter if it is a personal or professional account.

Husband depositor has complete freedom in relations with the bank. Thus, he is not obliged to justify to the bank the rights they have on money deposited and the bank can not be asked to justify their nature (shared or private property). Therefore, no matter whether monies deposited by depositor husband his name actually belong to the other spouse. Bank shall not be responsible for such abuse of power by the husband depositor, unless that acted in collusion, in that case, fraudulent intent husband is his client.

[10] See I Turcu, banking operations and contracts. Treaty Banking, ed. Ava updated and completed, vol 2 Lumina Lex Publishing House, Bucharest, 2009, p 48-50.

[11] Although the legislature has used the concept of deposit that appears to have a narrower scope, we believe that the reference should be understood as a reference to any bank account in connection with the transaction.

Likewise, the bank can not interrupt the normal operation of an account only at the request of the other spouse, allegedly injured but judgment is required in this regard. Bank attachment is allowed, even at the request of the creditor spouse[12].

In divorce. when it comes to matrimonial property regimes Community sharing commons monies deposited in the name of either spouse.

Article 113 par. (2). d) O.U.G. No. 99/2006 stipulates that banking secrecy information can be provided "at the written request of the account holder spouse when evidence that he entered the court a request for partition of goods, or of the court." Therefore, whether the requirements of the text, the credit institution may not rely on the obligation of professional secrecy, refusing to provide the requested information.

c) Upon termination of marriage. if the account opened by one of the spouses, the termination of the marriage by death of a spouse, place issues of amounts included in the succession question, and sharing them.

Article 113 par. (2). a) O.U.G. No. 99/2006 allows credit institutions to provide information requested by professional secrecy of the account holder's heirs, including their legal representatives.

Regarding operation of the account, up to the partition, the provisions of Art. 2187 of the New Civil Code, on behalf of individuals.

If the amounts that would be included in the estate are deposited into an account whose owner is the surviving spouse, of course, the other heirs of the deceased spouse are interested to apply for and obtain the blocking account

This rule applies only in relation to the bank, so only the matrimonial regime of the spouses is irrelevant. To the bank is irrebuttable presumption because it is based on the subjective position of the depositary, but legal provision which becomes public policy. The Bank has no right to give information on the accounts spouse nor I can release money deposited by clients for violating professional secrecy.

In contrast, relations between spouses that presumption has limited application, so the husband can prove that the account holder ownership belongs to the respective amounts and call to justice for their recovery. The presumption also applies husband being holders that can only be removed by blocking judicial account (enforceable judgment), but it is a presumption of ownership.

Each spouse may ask the other to inform him about assets, income and his debts, and in the event of unjustified refusal, may appeal the guardianship. If the information requested by a spouse can be obtained by law only at the request of the other spouse, refusal to require rebuttable presumption arises that the plaintiff husband's allegations are true. Following the independence of each spouse in relation to banking and the performance of which is subject to this limitation requires the other spouse's right to information. Each spouse may ask the other to inform him about assets, income and his debts, and in the event of unjustified refusal, may appeal the guardianship. The court may order the husband to one who noticed it or any third party to provide information requested and submit the necessary evidence. Third parties (including banks) may refuse to provide information requested if, according to the law, the refusal is justified by professional secrecy.

Reverse the economic independence of the spouses is the incumbent duty of each spouse to the other information on the assets, income and debt. Wrongful refusal of a

[12] Marieta Avram, Cristina Nicolescu, *Matrimonial regimes,* Editura Hamangiu, 2010, p 143

spouse to provide other such information can be censored by court guardianship so her husband defendant or third party holder of information may be required to provide.

Text solves the problem that may arise in particular if it is found that the third party refuses to provide the information requested, opposing secrecy, so basically, the information can not be obtained only at the request of the respondent husband. in this case establishes the rebuttable presumption, that the applicant spouse claims are true.

The action of one of the spouses, based on art. 318, may be allowed only if a spouse has a legitimate interest and not only act in a spirit of chicanery or mere curiosity.

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REGULAR PROPERTY GOVERNED BY THE NEW CIVIL CODE

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Abstract: *Joint property is, every time, pursuant to a legal document or to another mode of acquisition provided by law, the right to private property has two or more holders. If the asset is possessed in common, co-ownership is presumed until proven otherwise. Each co-owner is the exclusive holder of a share of the ownership right and can freely dispose of it in the absence of contrary stipulation. Regular property is a mode of the ownership right within which each holder exercises on his/her behalf and in personal interest the powers of his/her right on fixed periods, which successively and perpetually repeat, at regular intervals, assuming at least two holders, natural or legal persons. Within regular property each holder exercises his/her single ownership right, there being several owners of the same asset and not many co-owners of the same asset.*

Keywords: *regular property, joint property, absolute, exclusive, perpetual, co-owner, presumption, exclusion.*

1. Introduction

The private ownership right is defined in article 555 of the Civil Code as the holder's right to possess, use and dispose of an asset exclusively, absolutely and perpetually, within the limits set by law.

Unlike other holders of certain subjective rights upon the same asset, the owner, that is to say the holder of the ownership right, performs the legal attributes of this right (*jus possidendi* possession, *jus utendi and jus fruiendi* use and *jus abudendi or abusus* disposal) on the asset through his/her own power and for his/her own interest. The other holders of the certain subjective rights upon the same asset exercise only some attributes (ownership and use) by dint of the owner's power of transmission, owner who materializes them and set the limits for exercising them[1].

Regular property is a new institution regulated by article 687 - 692 of the Civil Code; it should not be mistaken for the joint property itself.

Joint property is, every time, pursuant to a legal document or to another mode of acquisition provided by law, the right to private property has two or more holders.

If the asset is possessed in common, co-ownership is presumed until proven otherwise.

Each co-owner is the exclusive holder of a share of the ownership right and can freely dispose of it in the absence of contrary stipulation.

The shares are assumed to be equal until proven otherwise. If the asset has been acquired by a legal act, it cannot be proven otherwise except through documents.

The co-owners will share the benefits and will bear the burdens of the co-ownership, proportionally to their share of the asset.

Regular property should not be mistaken for the quota property; it is a distinctive form of the forced joint property.

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[1] Marilena Uliescu, Aurelian Gherghe, Civil Law. Drepturile reale principale. Second edition, revised and enlarged under the New Civil Code, Universul Juridic Publishing House, Bucharest, 2011, p.111.

Within regular property each holder alone exercises his/her ownership right, there being several owners of the same asset and not more co-owners of the same asset.

The difference between regular property and quota property is just the divided character of the right, expressed by time intervals[2].

Regular property is a mode of the ownership right within which each holder exercises on his/her behalf and in personal interest the powers of his/her right on fixed periods, which successively and perpetually repeat, at regular intervals, assuming at least two holders, natural or legal persons.

Within regular property each holder exercises his/her single ownership right, there being several owners of the same asset and not many co-owners of the same asset.

According to the stipulations of article 646 of the Civil Code, the assets subject to regular property are also in forced joint property. The co-ownership regime is governed by rules derogating from the general scheme of co-ownership.

According to the stipulations of article 687 of the Civil Code, in the absence of special regulations, whenever more people exercise successively and repetitively the attribute of the use specific to the ownership right over a movable or immovable asset, in fixed periods of time, equal or unequal, represents regular property. Thus, two or more people may be holders of regular property over an asset if they have a fixed share or quota of the ownership right over the asset, similar to the quota co-ownership, but the use attribute is not exercised simultaneously, but successively and by each owner, on certain periods of time, determined, equal or unequal.

The legal character of the regular property right is the same with the one of the ownership right, being an absolute, exclusive and perpetual right.

2. Characteristics of regular property

- the object of the regular property right remains unfractionated in its materiality, it is not divided in shares, but in portions of time in which each holder exercises the powers of his/her right;
- concerning the time interval allotted, each co-owner may sign, under the law, legal acts such as rental, sale, mortgage, and the like (article 689 paragraph1);
- the management or disposal regulations concerning the quota of the ownership right corresponding to another time interval are unopposable to the respective quota holder (article 689 paragraph 2);
- in the relations with the good faith third co-contractor parties, the specified management or disposal regulations are struck by relative invalidity (article 689 paragraph 3);
- each co-owner has the obligation to make conservation acts, so as not to hinder or impede the exercise of the other co-owners' rights (article 690 paragraph1);
- depending on the repairs made, each co-owner is obligated to contribute to the costs in relation to the quota owned. For the major repairs, the co-owner who advances the necessary expenses is entitled to damages in relation to the value of the other co-owners' rights;
- concerning the acts through which the asset substance is consumed in whole or in part, all co-owners must agree (article 690 paragraph 2);

[2] Corneliu Bârsan, Civil Law. Real rights governed by the New Civil Code, Hamangiu Publishing House, Bucharest, 2013, p. 178.

- co-owners may enter into a management contract. In case any of the co-owners denounce the management contract, it shall cease to exist (article 690 paragraph 4 and article 644 paragraph 2 of the Civil Code).

3. Grounds for regular property

Regular property arises on the grounds of a law such as a contract or testament; the requirements concerning the rent-roll apply properly if the asset which is the object of the regular property is a real estate.

The object of regular property can be formed both from real estate and movables. An example of regular property is time-sharing[3] contract, property of a vacation house.[4]

The assets subject to regular property are tangible and inconsomptible because each co-owner has the obligation to provide them at the end of each period to the other co-owner holder of the regular property right.

4. Validity of documents signed by the co-owner

Concerning the time interval for each co-owner, any co-owner may sign, under the law, documents such as the rental, sale, mortgage, and the like.

The administrative or disposal documents concerning the quota of the ownership right corresponding to another time interval are unopposable to the holder of the quota concerned.

In the relations with the good faith third co-contractor parties, the administrative or disposal regulations mentioned are voidable.

The injured co-owner's right is recognized in order to, before partition, perform the actions against the third party who would have acquired the joint asset after completion of the document. In such cases the refund of the asset possession will be done for the benefit of all co-owners, with damages, if appropriate, for those who have participated in signing the document.

Each co-owner can stand alone in court, regardless of standing, in any lawsuit relating to co-ownership, including the action for recovery of property.

The decisions of the court of law given on behalf of the co-ownership are in the advantage of all co-owners. The judicial decisions hostile to a co-owner are not opposable to the other co-owners.

[3] Directive no.2008/122/CE of the European Parliament and of the Council of 14 January 2009 on consumer protection related to certain aspects of the contracts concerning the right to use assets on a limited period of time, the contracts on products for holiday with long term use, as well as the resale and exchange contracts, published in the Official Journal of the European Union, series L, no. 33 of February 3, 2009.
The Directive was transposed into the Romanian legislation by Ordinance no.14/2011 for consumer protection upon signing and executing contracts for acquiring the right to use, on a limited period of time, one or more accommodations, of the long-term contracts for the acquisition of certain benefits for holiday products, of the resale contracts, as well as the exchange contracts, published in the Official Gazette no.134/22.02.2011.

[4] The Romanian Lottery sold between 1995 and 2004 lottery tickets (The gold jackpot) which offered as prize the right for life to spend one week in a villa centre in Poiana Braşov.
The ownership right over this period can be passed on. This way, most of the poor winners have sold their winning jackpot or their right of use.

When the legal action is not brought by all co-owners, the defendant may ask the court the introduction of other co-owners as plaintiffs, within the terms and conditions set out in Code of Civil Procedure for the proceedings of others[5]

5. Rights and obligations of co-owners

According to article 690 of the Civil Code, every co-owner is obliged to make all the conservation acts, so as not to impede or hinder the exercise of the other co-owners' rights.

For the major repairs, the co-owner advancing the necessary expenses shall be entitled to compensation in relation to the value of the other owners' rights.

The documents that consume in whole or in part the substance of the asset can be made only with the other co-owners' agreement.

At the end of the time interval, the co-owner is obliged to deliver the asset to the co-owner entitled to use it in the next interval.

The co-owners may enter into a management contract. In case any of the co-owners denounces the management contract, it shall cease to exist.

[5] Article 57-59 of the Code of Civil Procedure Either party may summon any person who could claim the same rights as the plaintiff.
The request made by the defendant shall be submitted together with the legal contest. When the legal contest is not mandatory, the application shall be filed not later than the first day of the appearance before the court.
The request by the applicant shall be filed not later than the close of the debates before the first instance.
The request shall be justified and shall be communicated both to the summoned party and to the adverse party. Summon request, legal contest and file writings copies shall be attached to the summoned party' request.
Article 58
The summoned party acquires the quality of intervening in his/her own interest, and the court decision shall be opposable.
Article 59.
In the case stipulated by article 58, when the defendant sued for a money debt admits the debt and declares that he desires to pay for it to the person who shall legally set this right, shall be removed from the trial if he/she deposits the amount due.
In this case, the trial shall continue only between the plaintiff and the sued.
Article 67-70 of the new Code of Civil Procedure, Law no.134/2010 published in the Official Gazette no.485/15.07.2010.
Either party may summon any person who could claim, by means of a separate application, the same rights as the plaintiff.
The request made by the plaintiff or by the main intervener shall be filed at the latest by the end of the trial investigation before the first instance.
The request made by the defendant shall be filed within the prescribed period for filing the legal contest before the first court, and if the legal contest is not mandatory, no later than the first hearing.
Article 68 Communication of the request
The request shall be justified and, together with accompanying documents, shall be communicated both the sued party and to the adverse party.
Copies of the proceedings, legal contest and file writings shall be attached to third party's request copy.
Article 69 The position of the third party in the trial
The sued party acquires the standing position of plaintiff and the decision takes effect to his/her regard.
Article 70 Removal of the defendant from the trial
In the case stipulated in article 69, when the defendant, sued for a money debt, admits the debt and declares that he desires to pay for it to the person who shall legally set this right, shall be removed from the trial if he/she deposits the amount due at the disposal of the court.
Likewise, the defendant, sued for assigning an asset or its use, shall be removed from the trail if he/she declares that he/she shall grant the asset to the person whose right shall be determined by court decision. The asset in question will be seized by the court vested with judicial proceedings, the provisions of article 959 and the following being applicable.
In these cases, the trial will continue only between the plaintiff and the third party sued. The decision shall be communicated to the defendant as well, to whom it is opposable.

6.Obligation for compensation and exclusion

Failure to comply with the co-owners' obligations draws the payment of compensation.

If one of the co-owners seriously disturbs the exercise of the regular property, he/she can be excluded, by court order, at the request of the injured co-owner.

The exclusion can only be ordered if one of the other co-owners or a third party buys the share of the excluded one.

To this end, a closing of admission in principle of the exclusion demand will first be decided, which establishes if the exclusion conditions are met, a closure that may be appealed separately.

After the final conclusion of the admission closing in principle, in the absence of the parties' agreement, the price of the forced sale will be determined based on expertise. After recording the price at the bank set by the court, the ruling which shall substitute the sales contract will be delivered. After this decision becomes final, the acquirer will be able to sign his/her right in the rent-roll, and the transmitter will be able to cash the amount recorded at the bank established by the court.

7. Cessation of regular property

According to article 692 of the Civil Code, regular property ceases through cancellation out of the rent-roll under the acquisition by one person of all the shares of the regular property right, as well as in other cases provided by law.

In the case of regular property and in the other cases of forced co-ownership, the partition is possible only by agreement.

In conclusion, regular property is a mode of the ownership right, in addition to the revocable property and the joint property. Regular property can be described as the legal situation in which more people exercise successively and repetitively the attribute of the use over a movable or immovable asset in equal or unequal time intervals, but fixed. The asset that is the subject of regular property may be sold, rented, or may constitute a warranty.

The provisions of article 687-692 do not affect the provisions contained in the GEO no. 14/2011 on consumer protection when signing and executing contracts for acquiring the right to use, on a predetermined period of time, one or more accommodations, long-term contracts for the acquisition of benefits for holiday products, resale contracts, as well as exchange contracts.[6]

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[6] GEO no.14/2011 on consumer protection upon signing and executing contracts for acquiring the right to use, on a limited period of time, one or more accommodations, of the long-term contracts for the acquisition of certain benefits for holiday products, of the resale contracts, as well as the exchange contracts, published in the Official Gazette no.134/22.02.2011.

SOME CONSIDERATIONS ON THE CONTENT OF THE LEGAL RELATIONSHIP EMERGED FROM THE CREATION OF THE TOPOGRAPHY OF A SEMICONDUCTOR PRODUCT

Bujorel FLOREA*

Abstract: *The author analyses the regulation of the legal relationship emerged from the creation of a topography of semiconductor product, both from the viewpoint of compliance with the norms of legislative technique and from the perspective of the shades of interpretation of the legal norms in the respective space. The study systematizes the issue of the moral and patrimonial rights of the limits of exercising these rights and of the specific obligations belonging to the owners of the topographies of semiconductor products. There should be noted the multiple de lege ferenda proposals meant to eliminate the chaotic image of settling the norms and to help at establishing a legal physiognomy that should induce rigour and balance in the field of the legal relationship emerged from the registration of the topographies of the semiconductor products.*

Keywords: *topographies of semiconductor products, exclusive right of topography exploitation, exclusive right of authorizing or forbidding certain acts regarding the registered topography, commercial exploitation of the topography, limits of the exclusivity of the exploitation right.*

1. Remarks regarding the regulation of the rights emerged from the creation of a topography of semiconductor product

The content of the legal relationship emerged from the creation of a topography of semiconductor product consists of the rights and obligations of the person who was granted the title of protection. In this case the title of protection is represented by the certificate of registration of the topography, released by OSIM (The State Office for Inventions and Trademarks), after the registration of the topography was published in the Official Journal on Industrial Property. Before this step, the application for registration has to follow all the procedures stipulated by the Law[1]: the constitution of the national statutory deposit, the examination of the the application for registration of the topography, the decision to grant the protection and its registration. Once the title of protection is released, the owner enjoys the protection of the Law[2], as regards the defence of his moral and patrimonial rights concerning the topography for which the protection was granted.

The Law no. 16/1995 is deficitary from the perspective of the coherent and logical regulation of the content of the legal relationship concerning the topography of a semiconductor product.

Thus, *first of all*, we should emphasize the fact that in the content of the Law there is only one chapter, entitled „Rights" (Chapter IV), which approaches, unfortunately

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[1] The law that provides the legal protection of the topographies of the semiconductor products is the Law no. 16/1995 regarding the legal protection of the topographies of the semiconductor products, with the further amendments and completion, republished in the "Official Gazette of Romania", part I, no. 45 from 6 October 2006.

[2] *Brevitatis causa*, for facilitating the reading, anytime we use "Law" in the current study or we indicate an article without mentioning the normative act it belongs to, we will refer to Law no. 16/1995.

truncated, the content of the legal relationship of the topography of the semiconductor product. The Law lacks, hence, the legal norms regarding the obligations that are part of the content of the respective legal relationship. However, it is well known the fact that the content of any legal relationship includes both the rights and the obligations that make up that relationship.

Secondly, the lawmaker regulates the content of the legal relationship according to a formula that excedes the elemntary logic. Thus, the chapter dedicated to the content of the legal relationship of the topography begins with *extinction* of the exclusive rights (art. 20), continues with the enumeration of the rights and of the limits concerning the use of the rights (art. 21), and then talks about their beginning (art. 22). We consider that at first should be regulated the date when the legal relationship is born, followed by the enumeration of the rights (as well as of the correlative obligations), the indication of the limits of exercising these rights, and only in the end should be regulated the causes for the ending of the rights.

Thirdly, the limits on the exercise of the patrimonial copyrights regarding the topography of a semiconductor product are dealt with in a non-unitary way. These can be found both in the content of art. 21 para.(2) and para.(3), and in art. 26 of the Law. We consider that for the rigour of the regulation, all the limits through which is eliminated the exclusivity of the exercise of the patrimonial copyrights had to be regulated in the content of the same article or in successive texts of law.

Fourthly, we should mention the fact that in the content of the Law, with two exceptions, the lawmaker does not deal with the moral copyrights. The exceptions consists of the moral copyright to mark the semiconductor product (art.23) and the moral copyright to name (art. 24), uninspiredly inserted between two articles whose content, totally different, does not recommend the placement between them of theses moral copyrights. Therefore, art.22 refers to the date of the beginning of some exclusive patrimonial copyrights, and art. 25 to the right to remuneration for the authors of topographies created during the work duties.

Fifthly, we notice that the end of the rights granted to the owner of the certificate of protection is also not regulated unitarily. On the contrary, the lawmaker approaches the problem of the end of the rights both in art. 11[3], and in the content of art.20[4], but also in a special chapter (Chapter VI „The end of the rights") dedicated to the end of the rights. We consider that, *de lege ferenda*, the disparate texts of Law, whose content refers to the end of the rights regarding the topography, should be also included in the chapter that should deal unitarily with this problem.

Sixthly, the duration of the patrimonial rights of the owners of the topographies of the semiconductor products is also not entirely dealt with in the special chapter aimed at the rights and obligations emerged from the creation of a topography. In this regard we specify that the content of Chapter IV, concerning the „Rights", as we have already mentined, does not include the provisions of art. 11, regarding the duration of the rights emerged from a

[3] According to art.11 of the Law: "*In the case when a topography has not been exploited commercialy for 15 years since the date it was created or encoded for the first time, at the end of this term the right to protection ends, as follows: a) if the topography was not registered, it cannot represent the object of an application for registration; b) if the topography was registered, the rights granted through registration are extinguished*." (The translation of all quotations belongs to the author).

[4] According to art. 20 of the Law: "*The exclusive rights are extinguished in 10 years since the first of the following dates: a) the end of the year when the topography became the object of a commercial exploitation for the first time in the world; b) the end of the year when it was constituted the national statutory deposit".*

topography that has not been exploited commercially for 15 years from the date when it was created or encoded for the first time. These provisions (in art. 11) are included in Chapter II. „The right to protection", chapter that enumerates the subject of the rights to the legal protection of a topography.

Consequently, in the following, we will examine the content of the rights emerged from a topography, under the aspects of the moral copyright, the patrimonial rights of the owner of a topography, the limits of their exercise and the obligations of the owner of the certificate of registration of the topography. We appreciate that the institution of the duration of the rights related to the topographies should be treated together with the transmission and the end of these rights, institutions that will make the object of a possible future study on this topic.

2. The moral rights of the creators of the topographies

From the analysis of the texts of Law regarding the moral right of the authors of the topographies of the semiconductor products, we notice that the norms that regulate them are grouped in two different areas in the content of the Law. Hence, there are some regulations regarding the moral rights in the Chapter IV. „Rights" in the Law, on the one hand, and other norms in the content of other articles, which are inserted in Chapter III. „Registration of the topographies", on the other hand.

In the Chapter dedicated to the rights (Chapter IV) are regulated *the right to name (art. 24)* and *the right to mark with T the semiconductor products* fabricated on the basis of the protected topography (art.23).

The right to name represents the legal possibility of the creator of a topography to claim that his name should be mentioned in the certificate of registration of the topography and in the publications issued by The State Office for Inventions and Trademarks regarding the registered topographies. In the text of Law (art. 24) the lawmaker refers to two situations: the right to mention the name and the right to mention the capacity of creator of topography. We consider that these are not two different moral rights: the right to name and the right to the capacity of creator.

Both the notion of right to name and the notion of right to the creator capacity designate the circumstance that the author of a topography is a natural person strictly determined and individualized, whose paternity to the creation of the topography has to be acknowledged. In other words, the content of the two notions used by the lawmaker is identical and, consequently, it was not necessary to formulate them simultaneously within the same text of Law. The mentioning in the spccified documents (the certificate of registration and the spceial publications) of the name of the author of the topography means only the acknowledgement of his creator capacity. The name of the person who made the topography is mentioned exactly to reveal his capacity of author of that topography.

It is true that in some literature[5], the right to name and the right to the capacity of author of an industrial creation are treated separatedly, as if they were different rights.

In reality, as it results implicitly from the mentioned literature, the right to name derives from the creator capacity[6]. The invocation of the right to name, as a right acknowledged to the creator to claim to have his identification data mentioned in the

[5] See T. Bodoaşcă, *Dreptul proprietății intelectuale (Intelectual Property Law), 2nd edition, revised*, Universul Juridic Publishing House, Bucharest, 2012, p. 262-164.
[6] See T. Bodoaşcă, *op. cit.* p. 264.

certificate of registration and in the publications regarding the registered topography is a modality to establish the identity of the creator, meant eventually to ensure the legal acknowledgement of his creative activity and implicitly of his possibility to apply to the coercitive force of the state in the view of having his rights respected.

Consequently, we believe that, *de lege ferenda*, the simultaneous use of the two notions with the same meaning should be eliminated from the text of Law, such a formulation being obviously an error, a pleonasm.

The right to mark with T the semiconductor products fabricated on the basis of the protected topography (art. 23) is also a moral right of the owner. Unfortunately, this moral right is regulated, in our opinion, deficitarily. Thus, the aim of the regulation of such a right is that to create the assumption that the exclusive rights of exploitation of the tography, signaled through T symbol exists and belongs to the person who uses it. However, the mark with T of the semiconductor products fabricated on the basis of the protected topography, without other elements of identification of the owner, does not provide the reservation of the rights in his favour, as the owner is not known. The lawmaker should have also specified that the symbol reperesented by a T stamped on the semiconductor products was going to be followed by the name of the owner. Only this way can be assumed that T symbol has the role to warn with regard to the reserved exploitation of the rights in the favour of the person whose name accompanies the above mentioned symbol. For supporting this point of view we invoke the similar provisions included in the Law no. 129/1992[7] and in the Law no. 8/1996[8] which stipulate expressly that the symbols represented by the respective letters are accompanied by the names of the persons who have the right to trademark.

Thus, *de lege ferenda*, we propose that this article should be completed by adding the mention that letter T should be accompanied by the name of the owner of the certificate of protection of the topography.

The other moral rights can be identified in the texts of Law included in Chapter III. „The registration of the topographies", or in the totality of the Law, through analogy with the moral rights of the owners of other industrial creations. We identify thus also other moral rights such as:

- *The right to request the release of the certificate of registration* of the topography (art. 12);
- *The right of the applicant for registration to carry out the necessary completions and amendments* (art. 15);

[7] Article no. 37 of the Law no. 129/1992 regarding the protection of the designs and models (republished in the "Official Gazette of Romania", part I, no.876 from 20 December 2007) has the following content: "*The owners of the certificate of the registration of the drawings and models can mention on the product D sign, respectively D capital letter, encircled, accompanied (the author's undeline) by the owner's name or by the number of the certificate".*

[8] Article no. 148 of the Law no. 8/1996 regarding the copyrights and the related rights (published in the "Official Gazette of Romania", part I, no. 60 from 26 March 1996, with the following amendments and completions), stipulates that: "*(3) The authors and other owners of titles or the holders of the authors' exclusive rights to which the current law refers have the right to stamp on the originals or on the authorized copies of the works the mention of reserved exploitation, according to the usance, consisting of a symbol represented by the letter C, in the middle of a circle, accompanied by their name, by the place and the year of the first publication*".

(4) The producers of sound recordings, the performing artists or other holders of the exclusive rights of the producers of sound recordings, or the performing artists to which the current law refers have the right to stamp on the originals or on the authorized copies of the sound or audiovisual recordings or on their cover, the mention of reserved exploitation according to the usance and consisting of a symbol represented by the letter P, in the middle of a circle, accompanied by their name, by the place and the year of the first publication."

- *The right to contest OSIM decisions* regarding the applications of registration of the topographies (art. 16);
- *The right to revoke OSIM decisions* regarding the applications of registration of the topographies (art. 19);
- *The right to renounce* at the protection of a registered topography (art. 35);
- *The right to file a complaint with the court* in case of litigations concerning the capacity of creator or owner of the topography (art. 39);
- *The right to benefit from the services of a intelectual property advisor* (art. 7 of the Law and Rule 10 para. (2) of the Norms of application of the Law).

We consider that these rights have the legal nature of some moral rights as they display the same features as the classical moral rights, such as, for example, the right to the author capacity. They are tightly connected to the person of the creator or of the owner of the certificate of protection, the only one entitled to appreciate if he will make use of them or if he will renounce at them.

Moreover, the above mentioned rights have a non-patrimonial character also because they are not expressed in a pecuniary form and they precede the patrimonial rights, they are independent from.

As these are moral rights of the authors of the topographies of the semiconductor products, they have the following legal characteristics: are inalienable[9], perpetual[10], imperceptible[11], imprescriptibility[12] and opposable *erga omnes*[13].

3. The patrimonial rights of the owner of a topography

The analysis of the legal norms reveals the following patrimonial rights of the owner of a registered topography, for the entire period of protection:

- *the exclusive right to exploit* the topography;
- *the right to authorize or to interdict certain acts* concerning the topography[14];
- *the right to remuneration* for the authors of topographies executed as a duty at work or at the order;
- *the right to damages* if a third party, fraudulently reproduced, exploited commercially or imported the topography.

[9] *The inalienable character* consists of the fact that the moral rights cannot make the object of a renounciation or a transfer.

[10] *The perpetual character* means that the moral rights exist as long as the author of the topography is still alive, and after his death the succesors exercise them.

[11] *The imperceptible character* of the moral rights refers to the circumstance that these cannot be traced to satisfy the debts of the author's creditors.

[12] *Imprescriptibility* of the moral rights of the author of the topography makes that these rights can be exercised anytime, and cannot be gained through prescription, and the right to action for the violation of a moral right of the author of the topography cannot be extinguished through extinctive prescription.

[13] *The opposable erga omnes character* of the moral rights of the author of the topography derives from the fact that the author derives from the fact that the rights are acknowledged to the author in his relationship with the third parties, who had the general negative obligation of not acting so that he disturbs the exercise of the rights by his owner.

[14] According to art. 36 of TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights), the Member States will consider illegal the following acts, if they are committed without the authorization of the owner: the import, the sale or the distribution in any other way, with commercial purposes, of a protected configuration scheme, of an itegrated circuit which incorporates a protected configuration scheme or of an item which incorporates such an integrated circuit, only to the extent to which this item countinues to integrate a configuration scheme illicitly reproduced.

In the content of art. 21 of the Law are regulated, in the favour of the owner of a registered topography, *the exclusive right to exploit* the topography and *the exclusive right to authorize or to forbid* the following acts:

a) reproduction of that topography, to the extent it is protected as being original;
b) the commercial exploitation or the import to this purpose of a topography or of a semiconductor product produces by the means of this topography.

A topography that complies with the condition of originality[15] is protected if it is the result of the intellectual effort of his creator and if at the date when it was created it was not commonplace for the creators of topographies and for the producers of semiconductor products.

According to the provisions of the Law[16], *commercial exploitation* means selling, renting, leasing or any other method of commercial distribution or offer made to these purposes.

The above mentioned text of Law (art. 2, lett.d) also stipulates that: *„Depsite all these, the commercial exploitation does not include exploitation in conditions of confidentiality; it is applied on the condition that no distribution to the third parties should take place except for the situation when the exploitation of the topography is done in conditions of confidentiality required by the necessary measures in the view of protection of the essential interests for the national safety"*. As it can be easily noticed, this text of Law is expressed not very clearly, which can lead to confusions. Without claiming that we managed to understand exactly the lawmaker's intention, we try to find a logical thread of the legal norms included in the above quoted article. Hence, we consider that the lawmaker intended to formulate two ideas: first of all to indicate the exception from what commercial exploitation means and then to define that exception.

As regards the exception from the content of the commercial exploitation, the lawmaker shows that the notion of commercial exploitation does not include the exploitation in conditions of confidentiality. In other words, the exploitation in conditions of confidentiality (i.e. without publicity, without being openly carried out, but secretly, in clandestinity) does not belong to the field of commercial exploitation.

As concerns the definition of the exploitation in conditions of confidentiality, we believe that the lawmaker's intention aims at two aspects:

– the former, according to which the exploitation in conditions of confidentiality involves no commercial distribution of the topography to third parties;
– the latter, according to which even if it takes place a commercial distribution, it is also an exploitation in conditions of confidentiality if this is imposed by the necessity of protection of the main interests for the national security.

Thus, if the exploitation of the topography takes place in conditions of confidentiality, the exlusive right of the owner to authorize or to interdict the commercial exploitation does not apply, as it is a case of limitation of the exclusivity of exercising this right, a possible commercial distribution being required by the necessity to defence the interests of national security.

As concerns these observations, we believe that, *de lege ferenda*, it is necessary to reformulate the content of art. 2 lett. d) of the Law, in order to fix more clearly and more rigurously the legal will of the lawmaker.

Another patrimonial right is *the right to remuneration*, having as subjects the creators of topographies executed as duty at work[17] or at order[18] (art.25 of the Law), even if the

[15] See art. 3 para.(1) of Law no. 16/1995.
[16] See art. 2 lett. d) of Law no. 16/1995.
[17] According to art. 9 para.(1): "*If the topography was created by an employee as a duty at work, the right to protection of the topography belongs to the company where the creator of the topography is employed".*
[18] According to art. 9 para. (2): " *If the topography was created at the order of a natural or legal person, the right to protection of the topography belongs to the person who ordered it".*

other rights emerged from the execution of the topography belong to other persons. In the literature it was considered that the remuneration we refer to can have stimulating effects or, on the contrary, can produce „a state of inhibition with serious consequences[19]" at the level of the creative activity.

The remuneration of the creators in these situations is established through the contract between them and the owner of the protected topography: the employer or the person who oredered the topography (commissioner), according to the case. *We consider that* this remuneration should be established under the form of a percentual share from the possible benefit the employer (respectively the commissioner) will obtain from the exploitation of the topography executed as a duty at work or at order. From this perspective, can be seen undoubtedly the direct connection between the remuneration due to the creators of topographies and the way the exclusive right of exploitation of the topography is exercised by the owner.

Although the Law does not stipulate, it is obviously that the remuneration of the creators of topographies executed within the creative mission contracts at order represents an essential element of these contracts. Consequently, the absence from their content of the clause referring to the remuneration of the creator of the topography is going to be examined by the trial court, which will be able to dispose, through analogy with other intellectual creations, either of the revision of the contracts or of ascertaining their nullity, obliging the employer (commissioner) to cover the damages caused to the creator of the topography.

In order to exist a similar legal treatment with the employed inventor, we propose*, de lege ferenda*, that the employed author of the topography should benefit from *the right to a compensation*, if the information included in a topography are classified as secret state information.[20]

Another patrimonial right of the person entitled to the protection of topography is *the right to damages*. According to art. 27 of the Law, the person who has the right to be protected on the grounds of the current law can claim damages, according to the common law, for the period of time previous to the beginning of the exlusive rights, if it is proved that a third party reproduced fraudulently or exploited commercially or imported to these purposes the topography. *In our opinion*, this text of Law requires some observations.

First of all, the lawmaker regulated the possibility that the owner of a topography can claim damages for a period of time when his exclusive rights on the topography had not begun yet, thus for the period of time when the topography was not legally protected. In this case the question is if owner of the topography can invoke the violation of some rights which he had not gain, consequently they did not exist to claim damages, according to the common law.

Then, the second issue that has to be clarified refers to the configuration of the content of the deed of the third party – the reproduction, commercially exploitation or fraudulent import of the topography.

The answer to these problems is difficult, as long as in the intellectual property legislation there are not similar texts, and the jurisprudence in this field does not contain solutions for such problems. We will try, however, despite these drawbacks, to answer the above formulated questions, starting from the analysis of some features of the action for compensation based on the illicit deed regulated by Law.

[19] See O.Camulschi, *Drepturile patrimoniale ale inventatorilor (The Inventors' Patrimonial Rights)*, in "Revista de drept comercial", no. 1/1993, p. 71.

[20] This is the case of the employed inventor, according to art. 40 para.(2), the last thesis of the Law no. 64/1991 regarding the patents.

Therefore, a first characteristic of the action for compensation is that the illicit deed regards the violation of some *rights with eventual character* at the moment when it was committed. Only after the topography was registered by OSIM, the rights related to this industrial creation gain current character, are consolidated and it is definitely established the identity of the owner of the violated rights.

On the other hand, the illicit deeds stipulated by the lawmaker *affect more the value of the topography* rather than the rights emerged from registration. For example, we mention that the effects of the fraud of the topography can be:

- the decrease of the legal efficacy of the topography, having as a consequence the extinction of its original character and sometimes even its fall in the public domain;
- the weakening of the commercial efficiency of the topography, as the fraudulent persons attract anticipately a part of its consumers;
- the degradation of the protected topography if this covers some semiconductor products of inferior quality.

Another characteristic of the action for compensation consists of the fraudulent *character of the deed* committed by a third party. The fraudulent deeds of the third party that can be invoked for action for compensation cover the following forms:

- the fraudulent reproduction of the topography;
- the fraudulent commercial exploitation of the topography;
- the import for fraudulent puposes of the topography.

Thus, all the forms of violating the rights of the owner of the topography must have a fraudulent character. Yet, the texts of Law does not configurate, as we showed, the content of the fraudulent term in the analysed matter. That is why we try to formulate some ideas in order to reveal some starting points fort the further completions:

- in order to discuss about tort liability[21], *the illicit deed of the third party*, which harmed the interests of the owner of the topography - unlike the common law[22] -, *should have been committed on purpose.* Consequently, the circumstance that the third party's deed should have a fraudulent character makes that the tort liability can take place only if he/she acted oon purpose. The fraudulent way to violate the rights of the future owner of the topography involves the fact that the third party acted being aware that his/her deeds are illicit and that they will produce damages to the owner, but he ignored deliberately and consciously these aspects.

Per a contrario, if the third party reproduced, commercially exploited or imported the topography without being aware of the fraudulent character, then the subject cannot be held responsible, as there was no intention of fraud. In this case, the third party is exonerated from responsibility. Hence, this is an exception from the rule according to which the tort liability applys independently from the form of guilt in the commitment of the guilty deed.

- *the acts committed by a third party* are fraudulent to the extent to which *they are susceptible of creating confusion for the consumers* as regards the owner of the topography. The confusion should not be produced, it is enough to be possible.

[21] According to art. 1349 *Răspunderea delictuală (Tort liability)* of the Civil Code: "*(1) Any person has the duty to comply with the behaviour rules that the law or the customs of the country imposes and should not harm through his actions or inactions the rights or the legitimate interests of other persons. (2) The person who, having discernment, violates this duty, is responsible for all the caused damages, being obliged to cover them integrally."*

[22] According to art. 1357 para.(2) of the Civil Code: "*The author of the prejudice answers for the easiest guilt."*

- establishing the fraudulent character of the reproduction, the commercial exploitation or the import of a topography which was later registered is a *problem of interpretation*, being the exclusive prerogative of the competent trial court.

In conclusion, the owner of the registered topography can claim the covering of the damage caused by a third party through fraudulent facts, even if his violated rights were acknowledged later. The only condition of tort liability is that the third party should have acted being aware of the fact that his/her deeds are illicit.

4. The limits of exercising the patrimonial rights emerged from the registration of the topography

There are some situations, strictly regulated by Law, when the exclusive right of the owner of the topography to exploit or to authorize the acts stipulated by Law does not apply. In other words, in these cases any person can reproduce, exploit or act as regards the topography without the owner's agreement, as the exclusivity of the owner's rights cannot be opposed to him. Unfortunately, these limits are also not unitarily regulated within the same chapter or article of Law, but can be traced in texts of Law included in different chapters. The limits of exercising the patrimonial rights of the owners of the topographies are regulated in art. 21 para. (2) and para. (3) and art. 26 of the Law. These limits concern the following situations:

- *reproduction* of a topography *with a private character for non-commercial purposes* (art. 21 para.(2), lett.a);
- *reproduction with the aim of analysis, evaluation or education* regarding concepts, procedures, systems or techniques incorporated in the topography or regarding the topography (art. 21 alin.(2), lett. b);
- *acts regarding a protected topography,* which was created starting from an analysis and an evaluation of another topography, carried out with the aim of analysis, evaluation and education (art. 21 para.(2), lett. c);
- *acts committed after the topography or the semiconductor product enetered the market* in Romania or in the European Union, by the owner or with his agreement (art.21 para.(3))[23];
- *the expoitation of the topography in good will* (art.26). if a person purchased in good will the semiconductor product, without being aware that this incoroprates a protected topography, illegally produced, he may exploit the topography without breaking the right of its owner. The exploitation of the topography by the unaware third party takes places only until he becomes aware that the topography is protected. From this moment, the third party does not have the right to purchase, without the owner's authorization, similar semiconductor products. However, he can continue the commercial exploitation of the semiconductor products that have been purchased or contractated before the date he gets to know that the topography is protected, on

[23] This limitation is an application of the *theory of the extinguishment of the right*, largely duscussed in the literature. Thus, according to this theory, elaborated by the German doctrine in the field of inventions and later extended to all the objects of the industrial property, the owner of the title of protection loses the protection on the protected product, from the moment when the object of the creation was put in circulation (on the market) by himself or with his agreement. For details see Y. Eminescu, *Tratat de proprietate intelectuală,Vol.II. Semne distinctive (The Treatise of Industrial Property. Vol.II. Distinctive Signs)*, Academiei Publishing House, Bucharest, 1983, p. 110-112; V. Roş, *Dreptul proprietății intelectuale (Intellectual Property Law)*, Global Lex Publishing House, Bucharest, 2001, p. 394; O. Camulschi, *Epuizarea dreptului de proprietate intelectuală (The Extinguishment of the Right of Intelectual Property)*, in "Revista română de dreptul proprietății intelectuale", no. 2(7)/2006, p.25-31.

the condition of paying to the owner equitable compensation. This limitation regarding the right to exploitation of the topography in good will is applied to the legal succesors of the owner of the protected topography.

We should emphasize the fact that the Law does not regulate *the right of previous personal use of the topography*, like in the case of other creations with industrial applicability (inventions, utility models). Known under different names ("*the right of previous personal posession* "[24], „*the right of previous personal use*"[25], or „*the immunity principle* "[26], „*the ubiquity rule*"[27]), this limit offers the possibility to any person to execute, in good will, without the consent of the owner of the certificate of protection of the topography, any act of producing his own topography, identical or similar with that of the owner. We appreciate that the limitation of the owner's right of exclusive use of the prerogatives granted by Law, through the application of the right of previous personal use in the favour of some third parties is fully justified in the field of the industrial creations such as the topographies of semiconductor products. In this creation field it is also possible that sometimes, the same topography should be created twice by two or more persons, through independent intellectual efforts, but only one of them can constitute the national statutory deposit, and the other or other persons can exploit their own topography, without the constitution of the national statutory deposit. In this case, the person who applied to OSIM for the registration of the topography will become his owner and he has, according to art. 21 para.(1), for the entire period of protection, the exclusive right of exploiting the topography and the exclusive right of authorizing or interdict the acts of reproduction, commercial exploitation or the import of the registered topography[28]. It is obvious that the exclusivity of the right of exploitation in this case, in the sense that the owner of the registered topography can interdict the other creator to exploit his own topography, is an inequitable solution. That is why we believe that the lawmaker has to regulate the right of previous personal use also in the Law regarding the protection of the topographies of the semiconductor products. Only this way the creator of the topography that is not protected legally could exploit it, before the constitution of the national statutory deposit, and after that, in the amount established by the lawmaker[29].

Taking into account all these, *we propose*, *de lege ferenda*, the completion of the Law no. 16/1995, with the introduction of the right of previous personal use, besides the other special limitations that determine the elimination of the exclusivity of the right to expoit the topography.

[24] See Y. Eminescu, *Legea brevetelor de invenție. Comentariu (The Patent Law. Comment)*, Lumina Lex Publishing House, Bucharest, 1993, p. 144; B. Florea, *Dreptul proprietății intelectuale (The Industrial Property Right)*, Universul Juridic Publishing House, Bucharest, 2011, p. 179.

[25] See L. Mihai, *Invenția. Condițiile de fond ale brevetării. Drepturi (Invention. The Substantive Issues of Patenting),* Universul Juridic Publishing House, Bucharest, 2002, p. 139.

[26] See L. Mihai, *op. cit.,* p.139.

[27] See A.Petrescu, L.Mihai, *Drept de proprietate industrială. Introducere în dreptul de proprietate industrială. Invenția. Inovația (Intellectual Property Law. Introduction to the Industrial Property Law. Invention. Innovation)*, Bucharest University, 1987, p. 15.

[28] The reason of this right derives from the principle "*prior tempore, potior jure*" ("first in time, stronger in right").

[29] For some criticisms regarding the amount of exploitation of the creation in the case of the utility models see B. Florea, *Protecția juridică a modelelor de utilitate (The Legal Protection of the Utility Models)*, Universul Juridic Publishing House, Bucharest, 2009, p. 36-38.

5. The obligations of the owner of the certificate of registration of the topography

The creator of a topography or his owner has mainly the following obligations:
- the obligation to exploit the topography;
- the obligation to refund the damages and the other patrimonial rights to the persons from he has obtained them;
- the obligation to the payment of the fees for the procedures regarding the applications and the certificates of registration of the topographies.

The obligation to exploit the topography is not stipulated expressly as a duty of the owner of the registered topography, as it happens in the case of other creations with industrial applicability[30]. This obligation results implicitly from the Law and applies both for the creator of the non-registered topography and for the owner of the registration. In this regard, art. 11 of the Law stipulates that, in the situation when a topography has not been commercially exploited for 15 years from the date when it was created or first encoded, the right to protection ceases at the end of this term. If the topography that was not commercially exploited for 15 years was not registered, then it cannot represent the object of an application for its registration, and if it was registered, the rights granted through its registration are extinguished. Consequently, if the topography was registered in the last part of the term of 15 years and is not exploited even after registration, the rights emerged from its registration are extinguished at the end of this term, calculated from the date when it was created or encoded, and not after 10 years from the date of registration, as is the period of protection of the topography (art. 20 and art. 22).

The owner of a registered topography is obliged, according to art. 41 of the Law, *to refund the damages and the other patrimonial rights* to the persons from who he obtained them, when the rights on a registered topography stopped for a period of time from reasons that are not imputable to the owner. These reasons include, according to the lawmaker, the owner's renounciation to protection, his termination of the rights and the annulment of the registration. The refund aims at the rights corresponding to the period of time when they ceased to exist. The text of Law that regulates the obligation to refund the damages and the other patrimonial rights is also liable to criticism.

First of all, we should notice that including the annulment of the registration in the causes of termination of the rights of the owner of the registered topography is unispired. The annulment of the registration does not represent a modality of extinguishing the rights of the owner, but a civil sanction with retroactive effect, which cancels the registration of the topography. In reality, the cancelled rights have never existed, as they did not emerge illegally, as the legal conditions of registration of the topography were not complied with. Consequently, if we accept the idea that the cancelled right have never existed, then the compensations and the other patrimonial rights gained by the owner from the third parties have to be refunded for the entire period of time when the owner benefitted from them, not only at the date when the registration was cancelled.

Scondly, should be retained the aspects concerning the way this text is formulated, aspects that lead to the wrong idea that the rights on a topography can end for a period of time, after which the owner could regain his lost rights. How else could be interpreted the formulation in

[30] For example, we mention the provisions of art. 46 para.(1) and para. (2) of the Law no. 64/1991 regarding the patent, according to which, if the invention has not been applied or has been insufficiently applied on the Romanian territory for 4 years from the date of the constitution of the national statutory deposit, or for 3 years from the granting of the title, and the owner cannot justify his inaction, Bucharest Tribunal can grant an obligatory licence to the application of any interested person.

art. 41: „*In the situation in which the rights on a registered topography ended* ***for a period of time*** *(*author's underline*)...*"*?* Such a contradiction is not in conformity with the reality, as the ways of ending the rights stipulated by the lawmaker (renounciation at the protection, termination and annulment of the registration) once fulfilled, produce irreversible effects, in the sense that they lead to the definitive extinguishment of the owner's patrimonial rights. Hence, the refund of the damages and of the other patrimonial rights gained by the owner from third parties aim at, excepting the case of annulment of the registration of the topography, the period of time from the date when it ended the case of extinguishment of the rights on the topography until the date when the third harmed party claimed the damages. Undoubtedly it should be taken into account also the institution of the extinctive prescription of the right to action of the third party. In such a situation, the ex-owner of the topography can refuse the refund, invoking the exception of prescription of the right to action of the third party.[31]

Another obligation of the persons who claims the accomplishment of the procedures regarding the application for registration and the certificates of registration of the topographies is, according to art. 43, *that of paying to OSIM the necessary fees*, in the amount and at the terms stipulated by Law.[32] The natural and legal persons, with the residence or the headquarters abroad, pay the due fees in currency.

For the constitution of the national statutory deposit necessary to the registration of the topographies the following fees should paid:

- fee for the examination of the application for the registration of a topography;
- fee for the registration of the topography;
- fee for the publication of the registration of the topography;
- fee for the release of the certificate of registration of the topography.

The proof of the payment of these fees is made when submitting the application for the registration of the topography or in 2 months from the date of the notification of the nonpayment.

At the same time, at OSIM are paid also other fees regarding the topographies of the semiconductor products, such as:

- fee for the examination of the contestation;
- fee for the registration of the modifications as regards the legal situation of the application or of the certificate of registration;
- fee for the consultation of the public documents from the national statutory deposit;
- fee for releasing certificated copies of the public documents from the national statutory deposit or of pages of the National Register of the Topographies.

The fees paid at OSIM are refunded to the persons who paid them, if the relative works did not begin. An exception from this rule is represented by the fee for submitting the application for registration of the topography and by the fee for its examination, which are not refunded.

An uncorrelated problem between the Law no. 16/1995, on the one hand, and GO no.41/1998, on the other hand, regards the sanction applicable in the case of the non-payment of the due fees at the due terms. Thus, art. 43 para. (2) of the Law shows that the non-payment of the legal fees leads to the inexecution of the respective procedure. In

[31] As concerns the fact that the extinctive prescription apply rightfully or not to determine the extingusihment of the right to action, see Gh. Beleiu, *Natura juridică a prescripţiei extinctive (The Legal Nature of the Extinctive Prescription)*, in "Studii şi cercetări juridice" no. 4/1985, p.340; M. Nicolae, *Prescripţia extinctivă (The Extinctive Prescription)*, Rosetti Publishing House, Bucharest, 2004, p.585.

[32] See Annex no. 6 ("The amount and the terms regarding the payment of the fees for the topographies of the semiconductor products") from GO no.41/1998 concerning the fees in the field of protection of the industrial property and their regime for their use, with the further amendments, republished in the "Official Gazette of Romania", part I, no. 959 from 39 November 2006.

excahange, art. 30 para. (2) of the GO no. 41/1998 stipulates that the non-payment of the fees for the constitution of the national statutory deposit necessary for the registration of a topography has as effect the rejection from the registration of the topography. However, between the inexecution of the procedure and the rejection from registration of the topography there is a difference of legal treatment. The unexecuted procedures can be resumed after the payment of the respective fees, while a decision of rejection from registration cannot be simply annuled, by paying the due fees.

On the other hand, GO no. 42/1998 adds to the Law when it introduces the sanction of the rejection from registration of the topography for the non-payment of the fees, a sanction that is not stipulated by Law. It is thus violated *the principle of the hierarchy of the normative acts*, according to which, a normative act with inferior legal force cannot modify another normative act with superior legal force.

As regards these remarks, *de lege ferenda*, the sanction for the non-payment of the fees should have a unitary regulation, included in the Law, ensuring thus its supremacy over the normative acts issued for the organization of the application of the Law.

6. Conclusions

The legal relationship emerged from the creation of the topographies of the semiconductor products is, as we showed, quite complex. Law no.16/1995 which regulates it has some syntactic and difficulties and norms lack clarity and precision. This is the reason why we tried to examine the totality of the rights and obligations belonging to the subjects of legal relationship concerning the topographies of the semiconductor products and to propose some viewpoints in connection with the interpretation of the legal norms reagulating the content of this relationship.

De lege ferenda proposals formulated represent an invitation to the specialists to focus the attention on the approached field.

The special Law does not have a complete form and partly it does not have a clear and logical formulation in the analyzed field. Besides, the lawmaker cannot and does not have to stipulate and regulate everything.[33]

At its turn, the doctrine itself cannot claim that it can identify interpretation with value of absolute truth. „We should not blame the jurists for distorting a text from its primary meaning – they usually do it for offering a more equitable solution to the respective case. Slightly distorting the vulgar morality, they enter the service of a superior morality"[34]. Unlike the practitioner jurists, who have a case according to which they interpret the legal norms, the theoretician jurists are more dettached in this proceeding. The theoretical studies examine and interpret the legal norms to clarify and order their meaning and to define, from objective positions, the lawmaker's will, as accurately as possible. But for obtaining a nuanced picture of the analysed phenomenon the research should approach the examined topics from different angles. Maybe it is ncessary that the legal research should make abstraction of the circumstance that a subject has been previously approached and should identify new meanings of the legal norms, especially from the hermenutical perspective.

[33] See in this regard N. Popa, *Teoria generală a dreptului (General Theory of Law)*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2008, p. 201.
[34] See H.Levy-Bruhl, *Sociologie du Droit*, P.U.F., Paris, 1971, p.108, apud, N.Popa*, op. cit*., p. 201.

THE ROLE OF FREEDOM OF SPEECH IN A DEMOCRATIC SOCIETY. THE ISRAELI-PALESTINIAN CONFLICT THROUGH THE EYES OF ROMANIAN AND CHINESE PRESS

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Abstract: *The present article tackles the Israeli-Palestinian conflict from June 2006 through the mass media's point of view from Romania and China. The purpose of the paper is to analyse how the mass media can influence the readers' opinion about the same issue with the role and its limits of the freedom of speech in this particular case, from the juridical point of view. We analyse the same story from China Daily and Ziua Daily and conclusions are drawn regarding the implications for the development of the democratic state in a multicultural and multinational world.*

Keywords: *press, China Daily, Ziua Daily, political science, freedom of speech*

1. Introduction

Professor Mark E. Warren from the Department of Political Science, within the University of British Columbia states in his paper[1] that „Democracy is a response to politics: it is one way among many that collectivities can organize conflict and make political decisions. If politics exceeds the state, so too should democracy exceed its state-centric forms – an argument found in the traditions of anarchist, associational, and participatory democracy that contemporary circumstances have instilled with a new relevance." But we also know that a basic and fundamental step in gaining a democratic level within a state is the freedom of speech and mass media is the way in which this can be shown and read about very easily by foreigners, who want to see the level of democracy from that particular country.

In this way we can state that the mass media and the written press is the fourth power in a democratic state after the Executive, Legislative and Judiciary, because the elector can easily change its opinion if the presented „news" are shown in a bad light. Main functions of mass media are to cover the events, gather and spread information and finally to control the activities of state authorities. The society, in its turn, may exercise control over the authorities only in case it is aware of its actions and if necessary can intervene; for instance through voting during the elections.

However, the media cannot and should not replace democratic institutions, but just to highlight the unseen aspects of public life. Electoral process has political correspondent, in terms of media selection process of newspapers, magazines, radio and television stations by population. Starting from this finding, Doru Pop states that "by choosing a particular media channel, one transfer part of his/hers public authority on it, giving up to the direct participation, exactly like in the electoral process".[2]

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[1] Mark E. Warren, *Democracy and the State (Draft – September 14, 2004),* available online at http://www.chinesedemocratization.com/English%20Website/frame/materials/ReadingsToadd_ChnIndexpage/34Mark%20Warrent%20Democracy%20and%20the%20State%20Draft%202.pdf

[2] Doru Pop, *Mass media si politica*, Institutul European, Iasi, 2000, p.17

The main problem is regarding the relationship of politicians with the press in what they consider that the media is an enemy, which aims to increase the rating by any means. This is mainly true, but politicians must learn to think like a reporter who has to fulfil a task: to reflect the news, to be in the middle of the action, to report on dramatic stories. Thus, it is also a fact that politicians need the media and the press needs them also. There is no need for them to be sympathetic, to agree with what is written and distributed, but open conflict against reporters reduce the chances of transmission of information balanced neutral. Ultimately, we must consider the fact that the media does not tell people what to think but what to think about. Media effects are difficult to quantify, it is clear that it plays a decisive role in creating individual behaviour towards a political character, but this is not the only factor.

In the democratic, free press, based on competition, the information sent is required to be submitted in the most original way possible, to be presented in a special and ingenious way and to reach a certain target audience. Having to choose between many alternative media, the receiver uses the most of this right and carefully chooses the adequate TV channel or that „one" magazine on the internet to read, when wants to be informed about the state of the nation. Desire is not enough, now the media must satisfy "multiple desires", "diversified desire", as Peter Gross considers in his work[3].

Objectivity can only be considered as a neutral dissemination of information, but considering the comments, the layout of the page, quantification of the importance of the image/sketch from the article and of course the font type, even before explicitly reaching the magazine, the reader has already formed an opinion about the article, no matter what is the information about.

The fact that the press is an institutional true power is revealed by the influence which has exercised over what is discussed in the legislature and the attention that manifest regarding the behaviour of coalition partners and opposition political parties. Hence the effort to control and limit access and impact of media or to channel this power for one's own interests can be a serious problem to the stability of a democratic state.

2. China daily and Ziua daily reporting on israeli-palestinian conflict

We have decided to investigate the „power" of two relatively important newspapers in Romania, a European country and China, one of the main geopolitical superpowers of the world regarding a relatively impartial conflict which started hundreds of years ago, i.e. the Israeli-Palestinian war.

Mass media is the best instrument for the society to exercise its right to freedom of expression. However, the same society can enjoy freedom of speech and expression, which at the same time can infringe this right. An issue here can be: where are the limits of freedom of speech?

Article 19 of the Universal Declaration of Human Rights (UDHR) provides that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[4]

[3] Peter Gross, *Colosul cu picioare de lut – Aspecte ale presei romanesti post comuniste*, Ed. Polirom, Iasi, 1999, apud. Gheorghe Schwartz, Politica si presa, Ed. Institutul European, Iasi, 2001, p. 68

[4] The Universal Declaration of Human Rights, adopted on December 10, 1948 by the General Assembly of the United Nations, article 19.

Article 10 of the European Convention on Human Rights (ECHR) provides: „Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".[5]

Ziua reappeared 6 years after the December 1989 events that ended the autocratic rule of Romania, but ended its journalistic activity in January 2010. *Ziua* supported the idea of Holocaust recognition, and has not reflected anti-Semitic sentiments feelings. „The leading Romanian daily *Ziua* (16 May 2002) reviewed a book on Vadim Tudor written by two of his former associates. *Ziua* noted that in contacts with Arab officials, such as Libyan leader Mu'ammar al-Qadhdhafi, Vadim Tudor[6] vehemently attacked Israel, while at a reported meeting with Israeli Foreign Minister Shimon Peres in Strasbourg, he <justified Israeli policy>. According to *Ziua*, the book also claims that Vadim Tudor wrote a letter of condolence to Ariel Sharon, mentioning that the Israeli Prime Minister's „late beloved wife," like his own „beloved mother," was from the city of Brasov. The *Ziua* review mocked the behaviour of „the great liar," as Vadim Tudor's former associates referred to him."[7]

Vadim Tudor is the leader of the Greater Romania Party. It was founded in June 1991. Vadim Tudor is a political figure known for his nationalist and xenophobic views. According to *Time* magazine the party's platform was "a crude mixture of anti-Semitism, racism and nostalgia for the good old days of communism." *Ziua*'s attitude towards Vadim's behaviour was because Vadim was branding the Jewish people in front of the Libyan leader Mu'ammar al-Qadhdhafi, saying USA is „Israel's colony". In the same time, he was sending letters to the Israeli Prime Minister, Ariel Sharon, saying that Ariel Sharon's „<late beloved wife>, like his own <beloved mother>, was from the city of Brasov."

In China, the press is government controlled. Newspapers represent the voice of the government. Newspapers and government are one and the same. Chinese newspapers may be government-owned such as *PEOPLE'S DAILY*, state-owned such as *CHINA VIEW* (English language newspaper), independent newspaper *CAIJING/ BUSINESS AND FINANCIAL REVIEW* or state-run such as *CHINA DAILY*. Therefore, the Chinese press supports China's policy.

The state-run newspapers, such as *China Daily*, are the newspapers run by the Communist Party of China. Their policy is to support the policies of the Communist Party and only make criticism of the authorities if there is a deviation from the Party's policy.

The state-owned newspapers, like *China View* newspaper, are the newspapers owned by the government at any level (national, regional or local). A state-owned newspaper is also called a government-owned or public-owned newspaper. A government-owned newspaper may resemble a not-for-profit newspaper as it may not be required to generate a profit.

2.1. Similarities and differences in Ziua Daily and China Daily regarding the Middle East conflict

Israel launched an offensive against Palestine three days after an Israeli soldier was kidnapped on June 25th 2006.

[5] The European Convention on Human Rights, 4 November, 1950, article 10, paragraph 1.
[6] Corneliu Vadim Tudor (b. November 28, 1949 in Bucharest) is leader of the Greater Romania Party (*Partidul România Mare*), writer, and journalist. (http://www.answers.com/corneliu%20vadim%20tudor)
[7] Political parties and extra-parliamentary groups, (http://www.tau.ac.il/Anti-Semitism/asw2001-2/romania.htm)

According to *China Daily*, the conflict culminated on July 12th 2006 when „Hezbollah guerrillas captured two Israeli soldiers in attacks from Lebanon on Israeli border posts" as a reply to the Israeli military campaign against Hamas in Gaza Strip. The Israeli-Palestinian conflict continued for 34 days.

The conflict can be structured as: the beginning of the conflict, the attack of the Israeli army into Lebanon; then into the Palestinian territory, and the ceasefire agreement. Due to the length constraints of this paper, we will focus only on the first two subchapters of the conflict.

2.1.1. Beginning of the conflict

On 27th of June 2006, in *Ziua* international section, „War in Gaza" was the headline on an article that reported how on 25th of June 2006 „a group of eight Palestinian terrorists managed to infiltrate into Israeli territory through a secret tunnel between Sufa and Kerem Shalom, (Rafiah). The Palestinian guerrillas were divided in three groups. One attacked and destroyed a tank with a shoulder-mounted missile, another group attacked an observation station with mortars, automatic weapons and hand grenades, and two other terrorists attacked a tactical position 150 meters from Kerem Shalom."[8]

By contrast *China Daily* in a report headlined: „Palestinian militants launch raid from Gaza into Israel" from June 26th 2006 characterized the event by writing „An Israeli military spokesman said seven to eight gunmen had infiltrated underground and divided into three groups. One group attacked an empty armoured personnel carrier, a second attacked a tank with grenades and the third fired at another position."

The difference between how the two newspapers reported the news is not only in the given details, i.e. how the soldier was abducted, but also in the length of the articles.

During the Middle East conflict, *Ziua* newspaper had a special correspondent in the Middle East reporting the news. The Romanian correspondent in the Middle East was Tesu Solomovici, a Romanian Jew journalist.

China Daily reported the Middle East conflict using the reports of the wire services. The wire services used by China Daily in the Middle East conflict were Associated Press, Xinhua Agency and Reuters.

Ziua mentions the kidnapped soldiers' name, age and the fact that two other Israeli soldiers were killed and four were injured. „Israelis announced the death of Captain Hanan Barak (21years old) and Sergeant Pavel Slutzker (20 years old), the injury of four other soldiers and the kidnapping of Soldier Ghilad Shalit."

China Daily however wrote two articles in the same day for the same event. In the first article „Palestinian militants launch raid from Gaza into Israel", updated at 06:15, „(…) killing two soldiers and abducting another in an assault in which two attackers died."; „(...) <We have two dead, three wounded and a soldier that is missing,> the spokesman said."[9] Only in the second article of *China Daily*, updated at 16:41 „Hostage's dad appeals for his safety" is the name of the kidnapped soldier „ Noam Shalit, father of Cpl Gilad Shalit, 19,(….)".

Ziua's writing style is to present in one article as many information as possible about an event. From the articles in *China Daily* it can be observed it is important to know the significance of an event then to present the event.

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[8] "Ziua" newspaper no. 3660, 27.06.2006, International section, "Razboi in Gaza"(War in Gaza) http://www.ziua.ro/display.php?data=2006-06-27&id=202402

[9] "China Daily", 26.07.2006, World section, "Palestinian militants launch raid from Gaza into Israel", (http://www.chinadaily.com.cn/cndy/2006-06/26/content_625459.htm)

2.1.2. Israeli army takes action

The Israeli-Palestinian conflict culminated on July 12th 2006. Two Israeli soldiers were kidnapped by Hezbollah less than three weeks after a 19 year-old Israeli tank gunner was abducted.

The kidnapping was announced by the Hezbollah TV Station „El Manar". According to the article in *Ziua* from July 13th 2006, „Israel ready for war with Lebanon", Hezbollah wants the release of the Palestinian convicts from the Israeli prisons. „It is a known fact that in these prisons there are around 10.000 Palestinians, many of them, terrorists with their hands blemished with blood."[10] *China Daily* from July 13th 2006 „Israel kills 7 in Hamas house" reported Hamas leader Khaled Mashaal called the 19 year-old tank gunner a prisoner of war and „demanded a prisoner swap".

The kidnapping of two other Israeli soldiers and the beginning of the attack of Israeli army over Lebanon is covered by *Ziua* in only one article. Opposite *Ziua* is *China Daily*, which covers the same story in no more than 4 articles. *China Daily*'s policy toward writing an event is that if the editor considers the news is important, the newspaper will try to make a full picture of the event.

"Israel ready for war with Lebanon" from *Ziua* depicts not only the kidnapping of the two Israeli soldiers, but also Israel's premier Ehmud Olmert accusation against the Lebanese government that „the ones responsible for the kidnapping of the two soldiers will pay for their actions" and „the recent events do not represent a terrorist attack, but an action of a sovereign state, against Israel without any justification: Lebanon will pay the price." The same article also presents the first actions taken against Hezbollah. The Israeli forces aimed at a building that included 3 stores, in which Hamas leaders were reportedly holding a secret meeting. During the same day, Israeli air forces bombed bridges that „connect different areas of Lebanon and a power station as well. Israeli marines bombed a secondary road that connects the South of Lebanon with the rest of the country."

China Daily's „Israel kills 7 in Hamas house" from July 12th 2006 covers the bombing story of the Israeli air forces targeting the building with three stores „because it was a <meeting place for terrorists>" and the rescue operation of the Palestinians.

Ziua reports the news from a fair point of view. Hamas is the largest and most influential Palestinian militant movement. In January 2006, the group won the Palestinian Authority's (PA) general legislative elections, defeating Fatah, the party of the PA's president, Mahmoud Abbas.

Hamas has also carried out suicide bombings and attacks using mortars and short-range rockets. The group has launched attacks both in the Palestinian territories of the West Bank and Gaza Strip. Under these circumstances, Hamas group is seen by the world leaders as a terrorist group that attempts at civilians' security. Therefore, *China Daily* uses in its article the word „terrorist".

"Hezbollah: Two Israeli soldiers seized" article reports two Israeli soldiers were captured „in attacks from Lebanon on Israeli border posts on Wednesday" and the ground attacks of the Israeli army in Gaza Strip and on the Lebanese territory. According to the newspaper, Lebanese security sources said Israeli air forces answered back by bombing a „key bridge in southern Lebanon". After Hezbollah „fired Katyusha rockets and mortars at

[10] "Ziua" no 3674, 13.07.2006, "Israel ready for war with Lebanon" (http://www.ziua.ro/display.php?data=2006-07-13&id=203463)

Israeli border posts and a town, wounding four Israeli civilians", the Israeli army fired back „salvoes of artillery shells into the outskirts of four Lebanese border villages while Israeli soldiers exchanged gunfire with guerrillas in the area."

Another article from July 12th 2006 in *China Daily* „Israel calls Hezbollah's capture of soldiers an act of war" is a sequel to „Hezbollah: Two Israeli soldiers Seized". The article presents more actions taken by the Israeli army against Lebanon. „Two Lebanese civilians were killed in an Israeli air strike on a coastal bridge at Qasmiyeh. Four other bridges in the south were hit and five Lebanese were wounded, security sources said."

The articles in *China Daily* from 12th of July 2006 report in detail the damages suffered by Lebanon after the Israeli attack whilst the article from *Ziua* emphasizes the kidnapping of the Israeli soldiers and Israel's retaliated attacks. In the same time, *China Daily* writes more articles for a single event so it is more understandable for the audience the importance of the issue.

The day of July 13th 2006 was presented in both newspapers as a „black day" with many civilian casualties and infrastructure destruction both in Israel and Lebanon. In addition both newspapers offered background information about Israel's history of wars and territorial occupation. After the kidnappings from July 12th 2006, the Israeli army bombed Beirut's airport and the south of Lebanon. According to *China Daily*, the attack from July 12th is Israel's „heaviest air campaign against its neighbour in 24 years".

The Romanian newspaper *Ziua* covered the story in one article while *China Daily* covered the topic in 22 articles. The difference between the two newspapers was not in the way the conflict was covered but in the way the international reactions were presented.

Ziua in the article from July 13th 2006 „Middle East thunders", reported only the reactions of US President George W. Bush, German Chancellor Angela Merkel, Russia and France. George W. Bush declared at the meeting with German Chancellor Angela Merkel in Stralsund that Israel „has the right to defend, but it must not weaken the Lebanese government". During the meeting he also added that „he wishes <to support peace> in the Middle East, adding <the terrorists are trying to end the peace process>." German Chancellor Angela Merkel condemned the attacks and called for a peaceful solution to be reached. Merkel also added „the present tensions were due to the kidnapping of the Israeli soldiers by Hezbollah and noted that <the cause of the conflict> must be established." Russia asked for „the immediate release of the prisoners" but it also condemned the Israeli attacks „whose target were <the Lebanese civilian infrastructure> and the violence from Gaza Strip." French foreign Affairs Ministry Philippe Douste-Blazy asked all the parties „not to engage in a circle of violence whose victims will be the civilians".

China Daily also reported the reactions of the Japanese PM and UN Secretary-General Kofi Annan. Japanese PM, Junichiro Koizumi, made a four-day visit to Middle East where he „met Israeli Prime Minister Ehud Olmert (…) and told him to consider the future of regional peace in its response to the Hezbollah attacks." The Japanese PM also donated „nearly $30 million in aid to President Mahmoud Abbas on Thursday to help keep basic Palestinian services functioning". According to both *Ziua* and *China Daily*, the number of casualties after two days of fighting was estimated at 54 people, 15 of them Arab children.

After 12 days of war, according to *China Daily* in „Israel, Hezbollah continue attacks" from July 24th 2006 the war cost „365 lives in Lebanon and killed 37 in Israel". *Ziua* in „Diplomacy among bombs" did not write the number of deaths in Israel or Lebanon after 12 days of war, but the number of targets hit by Israeli forces. „At the end of the week, in addition to the war on the ground, Israeli planes executed over 300 air raids over Lebanon.

100 ground objectives were hit, the number of destroyed objectives hit in Lebonon stood at 1900. Israeli air forces mostly struck communication, radio and television towers." In the same article it is reported „(…) in the last couple of days, Hezbollah launched at least 210 missiles over Israeli territories. The cities Naharia, Tzfat, Kiriat Shmone, Haifa, Rosh Pina, Carmiel, Maalot, Afula, Sachnin, and Beit Hashita were hit."

July 24th 2006 was also the day when US Secretary of State Condoleezza Rice went to Middle East to „pursue a lasting solution, not an immediate ceasefire. Washington blames Hezbollah and its allies, Syria and Iran, for the conflict" according to *Ziua* and *China Daily*.

The 16th day of war is reported in *Ziua*'s article with the headline „Israel <profiteers at maximum the power of fire>" from 28th of July 2006 reported ahead of the fact that Israeli air forces carried out air raids in South Lebanon and the Bekaa Valey (in the east of Lebanon). „Around 400 shells were launched by Israeli planes over Khiam at the Lebanese-Israeli border." In retort „at least 50 missiles launched from Lebanon, aimed at the cities of Maalot, Safed and Carmiel, in the north of Israel. In Kiryat Shmona, a missile hit a chemical factory." The same article also reports the number of casualties suffered by Israel and Lebanon. „From the beginning of the Israeli military offensive until yesterday, 433 people, out of which 340 civilians, lost their lives in Lebanon. The Israeli side 51 deaths (33 soldiers and 18 civilians) took place."

"Israel pummels south Lebanon with bombs and shells, while Israel's inner cabinet decides to continue the current limited incursions into Lebanon rather than launching a bigger ground offensive against Hezbollah" says *China Daily* in „Major Developments on 16th day of war" from 28th of July 2006. The same article reports that France is urging the UN to negotiate a rapid ceasefire resolution and that US „aims new threats at Iran and Syria."

"Massacre in Qana" in *Ziua* from July 31st 2006 says death toll from Qana is „the bloodiest air raid since the conflict started, causing the death of 56 Lebanese refugee civilians, out of which 37 were children".

China Daily wrote „The Israeli army said it targeted Qana because rockets have been repeatedly launched from the area into Israel."

Ziua emphasizes the Qana attack as being the place where Jesus Christ transformed water into wine. The newspaper appeals to the emotions brought to the Lebanese refugees. *China Daily* does not touch the sore spot as *Ziua* does. It only presents the facts.

Ziua in „Secrets of the Lebanese war" from August 5th 2006 reveals the Israeli offensive from Gaza Strip. According to the article, after the 19 year-old soldier was kidnapped by Hezbollah on June 25th 2006, Israel started operation „Summer Rain". After the other two soldiers were abducted and eight others killed on July 12th 2006, Israel starts a new military campaign called „Change of Direction". „Were the two kidnappings the real reason for the present Israeli military campaigns, or just an excuse? Or maybe it's just <the drop that filled the glass>?" *Ziua* states the Israeli-Palestinian war was „a war planned ahead by USA and Israel, and the real targets are actually Syria and Iran. The hypothesis is denied by Washington and Jerusalem. Damascus and Teheran were said to have played an important role in the present Middle East conflict."

China Daily on the other hand in the articles from August 5th 2006 only gives more details about the latest developments. „Israeli jets bomb Hezbollah areas in southern Beirut and destroy four bridges north of the capital, cutting the main coast highway to Syria and forcing the UN to cancel aid convoys for 900,000 displaced people." The newspaper also writes that „Hezbollah leader Nasrallah threatens to target Tel Aviv if Israel attacks central Beirut. He also offers to halt rocket barrages if Israel stops hitting civilian areas in Lebanon."

Ziua analyses and interprets the events because the newspaper wants to inform the reader the reasons that might have led to the conflict. The arguments from the article are exposed to the reader by using a professional analyst. Whilst *China Daily* presents the facts the way they are.

3. Conclusions

The manner in which the issue was presented in Ziua Daily and China Daily can show different angles for the same reader, which eventually can influence its decision if it comes to a scrutiny regarding a similar issue in its country.

The Romanian newspaper's style of presenting the event was to give a lot of information in one or two articles per day. It was reporting the latest developments in the conflict or an analysis of the conflict. China Daily's reporting style is to present the conflict in an understandable way to the audience. The articles of China Daily were short but many by paying attention to the topic's sensitiveness. This can be seen not only from the way the conflict was covered but also from the number of articles. *China Daily* covered the Middle East struggles in more than 150 articles, whilst *Ziua* covered the Middle East conflict in no more than 70 articles.

Ziua highlights Israel's firm military actions against terrorist actions promoted by Hezbollah. The way the Israeli-Palestinian conflict is presented in the newspaper condemns fundamentalist Islamism. On the other hand *China Daily* stresses the damage to infrastructure and civilian casualties in the Muslim areas by the Israeli forces.

To sum up, we can state that the mass media can influence the reader in a way in which politicians merely can, but on the other hand the freedom of speech of the Chinese and Romanian journalists grant them the right of writing and telling the same story from their point of view without any juridical implications. A strong bias was encountered while this paper was written, but as the blindfolded Lady Justice represents objectivity, in that justice is or should be meted out objectively, without fear or favour, regardless of identity, money, power, or weakness (blind justice and impartiality), we leave the conclusions to be drawn by the readers accordingly. Our purpose was to objectively show how mass media can present an international conflict, which could have easily degenerated in a World War and to what limits.

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THE IMPORTANCE OF THE SUCCESSIONAL LIABILITIES IN THE INHERITANCE TRANSMISSION

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Abstract: *The inheritance is the patrimony transmission of a deceased natural person to one or more people into being (article 953 Civil Code). The inheritance transmission includes both assets and liabilities of the defunct heritage, but the heritage does not disappear with the decease of the natural person, he is a factual reality in the search of a subject of law which he is attributed to. The death of a natural person makes the heritage of the deceased to be hand over to his successors. The patrimony of a natural person forms a righteous universality including the ensemble of the rights and obligations with a patrimonial content of the respective person. The successional transfer represents the heritage of the deceased, but besides the actual rights and claims, the successional heritage also includes the duties and tasks of the inheritance. The successional liability was not given much attention, although it is an important part of the heritage. In principle, in matters relating to inheritance, legacy debts are obligations arising during the life of the author and they are in payment at the time of the inheritance opening. The transmissibility issue of the liability must be analyzed in detail. The legal doctrine establishes that the liabilities of the inheritance can be divided into two parts: the transmissible debts of the deceased and the inheritance tasks. The transferable debts of the defunct are many and varied. They have in common their debtor, the deceased, and include only the debts of his lifetime. Regarding the succession, the task term underlines the idea of curtailing expenses, in exchange for an advantage.*

Keywords: *successional liabilities, inheritance, defunct, debts, tasks*

The purpose of the successional transmission is the universality of the deceased patrimony or a share of it in the case of universals transfers.

The successional transmission begins in full right at the time of the inheritance opening, even without the knowledge of the successors, which is a consequence of the principle that a heritage cannot remain without holder in no time.

On the one hand, the successional patrimony includes the rights, meaning the inheritance assets, and on the other hand, the obligations, meaning the successional liabilities.

Legal heirs and those appointed by testament, either universal or with an universal title, cannot accept only the succession rights and refuse the debts payment of the deceased.

According to the article1101 from the Civil Code *Under the sanction of absolute nullity, the successional option is indivisible and cannot be affected by any means.*[1]

In this brief presentation, I will try to bring some light into the description of the successional liabilities, because over time appeared many issues related to this theme. The inheritance liability consists of debts and inheritance tasks. Debts are the patrimonial obligations of the deceased, regardless of the source and nature of the creditor, which are in the successional patrimony at the time of the opening of the inheritance. The deceased obligations are not considered an inheritance debt and they are not included in the successional liability.

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[1] Liviu Stănciulescu, *Course of civil law. Successions,* Hamangiu Publishing House, Bucharest 2012, p. 198

In addition to the debts of the deceased, the doctrine and judicial practice included other elements in the content of the successional liability. The successional liabilities also includes the funeral expenses, fees and taxes on the transfer of successional partition of the general property and other debts that are known in the current language as *succession tasks*.

The task of the succession must be opposite to the debts of the deceased and to the personal debts of the successors, on the other hand. One can distinguish between the succession tasks and the debts of the deceased, because the succession tasks do not appear until the opening of the succession, or after death. Therefore, they are apart from the debts of the deceased through the fact that they appear with the death or after death. The tasks are also characterized by the debtor in the sense that these debts are not born during the life of the deceased, but appeared at the earliest, with the death and do not have the deceased as a borrower. It may be considered that the debt was already born in the heritage of the deceased at the time of his death and belongs to the category of tasks (for example an employer died and salaries have not been paid).

We can deduce that the inheritance tasks are obligations that are born in the person of the heirs at the opening of the inheritance or later.

The Romanian doctrine defines the tasks as: *obligations that have not been in the patrimony of the one who bequeath, but which are born in the person of the heir at the time of the opening of inheritance or later, sometimes from the desire of the deceased, sometimes independent of him or his will*. [2]

The inheritance liability composed of duties and tasks of the inheritance shall be supported by the universal successor or with a universal title, either legal heirs or universal devisee or with an universal title, because they are called to a patrimony or a fraction of it. [3] Universal heirs or with a universal title contribute to the payment of debts and inheritance tasks proportional with the successional share of each one [4](*intra vires hereditatis*). It means that each heir has the obligation to participate on an equal basis to cover the debts and obligations left by the deceased, each with his part.

First of all, it is to be noted the fact that, regarding the legal nature of this right, the judicial doctrine and practice make an overview of the category of heirs who support the inheritance liabilities. So, according to the Civil Code and as I noted earlier the obligation to support the inheritance liabilities rests to universal heirs or with an universal title, because they acquire the entire patrimony or only a fraction of the patrimony of the deceased. [5]

People who support the inheritance liabilities

In our doctrine some authors show[6] that the legatees with a particular title are, in principle, just donors of a certain right and they do not respond for the inheritance liabilities. As an exception, the legatee with a particular title will be obligated to pay the inheritance liabilities, but *only with the good or goods forming the object of the legate*, but also in the following situations:

"When the testator expressly disposed"

[2] J.Pastoris, *Du principe de la transmission des dettes héréditaires en droit français,* thèse, Aix, 1896, p.12
[3] Dumitru C. Florescu*, The succession law. Second edition revised and enlarged.*, Legal Universe Publishing House, Bucharest, 2012, p. 205
[4] Article 1155 pargraph. 1 Civil Code.
[5] Article 1114 paragraph 2 Civil Code.
[6] Liviu Stănciulescu, *Course of civil law. Successions,* Hamangiu Publishing House, Bucharest 2012, p. 199

"The right left through legate represents an obtained inheritance by the testator, unfinished until his death and which includes both rights and obligations"[7]

"When other goods are insufficient to pay debts and inheritance tasks (article 1114 para.3 lit a-c Civil Code)

If the total testamentary dispositions made by the testator is greater than the net assets of the inheritance, all the testamentary dispositions, even the one with a particular title, will be reduced proportionally, because nobody can do liabilities as long as it has not paid its creditors. Therefore, in the case of the legate with a particular title, you will see the effects of the succession liabilities.

Through article 1139 paragraph 2 Civil Code, in the case of vacant inheritance, the village, town or municipality is responsible for the vacant inheritance liabilities *only in the limit of the goods value from the successional patrimony*, so the responsibility for the payment of the liabilities shall be limited in all cases to the value of the assets acquired. Vacant succession[8] is the one which is not required by anyone and there aren't any known heirs, or the known heirs have quit. Successoral vacancy is a temporary situation, which does not exclude the possibility that a successor can acquire a right over the inheritance. Its purpose is to ensure the interests of third parties, I mean the successoral creditors, in order for them to be paid and the successoral goods will not be taken away by other people.

According to the article 117 of the law no. 36/1995 *in the absence of legal or testamentary heirs, when there are goods in the successional mass, the public notary, informed in the conditions of the article 102, establishes that the succession is vacant and it is released a vacancy successoral certificate, in accordance with the law. If the successional mass consists only of a concession law or a right of use over a burial place, without funeral constructions, the notary will establish to close it without giving a successoral vacancy certificate. A copy will be sent to the concessionaire.* [9]

Even when tasks are born after the opening of the succession, they are treated as debts and duties and shall be sustained by all the heirs who are required to pay the liabilities.

The fundamental rule of the inheritance liabilities transmission is that of its legal division, from the opening day of the succession, between the universal heirs and with an universal title, proportional with their hereditary parts, calculated according to the vocation of each heir, regardless of the size of the profits obtained from it.

The division of the successional liabilities between heirs, influences the tracking right of the successional creditors. According to article 1.157 paragraph 2 from the Civil Code, the insolvency risk[10] of one of the universal heirs or with a universal title is split between the other universal heirs or with an universal title proportional with the successional quote of each one. In this case, the insolvency risk of the inheritance will be supported by the creditor. Before splitting the inheritance, the creditors whose claims come from the conservation or management of the heritage goods, or they have been born before the

[7] M. Eliescu, *Course of successions,* Humanitas Publishing House, Bucharest, 1997, p.144
[8] Fr. Deak, *Treaty of inheritance law, Second Edition*, Legal Universe Publishing House, Bucharest 2002, p. 440
[9] Subject of law which, as the holder of a real right (property or use) of goods or as executor of economic activities or public services provider, object of the concession contract, transmit, through this agreement, another subject of law (called the concessionaire) for profitable management, on a specified period, in exchange for a fee, the possibility to exploit those assets, respectively, to fulfill those economic activities or public services.
[10] Situation in which there is a debtor whose goods have a smaller value than the totality of obligations that would be satisfied with those goods.

opening of the inheritance, they can demand to be paid from the goods contained in joint possession and may require even the enforced collection of these goods.

Another issue in the case of splitting of the successional liabilities is the quality of the heir to be sezinar or not. The quality of the heir to be sezinar or not doesn't matter in terms of division of the successional liabilities between heirs, so lenders can also act against unsezinar heirs. For example, in the case of the legate with an universal title of all real estate it is not established the hereditary part in the form of a fraction, the hereditary part will be calculated reporting the value of the legate to the value of the entire inheritance, the legate will be held passive in this proportion.

The rightful division of the inheritance liabilities in proportion to the hereditary part is not an imperative rule, and from it, the deceased or the heirs can derogate through their convention.[11]

As an exception, the division rule of the inheritance liabilities shall not apply if:

a) The obligation is indivisible, meaning that each of the borrowers or their heirs can be compelled separately to perform the entire obligation, or each of the creditors or their heirs may require full performance (article 14252 Civil Code). The indivisible obligations shall not be transmitted fractional at the heirs, and the obligations are divided between the heirs in proportion with the parts of the inheritance;
b) The purpose of the obligation is a determined individual good or a determined performance on such a good;
c) The obligation is guaranteed by a mortgage or other real guarantee, in which case the heir who receives the affected good of the guarantee will be obligated for everything, but only up to the value of that good, and its participation in the remaining liabilities of inheritance shall be reduced accordingly;

When the legate has a mortgaged building, the legate with a particular title, although he is not obliged to pay the debt of the deceased personally, not being a borrower, however as the owner of the property he is held by the obligations secured by mortgage. Therefore, the legatee will respond only with the good or goods that form the subject of the legate. In order to get out the property from mortgage, the legatee with a particular title pays the debt only in the limit of the mortgaged good, and his participation to the remaining inheritance liabilities shall be reduced accordingly.

d) One of the heirs is charged by title to execute the obligation by himself (in this case, if the title is represented by the testament, the exemption of other heirs constitutes a liberality, subjected to reduction if necessary).

A very delicate situation, but from which the lenders are advantaged is that prior to the successional partition, creditors whose claims come from the conservation or from the administration of the inheritance goods or appeared before the opening of the inheritance, may ask to be paid from the goods that are in joint possession and may require the forced execution of these goods.

The problem here is the one in which the heir has the right to require payment of the claims which he has towards the inheritance from the other heirs, like any other creditor of the inheritance.

The universal heir or with an universal title who, because of the real guarantee or for any other cause, paid more than his share from the joint debt, has the right of recourse

[11] Dumitru C. Florescu,, *The succession law. Second edition revised and enlarged.,* Legal Universe Publishing House, Bucharest, 2012, p. 207

against the other heirs, but only for that part of the debt that has been common to everyone, even when the heir who has paid the debt would be subrogated for the rights of the creditors (article 1.157, paragraph 1, Civil Code).

In conclusion, the successional lenders may exercise their rights against the heir, but the law grants the latter sufficient time to be able to inform over the patrimonial situation of the deceased and reflect carefully on the option that he is going to exercise. Thus, the purpose of the Civil Code is to reconcile the interests of the creditors of the deceased with the interests of the successors. Therefore, according to the article 1103 from the Civil Code paragraph 1 *The right of inheritance option must be exercised within one year from the opening date of the inheritance*, term which begins when the one called to inherit, recognized the opening of the inheritance and his quality of being a successor.

I consider that this action through which the successional creditors may compel his successors to opt has a higher efficiency according to the new one-year term.

The Civil Code has come up with very effective changes regarding the successional option, meaning that there are two options: accepting the succession or renouncing it. The one called to the inheritance under the law or the will of the deceased, may accept the inheritance or renounce it. Thus, the successors may choose knowing the incidence effects of their acts, over obligation to pay liabilities and on the other hand, the successional creditors are able to know the choice of the successors, regarding their obligation to pay successional liabilities.

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JUVENILE OFFENDERS' CRIMINAL PUNISHMENT SYSTEM FROM THE PERSPECTIVE OF THE NEW CRIMINAL CODE

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Abstract: *Criminological research has shown that criminality among juveniles must be mainly prevented through the provision of care, education and rehabilitation of juvenile offenders. The educational measures meet this preventive nature, being a function of training, educational and professional training, correction of delinquent behaviour. Unlike educational measures, punishments fulfil coercion and exemplarity functions. In order to avoid subjecting juvenile offenders to torture, ill-treatment or contact with adult offenders during serving the sentence, the New Criminal Code brings a number of educational measures that are new as compared to the current regulation. The non-custodial educational measures regulated in the New Criminal Code are stipulated in article 115 as follows: the stage of civic training, supervision, confinement at weekends, daily assistance, and deprivation of liberty (articles 124 and 125 New Criminal Code) consist of the following: placement in an educational centre, placement in a detention centre.*

Keywords: *juvenile, protection measures, education, rehabilitation.*

Taking into account the recommendations of the European Court of Human Rights, the *New Criminal Code*[1] brings new guidance on the criminal sentencing system of juvenile offenders, abandoning the penalties for juveniles stipulated in the current Criminal code.

Criminological research has shown that criminality among juveniles must be mainly prevented through the provision of care, education and rehabilitation of juvenile offenders.

The educational measures meet this preventive nature, being a function of training, educational and professional training, correction of delinquent behaviour. Unlike educational measures, punishments fulfil coercion and exemplarity functions.

The legislator of the new Romanian Criminal Code abandoned the mixed and penalising system consisting of educational measures and penalties, and adopted the theory of exclusive application of educational measures on juvenile offenders, a theory which was accepted during the communist period, adopted by Decree no. 218/1977, which only stipulated the measure of placement in a special working and re-education school for a period of 5 years at most, even for serious offenses (murder, robbery, etc.).[2]

Thus, in order to avoid subjecting juvenile offenders to torture, ill-treatment or contact with adult offenders during serving the sentence, the New Criminal Code brings a number of educational measures that are new as compared to the current regulation. The non-custodial educational measures regulated in the New Criminal Code are stipulated in article 115 as follows: the stage of civic training, supervision, confinement at weekends, daily assistance, and deprivation of liberty (articles 124 and 125 New Criminal Code) consist of the following: placement in an educational centre, placement in a detention centre.

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[1] Law 286/2009, published in Official Gazette of Romania, Part I, no. 510 of 21 July 2009.

[2] Gheorghe Ivan, Mari-Claudia Ivan, Certain questionable innovations of the New Romanian Criminal Code, Law Journal, no. 11, Bucharest, 2012, p. 98

Due to their nature and especially to their purpose, in accordance with the provisions of article 133 of the New Criminal Code, the educational measures applied by courts to juvenile offenders do not attract any prohibition, disentitlement or disability.[3]

The following conditions stipulated in article 114 paragraph 2 of the New Criminal Code are required to implement educational measures:

a) the punishment provided by the law for the offense committed is imprisonment for seven years or more or life imprisonment;
b) the juvenile has also committed a crime for which he was given an educational measure which was served or whose serving began before committing the new offense for which he/she is under trial.

In the case of the non-custodial educational measures, according to article 114 paragraph 1 New Criminal Code, they necessarily apply if the penalty prescribed by law for the offense committed is imprisonment of less than 7 years.

The educational measure of *the civic training stage* provided in article 117 of the New Criminal Code is the juvenile's obligation to participate in a programme of at most 4 months, to help him/her understand the legal and social consequences that he/she is exposed to in case of committing criminal offenses and to make him/her accountable for his/her future behaviour.

This measure has an after-crime preventive nature, as it causes the awareness of illegal actions committed by the juvenile and it ensures the correction of his/her antisocial behaviour after committing the crime.[4]

The programme within the civic training stage must be established outside school courses or professional activity in order not to disturb their normal carrying out.

Supervision (article 118 New Criminal Code) consists in controlling and guiding the juvenile in his/her daily programme, for a period lasting between 2 and 6 months, under the coordination of the probation service in order to ensure attendance of school courses or professional training courses and prevention of conducting certain activities or getting in touch with certain persons who could affect his/her correction process.

This measure is aimed at checking the juvenile's daily behaviour in order to remove the factors that lead to delinquency.

The minimum duration of this measure is 2 months and the maximum of 6 months and it is implemented after the final decision. The execution of the measure is done daily, in compliance with the programme established by the probation service.

The educational measure of *confinement at weekends* is stipulated in article 119 New Criminal Code and it refers to the juvenile's obligation of not leaving the house on Saturdays and Sundays, for a period between 4 and 12 weeks except if during this period he/she is required to participate in certain programmes or to conduct certain activities imposed by the court.

Confinement implies a higher degree of constraint, since the juvenile is kept from leaving the premises of his/her house on Saturdays and Sundays, the only exceptions regulated by law which allow the juvenile to leave home while serving the punishment are occasioned by participation in certain programmes or activities imposed by the court.[5]

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[3] Costel Niculeanu, Legal regime of non-custodial educational measures in the light of the New Criminal Code, in the Law Journal, no. 8 Bucharest, 2012, p. 109.
[4] Alexandru Boroi, Criminal Law. General part. Compliant with the new Criminal Code, C.H. Beck Publishing House, Bucharest, 2010, p. 407.
[5] Alexandru Boroi, *work cited,* p. 408.

The scheduling of the measure on Saturdays and Sundays prevents the juvenile from being in certain entourages or environments that can influence him/her negatively, causing him/her to commit other crimes.

Supervision is coordinated by the probation service.

The minimum duration of this educational measure is 4 weeks and the maximum is 12 weeks and it is scheduled for Saturdays and Sundays cumulatively, not just for one of them.

If the educational measure could be scheduled and served intermittently on Saturdays and Sundays, it would be emptied of content by lack of juvenile supervision opportunities and implicitly aimless.[6]

The educational measure of *daily assistance* (article 120 NCC) consists in the juvenile's obligation to respect the programme set by the probation service, which contains the schedule and conditions for carrying out the activities, as well as the restrictions imposed on the juvenile.

This measure is taken for a period between 3 and 6 months and supervision is coordinated by the probation service.

Through the direct intervention of the probation service in organising the juvenile's daily schedule, the daily assistance is the most severe of the non-custodial educational measures under the new Criminal Code. Thus the juvenile is unable to carry out his/her normal activities of daily living, he/she is bound to respect a pre-established schedule based on participation in certain activities, observance of certain requirements, as well as imposing certain prohibitions[7] (for example prohibition of attending discos, bars etc.).

According to article 123 paragraph 1 of the new Criminal Code, the court may order changing the educational measures if the juvenile does not comply, in bad faith, with the execution conditions or obligations imposed by court order.

The court has the following possibilities:

- to replace the measure with another more severe non-custodial educational measures;
- to replace the measure taken by admission in an educational centre;
- to replace the non-custodial educational measure with the measure of admission in an educational centre, if after the extension of the measure or its replacement with another one more severe the juvenile does not comply with the obligations imposed by the court or with the serving conditions.

The educational measure of *admission in an educational centre* (article 124 NCC) consists of placing the juvenile in an institution specialised in the rehabilitation of juveniles where he/she will attend an educational training programme, as well as social reintegration programmes for a period between one and 3 years.

If during admission the juvenile commits a new offense or he/she is prosecuted for a previously committed offense, the court may maintain the measure of admission in an educational centre, extending its duration, without exceeding the maximum period stipulated by the law, or it can replace it with the measure of internment in a detention centre.

If during admission the juvenile has shown constant interest in acquiring educational and professional knowledge and has made progress towards social reintegration after serving at least half of the admission, the court may order the following:

[6] Costel Niculeanu, *work cited*, p. 111.
[7] Alexandru Boroi, *work cited*, p. 409.

- replacement of admission with the educational measure of daily assistance for a period equal to the duration of the non-executed admission, but not longer than 6 months if the person admitted is under the age of 18;
- release from the educational centre if the person admitted has turned 18;
- together with the replacement or release the court enforces the compliance with one or more of the obligations set out in article 121 until the end of the admission measure;
- if the juvenile does not comply, in bad faith, with the serving conditions of the daily assistance measure or the obligations imposed, the court reconsiders the replacement or the release and orders the serving of the unexecuted remainder of the duration of the admission measure in an educational centre;
- in case of committing, up to the fulfilment of the admission duration, a new crime by a person under the age of 18 and who was ordered the replacement of the admission measure in an educational centre with the daily assistance measure, the court reconsiders the replacement and orders the serving of the shortfall in the duration of the initial admission measure, with the possibility to extend its duration up to the statutory maximum or internment in a detention centre.

The educational measure of internment in a detention centre (article 125 new Criminal code) consists in placing the juvenile in an institution specialised in the recovery of juveniles, with a security and surveillance system, where he/she will attend intensive social reintegration programmes and educational and professional training programmes according to his/her skills.

Admission is scheduled over a period of 2 to 5 years, except if the punishment provided by the law for the offense committed is imprisonment for 20 years or more or life imprisonment, when admission is taken over a period of 5 to15 years.

If during admission the juvenile commits a new crime or he/she is tried for a previously committed offense, the court extends the admission measure without exceeding the maximum specified in paragraph (2), established in relation to the worst punishment provided by law for the crimes committed.

From the educational measure the time served until the date of the court decision is subtracted.

In case during the admission the juvenile has proven constant interest in acquiring academic and professional knowledge and he/she has made good progress related to the social reintegration, after serving at least half the admission period, the court may order the following:

- replacement of admission with the educational measure of daily assistance for a period equal to the duration of the admission not served, but not longer than 6 months if the person admitted is under the age of 18;
- release from the detention centre if the person admitted is under the age of 18;
- together with the replacement or release, the court requires the compliance with one or more of the obligations set out in article 121, until serving the time of the admission measure;
- if the juvenile, in bad faith, does not comply with the conditions of serving the measure of the daily assistance or the obligations imposed, the court reconsiders the replacement or the release and orders the serving of the remainder of time not served of the internment measure in a detention centre;

- in case of committing, before serving the admission time, a new crime by a person under the age of 18 and who has been ordered the replacement of the internment measure in a detention centre with the daily assistance measure, the court reconsiders the replacement and orders serving the remainder of the time not served of the internment measure in a detention centre or the extension of this admission as provided in paragraph (3).

By eliminating the penalties from the category of criminal sanctions applicable to juvenile offenders, the new Criminal code exclusively provides the courts with educational measures through which the formative-instructive and educational functions of such measures should be streamlined.[8]

Regarding the enforcement of preventive measures on the juvenile offender, *the New Criminal Procedure Code*[9] establishes special enforcement conditions of these measures on juveniles. In accordance with article 243 paragraph 2, arrest and detention may be ordered against a juvenile defendant only in exceptional circumstances, so that the effects of the deprivation of liberty would have on the juvenile's personality and development should not be disproportionate as compared to the aim pursued by taking the measure. In determining the period for which the preventive custody measure is ordered one takes into consideration the defendant's age since the date of ordering taking, extending or maintaining the measure.

In case of ordering the detention or arrest of a juvenile it is mandatory to notify his/her legal representative or, according to the case, the person in whose care or supervision is the juvenile. When the measure of preventive custody is taken, the probation service is also notified about this and about the place of the juvenile's detention, that is the probation service near the court which would have the jurisdiction to hear the case in the first instance (article 243 paragraph 4).

Article 244 of the New Code of Criminal Procedure stipulates that the detention regime must be particular in relation to the age peculiarities, so that the preventive measures taken against the juvenile offenders are not detrimental to their physical, mental or moral development. This aspect of the new legal text can be considered as a protective measure against juvenile offenders.

However, the effectiveness of the preventive measures is questionable. Since the punishments applied to juveniles were removed from the New Criminal Code, simply in order to emphasise more the educational measures and their functions, the new Code of Criminal Procedure maintains the preventive measures applicable to juveniles. I consider that the preventive measures do not have the educational nature pursued by the requirements of the new Criminal Code, but rather a binding nature. This is clear from the wording of article 202 of the new Code of Criminal Procedure, which provides that the purpose of the preventive measures is to ensure the good functioning of the criminal process, preventing the abstraction of the suspect or of the accused from prosecution or trial or to prevent committing another crime.

The right to defence is guaranteed to the juvenile defendant by article 90 paragraph 1 letter a). It states that for the suspect or for the accused juvenile the legal assistance is mandatory. Article 91 paragraph 1mentions that if the suspect or the accused has not chosen a lawyer, the judicial body shall ensure the appointment of a public defender. If the chosen lawyer is absent without a reason, does not provide a replacement and refuses to conduct

[8] Costel Niculeanu, *work cited*, p. 114.
[9] Adopted by Law no. 135/2010 published in the Official Gazette of Romania, Part I, no. 486 of 15 July 2010. The New Criminal Procedure Code will enter into force on the date established by law to implement it.

his/her defence, although the exercise of all procedural rights was ensured, the judicial body takes steps to appoint a public defender to replace him/her, giving him/her a reasonable time limit and the necessary facilities for preparing an effective defence, mentioning this in the minutes or at the end of the session. During the trial, after the start of the debate, when the legal assistance is mandatory, if the chosen lawyer is unreasonably missing at the hearing, he/she does not provide a replacement and refuses to conduct the defence, although the exercise of all the procedural rights was ensured, the court shall take steps to appoint a public defendant to replace him/her, giving him/her a period of 3 days to prepare the defence.

The Future Criminal Procedure Code establishes a new institution applicable in the criminal trial, the „plea agreement." Article 478 paragraph 6 of the new Code of Criminal Procedure provided as protection measure of juvenile defendants their prohibition from signing such an agreement. The plea agreement aims at confessing committing the deed and the acceptance of the legal classification of the offense for which the proceedings were started, and it concerns the type and amount of the punishment, as well as its execution type.[10]

Article 352 of the new Code of Criminal Procedure establishes the rule according to which the hearing is public, but if it brought prejudice to the juveniles' interests, the court may declare the session closed for the entire or only a part of the trial.

Regarding the trial of the case, article 509 of the new Criminal Procedure Code stipulates that it is urgent and with priority and it is not public. If the defendant is a juvenile under the age of 16 and the court considers that the use of certain evidence may have a negative influence on him/her, it may order his/her removal during the hearing. The parents or the persons entitled to representation may be temporarily removed from the courtroom if it is considered that they do not have a positive influence on the juvenile. In order not to confuse the juvenile and not to affect him/her psychologically, the legal text states that his/her hearing will be held once, and the second hearing shall be admitted by the judge only in duly justified cases.

Article 510 of the new Code of Criminal Procedure provides that when in the same case there are several defendants, both juveniles and adults, and dissociation is not possible, the court will follow the usual procedure for the trial. The provision is the same as in the current regulation of the Code of Criminal Procedure, regarding the juvenile defendants in these cases, the provisions relating to the procedure in the cases with juvenile offenders are applied.

The new Code of Criminal Procedure stipulates in article 415 a new institution called the withdrawal of the appeal. The text of the article states that the juvenile defendant may not withdraw the appeal declared in person or by his/her legal representative. The provision seeks to guarantee the juvenile defendant's right to the trial of his/her case in another stage of the criminal trial, by the other judges who can give a different appreciation to the evidence, giving a solution potentially more favourable than the one of the first instance.[11]

The new rules set out in the new Code of Criminal Procedure tend to protect more the juvenile suspect or accused, hopefully they will be effective from a practical standpoint, not just from a theoretical one.

Every juvenile should be treated by observing the principle of non-discrimination, of human dignity and equality, both concerning him/her and his/her family. The free expression of opinion about criminal justice, taking into account the age of the juvenile

[10] Camelia Şerban Morăreanu, Protection of juveniles by the provisions of the new Criminal Procedure Code, in the Criminal Law Journal, year XIX, no. 2, Bucharest, 2012, published in collaboration with Universul Juridic Publishing House, p. 105.

[11] *Ibid.*

represents one of his/her rights that should not be restricted. The child's right to privacy, family, home, correspondence is an attribute of human rights observance.

Society has always focused on educating children and solving some problems such as their maltreatment, subjection to torture or other forms of treatment or cruel, inhuman or degrading punishment. The sanctioning systems of juvenile offenders are different from one society to another, some countries also including the criminal treatment in the special legislation applicable to juveniles (for example Portugal, Spain, Switzerland, Germany). It is imperative that juveniles be treated in a manner to facilitate their reintegration into society with observance of their rights and creating a constructive role within the society.

The recent trend is to improve the prison conditions. Following his visit in our country in March 2012, the Vice-President of the European Court of Human Rights appreciated the measures taken by the Ministry of Justice to improve detention conditions and also working conditions of the prison staff.

Conclusions

Criminality among juveniles is a problem that has worsened in recent years. This phenomenon must be fought primarily through the provision of care, education and rehabilitation of juvenile offenders.

The sanctioning and mixed system, consisting of educational measures and punishments, which is covered in the current Criminal Code, did not prove effective over time. To avoid subjecting juvenile offenders to torture, ill-treatment or contact with adult offenders during serving the sentence, the new Criminal Code brings a number of non-custodial and custodial educational measures. I believe that such legislation is necessary especially for juveniles who are in detention because once in prison they become true offenders.

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THE FLEXIBILITY OF LAW SYSTEM

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Abstract: *The present paper intends to prove the necessity of law flexibility. Thus, I will describe the most important steps in the evolution of the intestate succession. The Romanian legal system is of Roman-Germanic origin, so that the Roman Law will be considered to be the starting point in the present paper. As far as we know, the ancient Romans were gathering together inside their senate house and were imagining lots of circumstances concerning one single social aspect before having legislating in the respective field. Anyway, the laws were being changed according to the evolution of the society as they had to keep up with the social progress. Thus, the Roman legal system developed itself, and after the collapse of the Roman Empire, it represented the basis of more legal systems in different countries, giving birth to the so-called Roman-Germanic law system. The Romanian Law, concerning the probate law, met more changes, the most recent one being the changing of the Civil Code under the influence of the following codes: The Civil Code of Quebec, the French Civil Code, the Italian Civil Code, the Spanish Civil Code, the Swiss Civil Code, the German Civil Code, and the Brazilian Civil Code. The present paper will bring out into strong relief why some aspects could have been adopted by our civil Code and why some others could not, for reasons connected with tradition, religion or history as well.*

Keywords: *probate law, flexibility, adaption, comparaison*

Any primitive society is governed by strict religious rules for living. Law is a component of the sacred, and the clergymen are in charge with making and keeping justice. This feature which was firstly shown by Fustel de Coulanges, lets us distinguish the following aspects: it is the patriarchal family that is the owner of all the assets. Family never dies as there are always certain members of it who will take good care of the perpetuation of the ancestors cult.

Taking into consideration that the first stage of any society met only the *inter vivos* juristic papers, our first conclusion is the following: people could not have simply conceived that the wish of a man had no effects after his death. Secondly, the process of transmitting a fortune to a human community that traces back to a common forefather, is done according to the rules which refer to maintaining the funeral cult.

Thus it could be said that what we call today to be an intestate law was founded before the testamentary one. In time, when changes took place in the mentality of the citizens of the respective fortress, the importance of the individual turned to be greater than the importance of the social group. The head of the family tries to take away the assets from under the control of the community[1].

This very fact correlated with the various circumstances which were specific to every single antique society, with the appearance of property leads, later on, to the appearance of the will, at first like an adoption, and after that as an institution *inter vivos.* Finally, the juristic paper *mortis causa* will appear.

The testamentary will and the intestate will cannot coexist, in the sense that no one could ever dispose only of a part of his fortune, and let the rest of it being transmitted by

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[1] Vladimir Hanga, Mircea Dan Bocsan, Course of Roman Private Law, the second edition, Universul Juridic Publishing House, Bucharest, 2006.

means of his testament. This rule brings out into strong relief that the two forms of inheritance appeared in two different epochs, namely, the testament after the intestate law.[2]

It is obvious that law changes itself according to the needs of the society which generated it. Anyway, I was deeply impressed by the seriousness of the juristic norms in that old period of time. The testamentary law is one of the most complicate systems, including different ways of calculating how much of an inheritance is there to be shared to every single inheritor.

In our Romanian law, an inheritance can be transmitted in two ways: the intestate law and the testament, but they can coexist.

Accepting an Inheritance

Three Orders of Inheritors

The inheriting system of the old civil law refer to persons born free according to the Law of the Xll Tables, as to the rule: *Si intestate moritur, cui suus heres nec escit, adgnatus proximus familiam habeto. Si adgnatus nec escit gentiles familiam habento.*[3]

This is the way three orders of inheritors are created: *sui heredes, agnates and gentiles.*

- *Sui heredes* are persons who, after the death of *pater familias* turn into *sui iuris* because before the death of *de cuius* they were under his control. These persons can inherit with priority when coming to inheritance together with the other civil relatives of *de cuius.* This category is made up of: the sons and daughters, the surviving spouse married with *mannus (*as a daughter) as well as the grandsons if their father died before the grandfather.

Iustinian, in *Iustiniani Institutiones* gave us the following explanation: `The old law, as it preferred men, asked to come to inheritance, as *sui heredes*, only the grandsons. The daughters` grandsons and granddaughters` grand grandsons entered the category of cognates. They were admitted to inheritance after the agnates. This is why the ancient emperors could not let such an injustice be perpetuated and corrected it in the following way: as the words `grandson` and `grand grandson` are used both for inheritors coming on masculine line and on feminine line as well, the respective persons were given the same inheritance grade and order`.[4]

According to the civil law, the fortune of the deceased person was shared *per capita*; every single child and the surviving spouse too were getting an equal part. They were pushing aside the grandsons and other farther inheritors of the deceased person.

The modern law extracted *the principle of priority of the grade* among the members of the same category of inheritors. A significant correction appeared in Rome: if one of the children had died before the process of inheritance opening, his descendents (namely the grandsons of *de cuius)* could come to inheritance as well as instead of him (the so called *successio in locum).*

The correction was made in order to guarantee the sharing of the inheritance *per capita* in case the child accidently dies before his father. As Gaius explained in `Institutions`, the inheritance is shared not *per capita*, but on branches.

[2] C.St.Tomulescu, Roman Private Law, University of Bucharest, Faculty of Law, Bucharest, 1973, page 199-219.
[3] P.F.Girard, Textes de droit romain, Paris, 1937, p.895.
[4] Iustinian, The Institutions of Iustinian, translation and notes by Vladimir Hanga, Mircea Dan Bob, The Juristic Universe Printing House, Juristic Culture Collection, Bucharest, 2000, page 239.

Successio in locum was taken over by the French modern law and appeared in our Romanian law under the name of representation.

- ♦ *The intestate succession of the agnates* – the agnates represent the second order of inheritance or the first one for the women who could not have their own successors. According to the Law of the Xll Tables the fortune is given to the closest relative, or to the closest agnate (if there is any).

The following relative relationships among men are of agnatic origin:

- brothers having the same father (not with the same mother necessarily);
- the brother of the father is agnate with the son of the brother and the other way round;
- the sons of the brother.

- ♦ *Gens* – the third order is made up of members of the *gens* to whom the deceased belongs, suppose the person was born free. The rules of this successional law are not entirely known as it disappeared quickly. Many specialist agreed upon the idea that this right could be older even than that of agnates.[5]

According to the way of accepting a succession, the inheritors were divided into three categories:

1. *sui et necesarii heredes (sui heredes* were also *necesarii* at the same time because they could not reject the fortune, which became theirs by all rights. They were coming either to the testamentary succession if they had been named, or to the intestate succession, but belonging only to a *pater familias.* The women did not have *sui heredes.*
2. *heredes necesarii* were represented by the slaves who had been named in the testament and thus set free, at the same time. They could not also reject the fortune. They could benefit only by the testamentary succession and only if they met some conditions.
3. *heredes extranei* or *voluntarii. Extranei* meant the inheritors who did not belong to the family of the deceased. *Voluntarii* meant `of free will`. They were not forced to accept the fortune, they were accepting it willingly (*aditio hereditatis)*

Ways of accepting a fortune according to the civil law[6]

We distinguish the following ways of accepting a fortune according to the civil law:

1. *Cretio.* The person who was accepting the fortune was saying the following words: *Quod me P.Mevius testamento suo heredem instituit eam hereditatem adeo cernoque* (Because P.Mevius – the name of the deceased- named me to be his inheritor by his will, I do accept his fortune).
2. *pro herede gestio (*administrating a fortune as an inheritor) when the inheritor was accepting the fortune by tacit agreement. Ex: someone alienates an asset that belongs to the respective fortune.
3. *Nuda voluntas (*the simple will) when the inheritor was explicitly expressing his agreement. The praetorian succession was accepted by means of an application addressed to the praetor who was according *bonorum possessio* without making inquiries about its being right.

[5] C.St.Tomulescu, quoted work.
[6] C.St.Tomulesu, quoted work.

The features of accepting a fortune

1. it is simply done;
2. it is irrevocable according to the rule *`semel heres simper heres`;*
3. it is personal; it could not be done by authorized representatives.

The conditions for accepting a fortune

It has to be done by a person who is named and has capacity of acceptance (*factio testamenti* and *ius capiendi* at the same time).

The moment of accepting a fortune

Generally speaking, the inheritor may accept it anytime as long as the succession was opened. Little by little, more other procedures have been created either to force the inheritors to express their agreement, or to create new categories of inheritors. We can mention:

1. the rule *hereditas non adita non transmittitur (*the unaccepted fortune cannot be transmitted). If the inheritor died before accepting the fortune, it could not have been transmitted to his descendants, so the fortune was lost.
2. the rule *usucapio pro herede (*usucaption because the inheritor is missing).

The Roman conception regarding the intestate law in the old and in the New Civil Code

Nowadays, the word *`inheritance`* means transmitting the assets of an individual who died towards one or more persons alive – art.953 New Civil Code (individuals, juristic persons or the state). Thus the rules which governs the inheritance may be applied only when an individual dies, and not when a juristic person ceased its existence.

The deceased person is also named *de cuius*, abridged formula which comes from the Roman Law *`is de cuius successions rebus agitur` (*the person whose fortune we speak about).

The persons who get the fortune are nemed *inheritors* or *successors.* Ex: in the New Civil Code, art. 1120 (3), art. 1121 (19), (20), art. 1123, etc.

The concept of belongings. This concept is used in order to express the assets which belonged to *de cuius* and which were transmitted to one or more persons alive. Under such circumstances, we may speak about the fortune got by the inheritors or the fortune left by the deceased, or the vacant fortune (*hereditas iacens,* coming from the Latin *iaceo*=to lay).

The concept of succession renders, generally speaking, any transmission of rights among living persons or *mortis causa.*

As far as we can notice, the Romanian terminology reflects the Latin one and the Roman thinking upon the intestate succession and the testamentary one, both in the Old Civil Code, and in the New Civil Code, too.

A new aspect is to be noticed: under the influence of the French Civil Code and of the Quebec Civil Code, the cases of absolute and judiciary indignity have been regulated in Chapter ll of our New Civil Code. There have been also regulated the indignity effects and the removal of these effects by the explicit agreement of *de cuius.*[7]

Taking into consideration the critical comments in the Romanian and French doctrine, the disposition of the Old Civil Code (art.806)[8], according to which the minor between 16-

[7] New Civil Code, Hamangiu Printing House, Bucharest, 2009, page 16.
[8] Old Civil Code, Hamangiu Printing House, Bucharest, 2004, page 283.

18 years old could not have at his disposal more than half of his fortune, was removed, because this disposition made half of the fortune belonging to a deceased with no intestate inheritors become vacant.[9]

The New Civil Code brings about many new dispositions regarding a testament[10]:

- emphasizes the necessity of handwriting the holographic testament;
- modernizes the branch of the privileged testament;
- the definitions of the general legacy and of the universal legacy have been restated in order to remove the critical opinions concerning art. 888 and 894[11]and the correspondent ones in the French Civil Code;
- the dispositions regarding the effects of the legacies have been unified and simplified;
- the disinheritance has been redefined, taking thus into consideration the opinions of the Romanian specialists.

Regarding the procedure of executing a will, Law 36/1995 referring to the public notaries and their activity, and the corresponding norms in the French Civil Code have been made use of. Inheritance transmission and partition` (Title lV) brings also several new aspects in the field.

- ♦ Inheritance option and inheritance application are treated unitary emphasizing the fact that the inheritor`s creditors may exercise an oblique action against the right of succession option in order to fully satisfy their debts.
- ♦ A clear distinction between reporting donations and reporting debts is made;
- ♦ A modern and unitary regulation of evaluating the reported assets is made[12]

Orders of Inheritors

The Civil Code regulates four orders of inheritors:

a. the 1st order – the direct descendants (sons, grandsons, grand grandsons, etc) of the deceased, with no limit of grade;
b. the 2nd order – a mixed class of the privileged ascendants (the parents of *de cuius*) and the privileged collaterals (brothers and sisters of *de cuius* and their descendants up the grade lV, including it);
c. the 3rd order – the ordinary ascendants (grandparents, grand grandparents of *de cuius* with no limit of grade);
d. the 4th order – the ordinary collaterals (uncles and aunts, first cousins, the brothers and sisters of the grandparents of *de cuius).*

According to the German Law system (Germany, Austria, Switzerland) the relatives of *de cuius* are divided into three main lines, being asked to come to inheritance in the following order:

a. the descendants of the deceased;
b. father and mother of the deceased (heads of the line) and their descendants who are not the descendants of the deceased at the same time;
c. the grandparents of the deceased (heads of the line) and their descendants.[13]

[9] New Civil Code, Hamangiu Printing House, Bucharest, 2009, page 17.
[10] New Civil Code, Hamangiu Printing House, Bucharest, 2009.
[11] Old Civil Code, Hamangiu Printing House, Bucharest, 2004, page 286.
[12] New Civil Code, page 18.
[13] Francisc Deak, Treatise of Succession Law, second edition, Juristic Universe Printing House, Bucharest, 2002, page 74.

The general principle of Inheritance Devolution

According to law, the relatives of the deceased and his surviving spouse are asked to come to inheritance. If de cuius did not leave any testament and if he had no relatives or surviving spouse, then the state will take the inheritance.

l.The Principle of Sharing the fortune to Relatives According to Their Grade

A class of inheritors is a category of relatives (for instance the descendants of the deceased) who removes another category or it is removed by another category, even if the relatives of the removed category are closer in grade to the deceased than the relatives in the named category.[14]

ll.The Principle of Kindred grade Proximity Among the Inheritors of the Same Order

According to this principle, inside the same order, the relatives with a closer grade remove the relatives with a further grade.

There are two exceptions from this rule:

a. inside the 2nd class, the parents of the deceased did not remove from inheritance the brothers or the sisters of the deceased and their descendants, but come together with them all to fortune, getting certain legal shares;
b. succession representation.

lll. The Principle of Equality Among Relatives of the Same Order and Grade

The relatives of the same grade share the fortune equally.The law regulates two exceptions:

a. the fortune is shared in branches when relatives of the same grade come to inheritance by succession representation;
b. if two or more privileged collaterals (brothers, sisters off-springs of different parents) come to inheritance, the fortune is shared in lines. The equality is kept only for the brothers of the same line, but the good brother of the deceased takes advantage, as he is given shares from the both lines (the privilege of the double link)[15].

Kinds of Inheritance

According to the New Civil Code, art.953 `the inheritance is the transmission of the fortune of an individual to one or more persons alive`. The inheritance can be intestate or testamentary. According to art. 955 (1) NCC, `the fortune of the deceased is transmitted by intestate succession if he did not dispose of his fortune some other way round by his testament`. The same art. (2) says:` a part of the fortune of the deceased may be transmitted by testamentary succession and the rest by intestate one.` We should notice that, unlike the Old Roman Law, testamentary succession and the intestate one can coexist nowadays.

In Roman Law, the testamentary succession was the rule. This is why the intestate one was being defined by reporting. It could also refer to the situation of a deceased person who did leave a testament but the testament had not been written according to the norms of time (situation which meant actually the absence of the testament).

On the other hand, in Roman Law, the testament had, under the penalty of absolute nullity (nullity in law), to mention the name of the inheritor, according to the rule *heres est*

[14] Francisc Deak, quoted work, page 73.
[15] Francisc Deak, quoted work, page 77.

caput et fundamentum totius testamenti. The name of the inheritor had to be at the very beginning (*caput)* of the testament, before any other other legacies or dispositions, fact which was absolutely necessary for a testament to be valid (*fundamentum)*[16].

In our law, the intestate succession is the rule.[17]It can be removed totally or partially by the testament left by *de cuius*. On the other hand, the inheritors cannot be named by means of a testament (*heredes gignuntur non scribuntur)*[18]but only legatees. These legatees may get the assets as general legacy, or specific legacy as well, just like the intestate inheritors may do, fact which justifies their being named testamentary inheritors.

Ways of Accepting the Inheritance

The inheritance may be accepted explicitly or tacitly (art. 1108 NCC). It is explicitly done when the inheritor explicitly appropriates the title or the quality of inheritor by means of a simple or an authentic certificate. It is tacitly done when the inheritor commits an act or a deed which could not have been done unless he were an inheritor. According to art.1110NCC, the following act are considered to be tacitly accepted acts:

a. gratuitous or onerous transfer of the ownership of an inheritance by the inheritor;
b. the act of abandonment, even gratuitous, for the benefit of one more specified inheritors;
c. the onerous fortune abandonment, even in favour of all inheritors or in favour of the subsequent inheritors.

Juristic Features of Transmitting an Inheritance

The in heritance has some features which distinguish it from the other ways of transmitting rights and responsibilities in civil law. These features have been taken over from the Roman Law, as it follows:

1. *inheritance transmitting is a mortis causa transmission* as it may always be produced as an effect of the physical death of an individual (*viventis hereditas non datur* was the correspondent Roman rule.
2. *inheritance transmitting is an universal transmission,* because its object is the whole patrimony of the deceased individual, namely all the rights and responsibilities with economic value which belonged to the deceased.
3. *inheritance transmitting is a unitary transmission* in the sense that the inheritance, as a whole, namely all the rights and responsibilities of the deceased are transmitted to legal inheritors or to legatees according to the same juristic norms, no matter the nature or origin of the assets which make up the patrimony.
4. *inheritance transmitting is indivisible* in the sense that accepting or renouncing has an indivisible character. Its object cannot be only a part of the inheritance. Every single inheritor must accept the inheritance according to his right or reject it.

[16] Vladimir Hanga, M.Jacota, Roman Private Law, Didactic and Pedagogic Printing House, Bucharest, 1984, page 240; Emil Molcut, Dan Oancea, Roman Law, The Chance Printing House, Bucharest, 1993, page 141.

[17] The intestate succession is `in the spirit of the Civil Code, the most natural way of transmitting the fortune of a deceased`, C.Hamangiu, I.Rosetti-Balanescu, Al.Baicoianu, Treatise of Romanian Law, 3rd volume, Bucharest, 1928, page 364. The exceptional character of the testamentary succession is emphasized in other systems of law, too. See, for instance, concerning the Swiss Law, J.Guinaud, M.Stettler, Droit civil II. Successions, Fribourg University Printing House, Switzerland, 1999, page 37-38.

[18] Lat.Gigno, gignere, genui, genitum = to give birth, to create.

General Conditions of the Inheritance Right

The old Civil Code regulates this aspect in the title `On the qualities necessary for succession` (art.654-658). The NCC regulates these aspects in Book lV, chapter ll (art. 957-962). A negative and a positive condition should be fulfilled by the individual in order to have the inheritance right:

a. to have ability to inherit, namely to exist when the inheritance is opened;
b. to have claim to an inheritance (art.962 NCC), not to be unworthy to inherit (art.958 refers to the inheritance unworthiness and art. 958 – to the judicial unworthiness.

The Data of Opening an Inheritance

As the inheritance is opened after the death of *de cuius*, the data of its opening coincides with the data of death of the person who leaves the inheritance. The data of opening the inheritance should not be taken for the data of beginning the notary succession procedure. It comes out that the person who claims the inheritance or certain rights of the inheritance must prove the death –data, hour, even minute- of the person whose fortune he wants to inherit.

Conclusion

All these facts prove the necessity of a flexible system of law as well as the capacity of our Romanian law system to be able to take into consideration the fundamental principles of law and to adapt itself to the evolution of the contemporary society.

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POLITICAL IDEOLOGIES OF THE LEFT WING: CONCEPTUAL CLARIFICATIONS

Adrian IORDACHE

Abstract: *The Present study is trying to spotlight the differences and the interferences between the different ideologies of the left, these ideologies that marked so powerfully the twentieth century. After a brief explanation of the concept of „ideology", we focused on Marxist socialist ideology. The next moment of our analysis consisted in how the social-democracy was formed and the role of Edward Bernstein in this context. Next, we saw how it detached the communism from the social-democracy and the importance of Lenin in the configuration of this new ideological movement. At the same time, we analysed the Stalinism, the Maoism and the Titoism. Finally, we discussed about the fall of communism and the place of the left ideology in our days.*

Keywords: *Marxism, social-democracy, communism, Maoism, Titoism.*

Introduction

Left = communism. Many people believe that. But things are not so simple. Such a simplistic reduction reveals either ignorance or ill will or both. To see things only in black or white is problematic for the onlooker. So, let little shade things.

What is ideology?

Essentially, an ideology is a beliefs system society can be improved by following certain doctrines; usually ends in -ism.

The starting point of an ideology is the belief that things can improve; it always provides a plan to improve society. Practically, ideology is a verbal picture of good society and the main means to build such a society.

Ideologies are not calm, rational attempts to understanding things. They are more likely commitments to change them (classical conservatism is an exception). In politics, ideology cemented together movements, parties and revolutionary groups. To fight and to support sacrifices, people need an ideological motivation. In fact, ideologies have a practical purpose: convincing more people, in order to build political movements and especially in order to win elections.

But, unfortunately, ideologies do not work just as their followers claim. Some are horrible failures. Ideologies contain utopias that often yield to reality. Although ideologues claim that they can create a perfect world, the reality always snubs them, with its imperfection. Classical liberalism of Adam Smith indeed contributed to economic growth in the nineteenth century, but has also led to large differences in wealth and repeated crises. It was modified in modern liberalism. Communism led to the brutal tyranny, economic failure and collapse. China has abandoned Maoism discreetly for rapid economic growth.

Marxist Socialism

Socialism is an economic and political system in which the government owns the industry declaratively for the good of the whole society; it is opposed to capitalism.

Liberalism (classic variety) dominated the nineteenth century, but critics deplored the growing gulf between rich and poor. Some did not believe that a few reforms would suffice; they wanted to overthrow the capitalist system. These were the socialists, and their leading thinker was Karl Marx.

Marx wrote not as a scholar but to promote revolution. He hated the „bourgeoisie" long before he developed his elaborate theories that they were doomed. An outline of his ideas appeared in his 1848 pamphlet, *The Communist Manifesto*, which concluded with the ringing words: „The proletarians have nothing to lose but their chains. They have a world to win. Workers of all lands, unite". Marx co-organized the first socialist parties in Europe.

Capital (*Das Kapital*) was a gigantic analysis of the reasons for which capitalism will be overthrown by the proletariat. Then socialism would come, a fair society, productive, without class distinctions. Subsequently, in a certain stage, when industrial production would be very advanced, socialist society will turn into communism, a perfect society without police, money or government. Goods will be in abundance so that people will simply take what they need. There will be no private property, so there will be no need for police. Because the government is simply a tool of class domination, with the abolition of the difference between classes, it will not need a state. It „will wither". Communism was then a predicted utopia beyond socialism.

Marx focused on the shortcomings and malfunctions of capitalism and not ever specified how socialism would look. Marx focused on the shortcomings and malfunctions of capitalism and never specified how it would look. He just said that socialism would be better than capitalism, nothing concrete about its activities themselves. This has caused all sorts of socialist thinkers to present their visions of socialism and to support that it meant Marx. The visions alternated from the „welfarism" moderate, focused on social protection of social democratic parties, to anarcho-syndicalism (unions to lead all), hyper centralized tyranny of Lenin and Stalin, its denunciation by Trotsky, Mao's permanent revolution, the destructive, experimental decentralized system of Tito.

These different interpretations of socialism led to the fracture of the socialist movement and then of communism.

Social democracy

Social democracy is the mildest form of socialism, which focuses on social protection measures, but does not favor the idea of state-owned industry.

By the early twentieth century, the German social democrats (SPD) who adopted Marxism had become the largest party of Germany. Marx had not taken too seriously conventional parties and trade unions; they could be at most the training ground of a genuine revolutionary action. But the German social democrats began to have success. They were elected to the Reichstag and local institutions; their unions have achieved higher wages and better working conditions. Some began to believe that the workers could achieve their goals without revolution. Why use bullets when we have ballots?

Edward Bernstein developed this perspective. In his book, *Evolutionary Socialism* (1901), he drew a conclusion quite annoying for dogmatic Marxists: Marx was wrong about the fall of capitalism and revolution.

During the ill-fated Weimar Republic (1919-1933), the social democrats have moderate militancy and collaborated with liberals and Catholics in an attempt to save democracy. Persecuted by the Nazis, SPD revived after World War II, and in 1959 he entirely abandoned Marxism, as did effectively all social democratic parties. In proportion as social democrats from several countries moderate their positions, he obtained more and more votes. They turned to the center-left parties with no trace of revolution.

Then for what social democrats advocate? They have abandoned the idea that the industry is state-owned.

Instead of state ownership of industry, social democrats use welfare measures to improve living conditions: unemployment and medical insurance, generous pensions, and subsidized food and housing. Social democracies have become welfare states: Welfarism would be a more accurate term than socialism.

There's one catch - there's always at least one catch - and that is that welfare states are terribly expensive. To pay for welfare measures, taxes climb.

Communism

Communism is Marxist theory merged with Leninist organization into a totalitarian party.

While the social democrats have evolved in reformists and supporters of social protection, a smaller wing of original socialists remained Marxist and became communist. The central figure of this transformation was a Russian scholar, Vladimir I. Lenin. He made several changes in Marxism, creating the Marxism-Leninism, another name for communism.

Many Russian intellectuals of the late nineteenth century hated tsarist system and embraced Marxism as a way to overthrow Tsarism. But Marx would have wanted that his theory apply in most of the advanced capitalist countries, not in backward Russia, where capitalism was just beginning.

In the seventeenth year of exile in Switzerland, Lenin reworked Marxism to fit the situation in Russia. He offered a theory of economic imperialism, borrowed from German militant Rosa Luxemburg and the English economist John A. Hobson, who wondered why the proletarian revolution that Marx predicted do not arose in the advanced industrialized countries. They concluded that the domestic market can't absorb all the goods that the capitalist system produces, so it has found markets abroad.

Capitalism had become, expanding abroad in colonies to exploit raw materials, cheap labor and new markets. Capitalism thus extended life; it was transformed into imperialism.

With profits from its colonies, the imperialist mother country could pay somewhat the working class to make reformists rather than revolutionaries. Imperialism had to expand, Lenin argued, but develops unevenly. Some countries, such as Britain and Germany, were highly developed, but where capitalism was just beginning, as in Spain and Russia, it was weak.

Industrializing countries were exploited as a whole by the international capitalist system. It was in them that revolutionary fever burned brightest; they were „imperialism's weakest link." Accordingly, a revolution could break out in a poor country, reasoned Lenin, and then spread into advanced countries. The imperialist countries were highly dependent on their empires. Once cut off from exploiting them, capitalism would fall. World War I, wrote Lenin, was the collision of imperialists trying to dominate the globe.

Lenin shifted the Marxian focus from the situation within capitalist countries to the global situation. The focus went from Marx's proletariat rising up against the bourgeoisie to exploited nations rising up against imperialist powers. Marx would probably not have endorsed such a re-do of his theory.

Lenin's real contribution lay in his attention to organization. With the tsarist secret police always on their trail, Lenin argued, the Russian socialist party could not be like other parties-large, open, and trying to win votes. Instead, it had to be small, secretive, made up of professional revolutionaries, and tightly organized under central command.

In 1903, the Russian Social Democratic Labor Party split on this question. Lenin had enough supporters at the party meeting in Brussels to win the votes of 33 of the 51 delegates present. Lenin gave his faction the name *Bolshevik* ("majority" in Russian).Those who lost, pleading for a more moderate line and more open party, took their named *Mensheviks* ("minority"). In 1918, the Bolsheviks changed their name to the Communist Party.

Lenin's attention to the organization proved to be very important. Russia was in chaos because of the First World War. In March 1917, a group of moderates seized power the tsar removing it, but were unable to govern the country. In November, the Bolsheviks had cunningly manipulated councils ("soviets" in Russian), who had appeared in the major cities, and took over the moderates. After winning a desperate civil war, Lenin appealed to real socialists around the world to join a new international movement under Moscow's control. It was called the Communist International or *Comintern*.

Almost all the world's socialist parties were split; left wing joined the Comintern and became a communist party in the 1920-192l. Since then social democratic parties and Communist are hostile to each other.

Maoism and Titoism

Maoism is an extreme form of communism, featuring guerrilla warfare and periodic upheavals, while Titoism is a mild, decentralized form of communism.

In the '30s, Mao Zedong came to the conclusion that the Chinese Communist Party (CCP) must rely on the poor peasants and guerrilla wars. It was a split Stalin, and after decades of dispute, the CCP took over mainland China in 1949.

Mao followed a radical line that included an industrialization failed attempt overnight ("Great Leap Forward" in 1958), destruction of bureaucratic authority (the "Proletarian Cultural Revolution" in 1966–1976), and even border fighting with the Soviet Union in 1969. After Mao's death in 1976, pragmatic leaders moved China away from his extremism, which had ruined China's economic progress. A few revolutionary groups stayed Maoist: Cambodia's murderous Khmer Rouge and India's Naxalites. Maoism is an ultra radical form of communism.

Yugoslav party chief Josip Tito went the other way, developing a more moderate and liberal form of communism. Even though Tito's partisans fought the Germans in Stalin's name, Stalin did not fully control Tito, and in 1948 Stalin had Yugoslavia kicked out of the Communist camp. During the 1950s, the Yugoslav Communists reformed their system, basing it on decentralization, de-bureaucratization, and worker self-management. Trying to find a middle ground between a market and a controlled economy, Yugoslavia suffered economic problems in the 1980s.

Titoism might have served as a warning to Communist rulers who wanted to experiment with „middle ways" between capitalism and socialism. The combination is

unstable and worked only because Tito was the undisputed ruler; when he died in 1980, Yugoslavia started coming apart until, by the early 1990s, it was a bloodbath.

The fall of communism

By the '80s, communism was ideologically exhausted. Few people in China, Eastern Europe and even the Soviet Union believed in it. In the non-communist world, the Left abandoned Marxism. Several Western European communist parties embraced "Euro-communism", an ideology more subdued who gave up the dictatorship and the idea of state-owned industry.

It was supposed that the capitalism must collapse; however, the United States, Western Europe and East Asia prosper. Many communist leaders have admitted that their economies were too rigid and centralized, and the remedy was to reduce state control in favor of free enterprise.

The Soviet President Mikhail Gorbachev (1985-1991) offered a three-pronged approach to revitalize Soviet communism:

- *glasnost* (transparent to the press),
- *perestroika* (economic restructuring),
- *demokratizatsya* (democratization).

Applied hesitant and half-hearted reforms have further intensified discontent because now the Soviets could give voice to their complaints. Since 1989, in Eastern Europe, non-communist parties took power. In the Soviet Union, it was elected a partially free parliament which began debates for change. Non-communist parties and movements have emerged. Gorbachev still could not decide how far and how fast reforms should take place and the economy, barely reformed, became stronger inflationary. A coup d'état in 1991 failed, and by the end of the year Soviet Union ceased to exist.

Political left today

Form that is today the society in Germany, France, England and even the United States is much different from the image of the wild capitalism which strongly criticized the socialists 100-150 years ago. In the time of Marx, and then in the time of Kautsky, Rosa Luxemburg, Bernstein unions were outlawed, strikes were seen as acts of rebellion and many participants in them - arrested, the day does not have a legal limited number of hours, lack of unemployment insurance, sickness and old age, workers and peasants who were not owners (and therefore do not pay taxes) were excluded from voting, welfare was reduced to religious philanthropy, education was not funded State and therefore was not accessible to children from poor classes etc.

Current capitalist system is different from that of the nineteenth century and even the early twentieth century.

Contemporary capitalism has a large public service sector; he does not ignore the hardships of broad social strata since universal suffrage forces in sparing future voters; the principles of human rights, stemming from the French Revolution were adopted by the UN and guide decisions of politicians; property private, though sacrosanct, lead no more to abuses, because it is balanced by a number of other social rights and duties.

Transforming capitalism took place under the pressure of labor movements and socialist critics, but also as a preventive strategy of bourgeois state, that aimed detachment

of part of the working class from the revolutionary movements by improving living conditions.

This image, which may seem idyllic, does not justify the loss of the left, as society gradually began to be eroded from within. How?

First, there is an increasing gap between rich and poor, not only globally, but also within each country. This is likely to increase social tensions, sometimes forcing the state to adopt repressive, undemocratic measures. One of the basic principles of a modern society, the equal rights of all citizens, is being challenged, or is replaced with equity, that is equal opportunities. But in a society of growing economic inequality, to talk about equality, not only in the possibility of access to education, but also in life, in access to different functions in their careers proves ignorance or cynicism.

Secondly, seeking economic efficiency, that is maximum profit demanded by shareholders, constrain managers of large companies to take drastic measures: layoffs of thousands of people from one day to another; the installation of a chronic mass unemployment, impossible to be absorbed; the monopoly control of the market and the limitation of fair competition between economic agents; the gradual abandonment of the pension system based on solidarity between generations and passing to the individualistic pension system etc.

This development, which is found in all countries, it was somehow expected. Once finished the competition between capitalism and communism, with the victory of the first, also disappeared the impulse of capitalism to make concessions, to adopt social measures.

All these show how justified it is and will remain a critical attitude against an unrestrained capitalism, how important it is the role of the modern left in confronting of contemporary ideas.

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THE RIGHT TO A GOOD ADMINISTRATION – FROM THE NEED OF CONSTITUTIONAL CONSECRATION TO ITS IMPLICATIONS ON PUBLIC ADMINISTRATION REFORM IN ROMANIA

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Abstract: *The legal and ethical implications of public administration's behavior in society constitute an important and constant topic of reflection and critical analysis. The topic proposed by the paper is doubly circumscribed: on the one hand, by the need and opportunity of consecrating at the constitutional level of the right to a good administration, and on the other hand, by the situating of the debate on the implications the consecration will have on the Romanian public administration reform. Acknowledges and guaranteed as one of the European fundamental values, by means of its insertion in the Treaty of Lisbon, but operable only in the relations established between the European citizens and the EU institutions, the right to a good administration entered the current Romanian agenda of public opinion debates, of the specialists in the field, of the political class and so on, in their concern to consolidate the observance of citizens' rights by the authorities in the exercising of public power. The establishment of the standards of good administration represents an important premise of increasing the social responsibility of public administration confronted with a permanent set of internal and external challenges in its attempt to intelligently adapt to the social reality. The constitutional consecration of good administration becomes at the same time a strategic axis of the modernization process of the Romanian public administration, allowing the transformation of the administration in a forum articulated in the network of actors involved in the decisional public space, as well as the re-establishing of the balance between citizens' rights – obligations and responsibilities of the public administration in the service of the citizen.*

Keywords: *public administration, good administration, Constitution, review, social-political values.*

I. Introduction

The need to develop a sustainable public administration system, capable of managing the challenges due to the transformations in the Romanian socio-political and economic environment calls for the strengthening of the role of public administration both from the perspective of social responsibility, and from that of offering real, efficient, citizen-oriented services.

Functioning within the grid of values and norms of the political power, public administration derives its legitimacy mainly from the *political power*, to which it is *subordinated*[1], and secondly from its ability to answer the demands originating from the sectors involved in its field of action, a legitimacy rigorously judged and evaluated by the citizens, depending on the amount of values administration observes.

Already subjected to a successive and long reform, the Romanian administration faces a legitimacy crisis, due to the suspending of administrative efficacy as a consequence of the repeated structural modifications administration experiences, as well as of its own decisional processes.

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This crisis determines preoccupations of an increasingly wide segment of citizens, with respect to knowing their rights, the possibility of notifying their breach, participation to the decisional processes which may affect their interests, the public servants' activity etc.

In the context of the need to increase administrative efficacy and efficiency, the constant desiderate of a better administration for the citizens invited us to reflect on an administrative model in which the observance of the right to a good administration represents the strategic axis for the modernization of public administration.

Public administration was subjected to several modernization directions, as a consequence of the evolution of the intellectual paradigms which triggered the multiple administrative reforms, thus experiencing the passing from bureaucracy to management and subsequently, until the present, from management to governance[2], but the improvement of the administrative capacity does not implicitly derive from the roller coaster of reforms, but rather lies on a rebalancing of the powers of the actors in the space of public actions: administration, citizens and private actors.

An unbalanced scale, which is due, to a large extent, to the fracture between the strong increase of the discretionary power of administration and the democratic standards. This phenomenon significantly contributed to the progressive construction of the right to a good administration, from principle, initially, until its consecration as a fundamental right in the Charter of Fundamental Rights of the European Union (FREU Charter), known to the European citizens.

II. The right to a good administration in the European space – content, meaning, nature and sphere

The complexity of the right to a good administration can be expressed through the difference of approach at the EU level and, respectively, at the level of the Council of Europe, according to two ample, separate and still complementary plans, from the perspective of its conceptual, overall illustration.

The first plan expresses the preponderantly legal approach, as subjective right of the European citizens, in relation to the community institutions, to which are due correlative obligations. The second plan expresses the extra-legal approach, in the sense of the diligence obligations born on the states, in the sense of the permanent improvement of the public services, supplied to the citizens of the European states.

A. Good administration in the meaning of the FREU Charter

In the context of the socioeconomic and institutional crises that the EU member states are facing, the observance of the fundamental rights of the citizens represents the key stone of a deeply democratic European construction and in this context, the right to a good administration must be understood as a new dimension of the democracy we live in.

The insertion of this fundamental right in the European law was gradually achieved until its full recognition in the Charter of Fundamental Rights of the European Union[3]. The reason consists in the numerous controversies coming from the specialists, on the legal nature of the right to a good administration. In this respect, the doctrine offered detailed

[2] See more, Prats Català, J., *De la Burocracia al Management, del Management a la Gobernanza. Las transformaciones de las Administraciones Publicas de nuestro tiempo*, INAP, Madrid, 2005, p.99 and the following.
[3] Published in DOM no. 364, of 18 Dec. 2007 (LCEur 2000, 3480).

arguments which to confer it both the statute of guiding principle with the role of optimizing the administrative behaviour, and of right in the legal sense or individual right.

The force of these controversies consisted of the fact that the right to a good administration emphasized especially the administrative aspects exceeding the strict observance of the legal norms, showing that what truly consolidated the legitimacy of administration does not reside in the strict observance of the legal norms, but in the adequate manner in which it responds to citizens' demands. This perspective rearranges the citizens' interests amidst the administrative concerns, rethinking the administrative model as a modern model which offers not only legal guarantees, but, in addition, offers guarantees on the quality of the services it supplies, perspective in which the concept of good administration is associated in the doctrine with the term of governance.

Initially proclaimed as *document with mostly political value* at the European Council of Nice on December 7th, 2000, the FREU Charter introduces in art.41, for the first time and expressly, lifting it to the tank of citizen right, *the right to a good administration*, a right subsequently recognized by the jurisprudence of the European Union's Court of Justice.

This step consolidated the European Union's efforts to create a better closeness of the citizens with the European institutions, together with the White Charter of European Governance[4], a European *soft-law*[5] instrument, important for promoting the modernization of the EU institutions and in close connection with the *contemporary proclamation of the right to a good administration in art. 41 of the FREU Charter,* as well as with the *interpretation by the European jurisprudence of this right and subsequently with its crystallization in the Lisbon Treaty*[6].

In para. (1) of article 41 of the FREU Charter is mentioned that any person „*has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*".

This desiderate can only be achieved in the context of a stable, responsible administration, independent from the political factor.

In completion of article 41, through articles 42, respectively 43, to any European citizen are recognized the right to access the documents of the European Parliament, European Council and European Commission and, respectively, the right to submit to the European Mediator complaints regarding improper behavior in the *administration of the Union's institutions and bodies*, except for the jurisdictional activity of the Court of Justice and of the Tribunal of First Instance.

The possibility to notify the European Mediator or the European Union's Court of Justice, as the case may be, constitutes elements of consolidation of the efficacy and of the efforts to guarantee the right to a good administration, strictly at the EU level.

Attempting to propagate a good administrative behavior within the European Union's institutions and bodies, a meritorious role of sanctioning the right to a good administration in the FREU Charter, was played by the European Mediator. In fulfilling this mission, the European Mediator performs a double role, both as *external control mechanism* (examining the complaints regarding the improper behavior in administration and recommending

[4] European Communities Commission, *European Governance: a White Book*, COM (2001) 428 final, Brussels, 07.25.2001.

[5] In the European administrative doctrine, by *soft-law* document of the community legal system is understood a legal instrument without compulsory character and which has as purpose the establishment of the general and programmatic principles on certain topics.

[6] Guillem Carrau, J., „El avance del derecho a la buena administración en el Tratado de la Lisboa", *Revista de Derecho de la Unión Europea*, No. 19, 2010, p.36.

reparatory measures in cases when it is necessary), and as a *source of support for the EU institutions*, helping them improve their activity by indicating the fields that can be ameliorated.

The European Mediator systematically defined the cases of improper administrative behavior within the Union's institutions and bodies, formulating in his annual report for year 1997, the following definition also confirmed by the European Parliament: „*improper administrative behavior is seen when the public body does not act according to its proper provisions or principles*".

Even since its institutional establishment, the European Mediator made great efforts to implement a Code of Good Administrative Behaviour within the European institutions, proposing such a project in 1999, which was approved two years later, in 2001. The Code has as purpose the more detailed explanation of what the right to have a good administration should mean in practice, right comprised in the FREU Charter. In 2005, the Code was updated and correlated with the provisions of art. 41 of the FREU Charter, remaining in the absence of the mandatory character an ethical code, although at present is underlined the need and additional value of transforming the Code in European law.

An examination of the European content and of the different aspects of the right to a good administration indicates that this fundamental subjective right falls into a set of principles and rights correlated with the two important perspectives which confer it a dual character.

A first perspective takes into account the observance of the European administrative procedure and refers to the *right of any person to have access to his/her own file* and to the documents composing them, the *right of any person to be heard* before taking any individual measure that can be detrimental to him/her, the *right to obtain a motivated answer* within a reasonable term, as well as the *right to linguistic pluralism* in the relation with the European institutions.

In what concerns the *right to participate and to be heard*, the Lisbon Treaty confers novelty elements, consecrating the complementarity between representative democracy and participative democracy, in the form established in articles 10 and 11 of this Treaty. Thus, participative democracy becomes an integral part of the European model of society, in which participation represents a citizens' right and subsidiarity becomes a pillar of participative democracy.

The second perspective regulates the behavior of public servants in their relationship to the citizen, in this sense emphasizing the citizen's right to be treated impartially and in an equitable manner, as well as the obtaining of reparatory measures for the damages caused due to the fault of administration or through administrative omission.

This double perspective of the right to a good administration combines to an equal extent rights deriving from the organization and functioning of public administration specific to the state of law and organically attached to the values of constitutional democracies, as well as rights regarding the administration's behavior, by means of its agents, this reflecting both traditional values of the bureaucratic administrative model (legality, hierarchy, authority, discipline, integrity), and of the modern administrative forms such as governance (efficacy, efficiency, quality and evaluation of capacity and competence etc.). The inclusion of the social actors in the decisional process brings forth values such as solidarity, respect, transparency etc.

The sphere of application of this right initially bounded by the Charter of Nice, subsequently accentuated by the Lisbon Treaty, under the aspect of its legal force, comprises the European administration, as well as the member states, when they implement

European law in their own legal system, therefore revealing a multi-level protection, both at the state and the supra-state level.

In what concerns the *bearers of this right*, from the economy of the treaty it is deduced that it is conferred only to the EU citizens, as well as to the individuals or legal entities having their residence or domicile in a EU member state, considering that this restrictive bordering derives from the concept of European citizenship.

The entry into effect of the Lisbon Treaty, which invested the FREU Charter with legal force and which is thus creating an intrinsic link of the right to a good administration with the principles of transparency and participation, answers the legitimate demands of the citizens, for transparency and impartiality in the daily behavior of the European administration.

B. Good administration in the light of the CM Recommendation /Rec 2007/7 of the Committee of Ministers of the Council of Europe

The European Mediator's initiative to implement a Code of the Good Administrative Behaviour within the European institutions was supported by other similar approaches, in a wider institutional plan, as is the one of the Committee of Ministers at the level of the Council of Europe, which in its Recommendation 7/2007 of June 20th includes different suggestions, with complex character, addressed to the governments of the member states for the purpose of promoting the right to a good administration within a model – code, with a content similar to that promoted by the FREU Charter and adopted within the European Union.

The good administration code proposed by the Council of Europe, also involves an extra-legal approach, inserts three important topics, the right to a good administration, the principles of good government and the Model – Code of good administration. Understanding good administration as component of good government, this Code attributes to good administration elements such as the *quality of the administrative structures, human resources management, as well as the efficacy and efficiency of the material and financial resources*[7].

In antithesis, „bad administration" derives, according to the meaning of the recommendation, from the inaction of the public administrations, as well as from their late action or their action not according to the law.

Unlike the *down – top* vision of the EU for promoting good administration from the perspective of the European citizens, the vision of the Council of Europe is rather *top – down,* attempting to insert this concept at the level of the European administration's behaviour. The second meaning promotes a modern form of government, in which administration's legitimacy derives from an efficiency-based and results-oriented management[8], especially on the quality of the interaction of administration with the private actors and civil society.

From this new perspective, good administration implies a *good execution of service provision that answers the essential needs of society*, by creating a *just balance between the rights and interests directly affected through the state's action, on the one hand, and, on the other hand, the protection of the interests of the collectivity, in its entirety*[9].

[7] Albu, E., „Excepția de nelegalitate – garanție a bunei administrări. Admisibilitatea excepției de nelegalitate privitoare la un act administrativ cu caracter normativ" in Bălan, E. et al. (Coord.), *Idem*, p. 117.
[8] See more Carp, R., „Dreptul la o bună administrare potrivit Recomandării (2007) 7 a Consiliului de Miniştri a Consiliului Europei şi jurisprudenței CJCE" in Bălan, E. et al. (Coord.), *Idem*, p. 109.
[9] Albu, E., *Ibidem*.

This balance imposes that in relation to the state, the right to a good administration *manifest as a sum of obligations it has in relation to the organization of public administration, on the one hand, and in order to guarantee the efficacy and conformity with the law of the public administration activity, on the other hand*[10].

III. The opportunity of consecrating good administration at the level of the Romanian constitutional law

The right to a good administration, binder of the different constitutional principles of organization and functioning of public administration, knows different degrees of recognition and development at the constitutional level in the legal system of the member states.

In Romania, the right to a good administration was indirectly introduced in our legal system through Law no. 13/2008 for the ratification of the Lisbon Treaty for the modification of the Treaty regarding the European Union and of the Treaty for the establishment of the European Community.

Although the current Constitution of Romania does not expressly recognize the right to a good administration, *it is implicitly derived from the corroboration of the dispositions of this fundamental law and, thus, appears as a sum of other rights*[11], which, by formulation, are similar to those that the FREU Charter recognizes as integral elements for the right to a good administration.

In support of this statement, we can mention the constitutional norms which sanction[12] *equality in rights* (art.16), *free access to justice* (art.21), *the right to defense* (art.24), *the right to information* (art. 31), *the right to petition* (art.51), the *obligation of the public authorities to answer the petitions* within the terms and conditions established by law (art.51, para. 4), the *People's Attorney's obligation to notify ex officio* in case certain persons are damaged in their rights by acts or deeds by the administrative authorities (art.59, para.1), *the use of the mother tongue of the national minorities in relation to the authorities of the local public administration* (art.120), *the right of persons belonging to national minorities to learn in their mother tongue and to be toughed in this language* (art.32, para.5).

The FREU Charter situates the right to a good administration in the section of rights that the Constitution of Romania consecrates as fundamental rights, in other words, eights to which maximum guarantees are granted. However, the lack of express consecration at our constitutional level does not reflect its value as interpretation criterion and, therefore, this right has no legal recognition in relation to the state administration.

Since this right pertains to the *essence of the state of law and of the activity of administration*, of the *lex ferenda*, the Romanian doctrine considers that the fundamental task of the Romanian lawmaker is to expressly sanction the right to a good administration among the fundamental rights and to subsequently create *detailing rules which to remove the declarative character of the respective legal norm and to allow the increased efficiency of the results of its application*[13].

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[10] Albu, E., „Principiile dreptului la o bună administrare în jurisprudența Curții Europene a Drepturilor Omului" in Bălan, E. et al. (Coord.), *Dreptul administrativ contemporan: spre o concepție unitară în doctrina şi practica românească*, Comunicare.ro Publishing House, Bucharest, 2010, p.128.

[11] Vedinaş, V., Capră Ambru, S., „Bazele constituționale ale dreptului la o bună administrare" in Bălan, E. et al. (Coord.), *Dreptul la o bună administrare. Între dezbatere doctrinară şi consacrare normativă*, Comunicare.ro Publishing House, Bucharest, 2010, p. 179.

[12] See more Vrabie, G., „Dreptul la o bună administrare – *in stato nascendi* în România" in Bălan, E. et al. (Coord.), *Idem*, p. 49 and Vedinaş, V., Capră Ambru, S., *Idem*, pp.39-46.

[13] See in this sense Vrabie, G., *Idem*, p. 49 and Vedinaş, V., Capră Ambru, S., *Idem*, p.55.

Thus, we consider opportune the consecration of the right to a good administration as fundamental right, in the context of the current initiative for the review of the Romanian Constitution[14], and which we hope will be among the objectives of such an approach, at the political level.

In the situation in which the Romanian constituent will have the will and the capacity to take this step, thus following the interpretation line of the European law, the right to a good administration will know a content „crystalized" in our legal system and will articulate, equally and unitarily, the entirety of legal relations of the citizens with the administration, becoming opposable to the entire public administration, regardless of their level, central, regional or local.

In the case contrary, the maintaining of this right at the level of common law will allow the different administrative authorities and bodies to outline their own contents, of their obligations, sometimes distinct, correlative of the right to a o good administration, existing the risk of drawing non-unitary directions with respect to the manner of organizing and functioning of the administration, as well as in the manner of the legal articulation of good administration in relation with the citizens.

We believe that this situation is not an acceptable solution, from the perspective of recognition of a „demanded" right, acknowledged and applied equally in the relations between administration and citizens.

The increased expansion of the public interventions determines that the regulation of this right *only* at the level of the primary legislation be achieved with difficulty, since the rhythm of the regulations does not coincide with the dynamism, diversity and complexity of the public administration's activity.

The lawmaker must recognize certain limits of the discretionary power of administration, in order for it to be able to reach its own objectives, which can, however, generate the situation in which the administration, within its discretionary activity and in the name of the general interest, act independently of the individual and collective interests, preserved by law.

IV. The implications of the consecration of the right to a good administration of the administrative reform in Romania

The consecration of the *principle-right binomial* represented by the right to a good administration in the fundamental law represents an opportunity for introducing certain evolutional transformation vectors of the organization and functioning of administration.

The sanctioning at the European level and, subsequently, in our legal system, of this right constitutes not only the evolution context of the Romanian administration, but also a grounded reason for executing in an accelerated or successful form, the reform measures leading to the flexibility and efficiency of the public administration.

In this sense, *a concrete nucleus of transformations* that must fight against the *historical force of inertia* of administration and for which the right to a good administration constitutes both the *ideal context, and the opportune impulsion pretext*: *trust, beyond legal security;*

[14] See Decision no. 17/2013 of the Parliament of Romania regarding the establishment of the Joint Commission of the Chamber of Deputies and the Senate for the elaboration of the Legislative Proposal for the review of the Romanian Constitution (Official Gazette of Romania no. 95/2013)

transparency, beyond formal publicity; independence, beyond impartiality; quality and pro-activity, beyond legality; and full responsibility, beyond patrimonial guarantee[15].

However, is the Romanian public administration prepared to reconsider the statute of the citizen from simple inert subject and receptor of public service to an active actor involved in the decisional processes of administration?

The administration's reform accepts the fact that a radical change is necessary, which places the focus on the integrity of the staff and on the need that *all representatives of the administration must learn management through objectives and performance assessment*[16].

The constitutional sanctioning of the right to a good administration implies also *a new legal normativity* applicable to the administrative reform, which takes into account the *elaboration of a normative framework and of a system of institutions necessary for enforcing these norms* (for example, the *adoption of an administrative code and of an administrative procedure code)*, on the one hand, and, on the other hand, the *implementation of these legal norms in the social life*[17].

From the same perspective, it is worth mentioning the proposal regarding the expansion of the People Attorney's role in the tracking of the observance of the good administration standards circulated at the level of the specialists, even though in the doctrine are maintained the divergent opinions on conferring a main function, of supervising public administration, for the purpose of protecting and guaranteeing the fundamental rights, or of a function of monitoring instrument for the administrative activity in the situations of defective administration.

The good administration of the public institutions in the national space, imply the assurance of a general framework of wellness for the citizens it serves and, from this perspective, the management of those institutions must be executed on the basis of minimum criteria, regrouped in the content of good administration and to which the political decision-makers must align their public interventions.

V. Conclusion

The recognition with compulsory legal force at the European level of the right to a good administration represents a permanent challenge also for the national administration, with respect to which the activity must be performed observing certain rules or standards.

We express the hope that in a future constitutional review this right be regulated expressly, thus grounding a unitary and equal legal-constitutional statute for all Romanian citizens and which act as a unifying element of the different doctrinaire and jurisprudential controversies.

In the context of the Romanian administrative reform, the constitutional sanctioning of this right will contribute to the increase of the degree of coordination and coherence of the legal system and, implicitly, of the quality of the administration's activity at any level, national, regional and local.

The recognition of the position of active actor of the 21st century citizen will contribute to the elimination from the administrative behaviour of the dysfunctions found under the name of defective administrative behaviour and will allow the citizens to participate,

[15] Rodríguez Pontón, F. J, El dret a una bona administració: un context, i també un pretext?" in Jesús Montoro, M., Sommermann, K.P (coord.), *Les administracions en perspectiva europea*, Escola d'Administració Pública de Catalunya, Barcelona, 2012; p.141.
[16] Iftene, C., „Administrarea bunei administrări. Elemente comparative şi de bună practică" in Bălan, E. et al. (Coord.), *Idem*, p. 399.
[17] Iftene, C., *Idem*, p. 384.

directly or through the institutions competent in hearing and protecting them, as is the institution of the People's Attorney, to contribute to the consolidation of the state of law.

The right to a good administration will become a „common asset" of all citizens, at the same time a guarantee, the engine of improving the administrative services, integral part of our legal system and whose regulation, as fundamental right, will require the elaboration by the Parliament of a coherent and unitary legal framework.

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TECHNOCRACY – A CONTEMPORARY POLITICAL DOCTRINE

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Abstract: *At the beginning of the 20th century the main ideas and ideology of tecnoracy were based. In 1921, the American William Henry Smith creates the term of technocracy seen as „a theory of social organization and a rational organization system of industry". The significant presence of technocrats in the contemporary social life brought in discussion the relation between technocracy and state (democracy). There is the opinion according to which technical progress has generated a real revolution, which actually brought to debate the compatibility between the democratic organization of society and the objective requirements of the scientific and technical revolution.*

Keywords: *doctrine, technocracy, political power, political system, ideology*

The technocrat doctrine is a contemporary version of the theory of elites, the technocrat governing being limited to a group of specialists. As a consequence, an organization and management of society on rational and scientific bases is foreseen, paying special attention to the issues regarding economic efficiency.

The technocrat doctrine is founded on the idea that decisions from different areas of social life, which require a high level specialization, can be given only to a limited group of specialists.

The political scientist William Henry Smith introduces this feature in the circuit of scientific debates, at the beginning of the Interwar period. Nowadays the technocrat doctrine emphasizes the need to technologize the decisions, based on science, on rationalization and efficiency criteria. It is a doctrine with a specific career in the 70s and 80s, but which also had many opponents, because its area of application became tighter and tighter.

The protectors of this doctrine consider that, under the conditions of the actual development of science, the power no longer belongs to political factors, mainly the parliament, government, political parties, but to scientists and international organizations.

In other words, the technical state, created as an effect of the efficiency of all activities, must be formed only be specialists, by technical state being understood an organism administering all social issues in accordance with the citizens' needs[1].

In this way, scientific decisions are taken instead of political ones, without requiring legitimacy, because they are based on the objective feature of the scientific probation. In concrete, the citizen, without special training, has no possibility in participating or contributing to the decision-making process.

Two features are specific to technocracy, namely the fetishism of the technical process and the diminution of the action of the humanist meaning of human's existence. For this reason, political men have expressed their concern regarding the technocrat danger, thus in the paper called *Tehnocrația. Mit sau realitate?* Jean Maynaud emphasized the potential danger of technocracy for democracy[2].

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[1] Francois Chatelet, Evelyne Pisier, *Conceptiile politice ale secolului XX*, Humanitas Publishing-house, Bucharest, 1994, p.493

[2] Jean Meynaud, *La tehnocratie, mythe ou realite*, Payot Publishing-house, Paris, 1964, p.28

We must mention that, even if the technocrat doctrine has more rational elements in a close connection with the actual society's development.

First of all, we are talking about the relation between science and power, enjoying a scientific feature. There is no problem for policy without technical implications, as there are not technical issues without political repercussions. There is a close connection, but also a clear separation between policy and technology. Science and technology competition becomes more necessary to govern, but with all this, the policy cannot be reduced to technology. If the policy becomes more rational, more scientific, by eliminating the political beliefs, the decision remains political, because the option, namely the election from several possibilities, is an attribute of the political man[3].

Under these conditions, the technocratic management is no longer based on a mandate from the citizens, but is the expression of some fixed competencies. In general, technocrats do not have to answer to anyone and this is why the doctrine and practice can open the way to authoritarian regimes.

Doctrinaire papers state that the predecessors of technocracy are Francis Bacon, Thomas Hobbes, Saint-Simon and August Comte.

Therefore, Saint-Simon states that the anarchy of capitalist production between the 18th and 19th century, by anticipating a society characterized by: economy planning, rational exploitation of world's resources by associate men, a society where „the administration will succeed the government of men", the state shall disappear, everyone shall participate to work, the repartition shall be made according to the work, though the society shall not dissolve private property.

All kind of technicians called „industrial bees" are the representative class towards which the admiration of the philosopher is pointed. He considers that, in the new society, they will have the mission to organize the political power, while the holder of the „general ideas" shall have an important role in the destiny of the future society and especially the science of organization and management of political life[4].

August Comte considered necessary the reorganization of society for which a theoretical activity was needed, because the change of political institutions firstly involves a change in human's morals. In other words, changing the political institutions can only be made by changing the idea that „the great political crisis and contemporary society hang heavily on the intellectual anarchy"[5].

So it is necessary a unanimous agreement over the number of the general ideas which will form a common social doctrine. The ideas founding a common and unitary conception over the social life are the ideas of the positive science, hence the idea that science can serve the social organization according to which the transformation of scientific methods in the calculus of political decision is necessary.

Positive philosophy states the thesis according to which the new society is based on two powers with two areas of competencies: the spiritual, exerted by intellectuals, philosophers, scientists and artists and the temporal one exerted by organizers and leaders of the production processes. Thus „the intellectual discipline shall be restored instead of anarchy, and shall replace the arbitrary, quackery, personal interest by a scientific and

[3] Robert A. Dahl, Poliarhiile. *Participare si opozitie*, European Institute, Iasi, 2000, p.71
[4] *Idem*, p.112
[5] Ion Mitran, *Politologie*, Romania de Maine Foundation Press, Bucharest, 2000, p.124

regenerative management, the hierarchy of the leaders being formed by the largest conceptions, on positive philosophies"[6].

The technocrat doctrine was materialized at the beginning of the 20th century when the main ideas were stated and the ideological bases of orientation were placed.

Thorstein Veblen critics the businessman who endangers the perspectives of society opened by science and contemporary technique by stating the thesis of the separation between the organization function and property. In fact, it passes from entrepreneur, meaning owner, to „specialist" meaning engineer, who takes over the management of economy, so that the process of separation between the two functions is objectively determined[7].

The entrepreneur being preoccupied by making profit neglects investments or points them towards unproductive activities, but with a quick profit, while the engineer adopts another type of attitude pointed towards rationality and efficiency imposed by the laws of science and market economy's mechanisms. Under these conditions, the society must select a body of engineers to replace businessmen in the organization and management of the economic life. Veblen's ideas were quickly embraced and spread, and its followers shall be organized in a genuine school.

In 1921 William Henry Smith creates the term of technocracy, meaning a „theory of social organization and a national system of industrial organization. It involves the scientific organization of the national energy and resources and the coordination of the industrial democracy with the will of people"[8].

The American sociologist James Burnham conducted, in the 4th decade of the 20th century, a rigorous analysis of the American society, primarily tracking the evolution of the power within enterprises, the new relations between the state and the production units as a consequence of the scientific and technical progresses, but also of the geopolitical changes after the First World War. In „*What is happening in the world*", James Burnham anticipates the empowerment of a worldwide technocrat society which will decide the use of the means of production and the assertion of managers as a leading class in society[9].

The future society is based on the use of specialists in the preparation and political decision-making, but makes no abstraction of the well trained political man's presence, who, together with the specialist, will take the best decision.

As a consequence, the future society shall be a society of managers, where the concentration of production will replace the private relation between the owners of the production means and its users.

The significant presence of technocrats in the contemporary society brought to debate the relation between technocracy and state, namely democracy. There is the opinion according to which the technical progress lead to a genuine evolution which debated the compatibility between the democratic organization of society with the objective requirements of the scientific and technological revolution. Some political scientists state that the democratic organization of society is obsolete, others, on the contrary, express their trust in democracy, as a form of political and social organization and in its positive role for the future society[10].

[6] Ovidiu Trasnea, *Doctrine politice ale capitalismului contemporan*, Politica Publishing-house, Bucharest, 1977, p.247
[7] Paul Dobrescu, *Tehnocratie si putere politica*, Politica Publishing-house, Bucharest, 1983, p.56
[8] Terence Ball, Richard Dagger, *Ideologii politice si idealul democratic*, Polirom Publishing-house, Iasi, 2000, p.113
[9] Paul Dobrescu, *op.cit.*, p.83
[10] Raymond Aron, *Despre politica in democratie si totalitarism*, All Publishing-house, Bucharest, 2001, p.91

It starts from the need for a powerful and active state, able to ensure the function of economy and to maintain the conditions for economic efficiency and profit. In a society where the technical progress was generalized and the role of managers, technocrats, was enlarged, policy and economics merge, the area of production was encapsulated in state's activities. Therefore, the intervention of the state required by the general needs of economic coordination, by the development of public services and infrastructure, allows the pursuit and attenuation of the capitalist economic fluctuations[11].

Reflecting to this reality, the French sociologist Maurice Duverger stated that „Great industrial enterprises have a dimension which prevents them from developing in a single national framework. Their foreign expansion no longer depends on their aptitude to compete, but also on the agreements concluded between governments, in a world where the economic frontiers are never opened and are closed. The enterprises absolutely need the support of the state to ensure their industrial development"[12].

The real needs of society require the presence of specialists, experts and technicians in administrative positions. Then, the fact that the appreciation of the policy is made from the perspective of the economic effects, and the institutions called to make decisions consulting technicians and experts is interpreted as a „proof" that the Parliament loses its authority, which restrains its role as a fundamental legislator. The assumption that the Parliament would establish the fundamental decisions of the social evolution would be an illusion. At a superior level, the orientations are already established: fast economic expansion, the satisfaction of social needs, aid offered to the underdeveloped states, globalization, the new international order, disarming and security[13].

At an inferior level of the Parliament, the role of the technician becomes more important, when his judgments fail we assist to the failure of the politician to make the right decision, therefore the technocrat model proposes the replacement of the politician with a specialist or a technician[14].

The second democratic trend, the humanist one, expresses its concern towards the anti-humanist which is generated sometimes by the theories overvaluing the role of technocracy in the evolution of society.

The same Jean Meynoud emphasizes the dangers of the technocrat expansion for the future of democracy. It develops three series of actions by which the technocrats attempt the dispossession of the elected representatives from their political attributions.

The first one refers to the opposition manifested in relation to the directives issued by the political authorities. We are talking about the resistance (blockage, sabotage, delay, bureaucracy) trying to counterattack the politicians' election, but sometimes the resistance takes the shape of ill will or overzealous[15].

The second one refers to the opposition resulted from the method of consultation, in this case, of the specialist in making decisions creates the possibility of the technocrat intervention. The consultation is not public; the secret feature of the procedure does not allow the evaluation of the real weight of the opinion, which exempts the specialist from the responsibility of the negative consequences of his advice and the transfer of the entire responsibility to the politics. After that is the fear of the politician to face the pression

[11] Maurice Duverger, *Europa de la Atlantic la Delta Dunarii*, Omegapres Publishing-house, Bucharest, 1991, p.94
[12] *Idem*, p.121
[13] Francois Chatelet, Evelyne Pisier, *op.cit.*, p.202
[14] Paul Dobrescu, *op.cit.*,p.91
[15] *Idem*, p.112

groups, which determines him to abandon the „practical" idea of consulting specialists in the decision-making process[16].

The latter action represents the opposition resulted from a transfer of attributions. The remedy against an incisive technocracy is the establishment of an active democracy, exiting citizens' political initiative and fit to ensure the vigilant control of the public servants, especially the important ones. The French political scientist considers that the enlargement of the technocrat power is embarrassed by a series of factors: insufficient technical knowledge of the specialists; the lack of political ability, which becomes serious if the politicians finally assume their responsibility; technocrats are not always aware of an elementary existence of the political art; the need to combine the meaning of the authority with the taste of persuasion; the lack of impartiality[17].

The presence of technicians in the political life is an incontestable reality because „In order to make the right decision the man must cumulate not only the software, the competence of the organizer and the art of management, but also the knowledge of economics, the experience of the best leaders, a certain general knowledge". From here does not flow the need for the political man to disappear, but only the need that he would become another model of politician[18].

Gaston Bouthoul reveals the fact that the policy will remain independent, but will become more rational, more scientific and more distant from the „common sense" policy. Political men should be able to fully use information, the formation and organization of citizens „in order to achieve the development of a civil life without which the man would be nothing but a robot, the worker a machine and the citizen a slave".

The decision will always be in the area of policy, because it resides from an attitude „devolving from trends, predictions or from a will to bend according to the events with a partial determinism. The democratic orientation is not endangered by the empowerment of the industrial civilization"[19].

The French sociologist Raymond Aron states in the same regard as Meynaud or B. Raymond that „Governors are amateurs in the area of science, strategy or economy…but they own a political capacity, even if scientists are more and more numerous in the government. (…) No machine will ever choose without the risk of an error the most worthy or able ones to rule"[20].

In the actual technocracy, the relation between power and state represents reductionist solutions, according to which „it is impossible for the citizen to participate in the decision-making process and in the management of society". This reductionism is determined by a series of factors, among which we mention: the political power identified with the state and the state is seen only as a technical organ, designed for administering in the most efficient way the social resources.

Thus, according to J. Ellul the alliance between technique and state is no longer a „neutral fact", on the contrary the state tends to become „a sum of modern techniques", as a consequence, the state would change not only his way of function, but also his essence, his deep nature.

[16] *Idem*, p.123
[17] Ralf Dahrendorf, *Conflictul social modern*, Humanitas Publishing-house, Bucharest, 1996, p.77
[18] Michael Oakeshott, *Rationalismul in politica*, All Publishing-house, Bucharest, 1995, p.78
[19] Ion Mitran, *Politologia in fata secolului XXI*, Romania de Maine Foundation Press, Bucharest, 1997, p.155
[20] Raymond Aron, *op.cit.*, p.143

"*The state is no longer the president of the republic, plus one or more chambers of deputies. He is no longer even a dictator surrounded by certain powerful ministers. He (the state) is an organization with a growing complexity which encompasses the sum of all modern techniques*".

Theoretically, our politicians are in the center of the machine, but practically they are progressively eliminated by this mechanism. Our men of state have become helpless satellites of this machine, which with all its components and techniques work just as well as without them[21].

The technocratic belief is clearly stated by the same author: „*Under the influence of technique, the entire state changes: one can say that there is no (or there is increasingly less) political power (with all its content – ideology, authority, power of man over men etc.). What is born is a technical state, a state with technical functions, of technical organization and a system of rationalized decisions*"[22].

In such a state, political decisions are taken in the virtue of some „technical motivations" because „the pure technique represents the general interests". The new „political technique" reserves attributions different from the classical ones.

In other words, the state invaded by modern techniques bases its conception of government on the exigencies of these techniques, and political doctrines can only justify certain actions and decisions, to present them as being in accordance with social ideals. As a conclusion, the citizen appears to be helpless in front of this evolution, realizing that he cannot participate in the management of the state.

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7. J. Ellul, *L'illusion politique*, La font Publishing-House, Paris, 1965
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13. Ovidiu Trasnea, *Doctrine politice ale capitalismului contemporan*, Politica Publishing-house, Bucharest, 1977

[21] J. Ellul, *L'illusion politique*, La font Publishing-House, Paris, 1965, p.273
[22] *Idem.*, p.276

CONCEPTUAL BASIS OF THE STATE SUBJECT TO THE RULE OF LAW EXPRESSED IN THE PHILOSOPHICAL THEORIES ON POSITIVISM, NORMATIVISM AND SOCIOLOGISM

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Abstract: *The positive philosophy target achieved only through sociology, is that of social reorganisation. For this purpose there must, in the opinion of the philosopher Auguste Comte, be achieved a moral reform which should be followed by a political reform of institutions to have as result society's reorganisation. The basic political principle is that of separation between the temporal authority and spiritual authority. Following this separation, society will be divided into three classes. Scientists, who will assert the legislative power, which will be focused on education, but which will only have a consultative role as far as the relationship with governors is concerned. Governors will be recruited among bankers, who will deal with public affairs and will represent the executive power. Another class is that of proletarians, who will be subjected to the chiefs of industry, without them being injured in their dignity or interests. Comte, as we have seen, describes the positive society principle, sociocracy. He rejects democracy as being a danger, because it trusts power to anyone and not to those able to assume it. This is why there must be recruited the best in the industry and finances fields who will put into practice the political principles together with scientists, the latter being those who delimit the general framework, who think the political principle through. Under the circumstances, the mere citizen is reduced to passiveness, the latter only having the duty to be subjected to a positivist education, with the purpose of making him understand and agree with the good provided by the sociocratic organisation. Therefore, we can notice that the positivist doctrine promoted by Comte is limited to the instauration of a totalitarian state, in which power is seized by a group of scientists, who, in the name of science, turn politics into dogma.*

Keywords: *weberian sociology, positivist doctrine, sociocratic organisation, etatic positivism, state subject to the rule of law.*

In the name of science, of positive facts, that is these the existence of which is acknowledged and not only supposed, ***Auguste Comte***[1] questions the liberal doctrine. Positivism represents a trial to reorganize the society on practical bases, not speculative ones, a breakage compared to the social organisation in the Middle Ages and even from the modern period.

Comte believes society has evolved during a third stage or period, the first being already obsolete, the third about to be issued, under the sign of sociology. The first period, dominated by theology, is based on the idea of divinity, the society reflects God's will, the political system is the divine right monarchy.

Then comes the second period, the metaphysical one, which disputes the divine order and tries to replace it with a society based on ration, denouncing the idea of a contract between governed and governors. The last period, called positive, appears after the French Revolution and, taking the progress achieved by the mathematics as an example, builds a rigorous society, scientifically organized.[2]

[1] Auguste Comte (1798-1857) French sociologist and philosopher.
[2] Florence Braunstein - Silvestre, Jean Francois Pepin, op.cit., p. 66.

The author also states that „*the first state from now on should be conceived as purely temporary and preparing; the second, which does not actually stands but as a dissoluting modification of the first, has only a simple, transitory destination, that is to gradually lead to the third state; precisely this, the only one completely normal, includes all the methods, the permanent regime of the human ration."*[3]

The target of positive philosophy, achieved exclusively by means of sociology, is *the social reorganization*. This is the purpose for which, in the philosopher's opinion, one should perform *a moral reform* to be followed by *a political reform of the institutions* to result in the reorganization of the society. The basic political principle is *the separation between the temporal authority and the spiritual one*. Following this separation, the society will be split in three classes. The scholars, who will exert the legislative power, focused on education, but who will have only a consultative part regarding the relationship with the governors. The governors will be recruited by the bankers who will take charge of the public affairs and will represent the executive power. Another class is the one belonging to the labourers who will obey the industry chiefs without having their dignity and interests harmed.

Comte's main interest focuses on the human deeds, on the relationships between individuals, relationships that make people a whole, in a society in which people are tied with an interdependence, a very active solidarity between them.

In these conditions it cannot be the question of rights, there is only the power of society to force us to do certain things. The law interferes with the social effective constraint.

All these facts are concrete, they fall under our senses. This series of concrete facts lead, for Comte, to the conclusion there is no right but there is a duty for each individual, a duty in the meaning that he is constrained by the social environment he lives in, to live in a certain way. This is how, in Comte's legal conception, the idea of Law completely evaporates and is replaced with the idea of duty. „*A subjective Law, as Comte says, only one exists: to do your duty"*.[4]

The French Revolution, Comte says and, after him, Leon Duguit, only managed to change a word: instead of assigning the sovereignty to the kind, it passes it to the nations.

The Revolution thought that this is how it gave the explanation missing to the idea of state. In reality, nothing changed, there was only eliminated the idea of godhead and, by personifying the idea on nation, it was assigned to the nation simply the right recognized before the king. „*For more than 30 years now, ever since I've been holding a philosophical pen, I have always imagined the sovereignty of the people as an oppressive mystification and equality as an ignoble lie*.[5] If the idea of subjective law implies the idea of personality, in what the public law is concerned, the nation is personified; it becomes a holder of a sovereignty right.

"*The nation has no personality and neither does the state. The personification of sovereignty under the shape of the state is a useless and dangerous idea, which does not answer a concrete observation; it is a mere construction of our mind*".[6]

The most significant representative of the positivist school in France was ***Léon Duguit***[7]**,** who believed that, first of all, one should set aside any concept he calls metaphysical and to start from actual data, as we perceive it.

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[3] Auguste Comte, *Speech upon the positivist spirit*, Scientific Publishing House, Bucharest, 1999, p. 12.
[4] Mircea Djuvara, op.cit., p. 353.
[5] Auguste Comte quoted by Mircea Djuvara, op.cit., p. 355.
[6] Mircea Djuvara, op.cit., p. 354 and the following.
[7] Leon Duguit (1859-1928) a famous French jurist, professor of constitutional and administrative Law.

As described above, Duguit, next to Comte and Herbert Spencer notices that the tyranny of a gathering, as well as the tyranny of the crowd (in this case of the people holding the sovereignty), can be much worse that the tyranny of a single man.

By promoting the observation, Duguit mentioned that if we look towards the society we live in and towards its political organization, we will truly see that the society is reduced only to individuals. More specifically, there is no society; there are only flesh and bone individuals. Each of these individuals holds a personality, besides it there is no other, not even one of the state, as the classical mentality states, demonstrating its will in certain moments in their practical life and show it with certain effects.

The experience, actual data, as we notice them, do not confirm the existence of a collective personality standing for itself and the Society, in such conditions, is only an abstract concept. In consequence, the idea of a personality of the state is a simple logical construction, thus metaphysical, which must be set aside because it promotes the obedience towards an arbitrary sovereignty.

Duguit, in these conditions, does not dispute the nation is a reality in our days, but disputes the theories supporting *„the person-nation"* invested with consciousness and will. Political theories are the ones splitting the society in governors and governed, in which the latter are characterized with will. Although will is when it shows on the outside, does not stand for itself – as Duguit stated – it cannot be but the majority's manifesting as general will. For instance, even when the population is asked for its opinion with a universal vote only a part of the population constitutes itself into a majoritary will, the will of the individuals representing the majority of the consulted population. *„National will and, thus, national sovereignty is pure fiction, without a scientific value and a positive, legal construction which will not be edified on it."*[8]

In Duguit's negative plea, of the national sovereignty and the state's personality we will find a pale reflex of the analysis made by ***Emile Durkheim***[9]. For Durkheim an individual is above all a social being who cannot live without social interdependence, as he calls it, without solidarity with the other individuals.

From Durkheim's legal concept it is detached the idea that the rights of private people are only social functions, and society presents a pole of a reality which has to the other pole the individual. The two poles, which usually up to that date were opposed, the individual and the society enter into a harmonious component, so they cannot be detached one from the other because there is an interdependence between them.

The legal society is, in these conditions, a co-existance of the liberties that is a compliance with mutual limits. It represents a duty of abstinence one towards the other. A single person, a single individual cannot create the legal society, so that could exist it is necessary to be as many as possible, the bigger the multiplicity of the relations between the component elements, the more complete each personality's is.

It is obvious that, in a primitive society, the number of the relationships is very reduced compared to the ones we find in a civilized and developed society. *„In what the administrative and constitutional fields are concerned, the public law field, the general provisions (relations governed by law) which tie the individual to the society multiply. The more society develops in its evolution towards progress, the greater the multiplicity of the*

[8] Leon Duguit, *Traite de droit constitutionnel*, II-eme tome, Ancienne Librairie Fotmeing, 1928, p. 14.
[9] Emile Durkheim (1858-1917) a French sociologist philosopher, the founder of the French school of sociology.

relationships between individuals becomes, the more complex, numerous and complicated public law provisions should become".[10]

Gaston Jèze[11] gets, like Duguit, to the idea that one cannot speak about a state sovereignty exactly like one cannot speak about a personified state, holder of the sovereignty. What really exists is individual wills. The idea of sovereignty is taken into consideration by Jèze as a metaphysical abstraction, as concrete observation does not show it as actually existing, but it shows only individuals with certain wills, producing some effects we call „*judicial"*.

Starting with the positive observation method, Jèze notices first of all that in law we must distinguish the politics of law and its technique. The politics of law includes the entire assembly of social, economic, political, moral considerations which determine, at a certain point, the law giver's will.

A doctrine taken from the positivist school beginning to rise in the XIXth century Germany and lasting until the beginning of the XXth century is *the esthatic positivism*[12] in which the state power is emphasized upon. The considerations on the grounds of this new current can be synthesized that the only subjective rights are the ones guaranteed by the State and these rights must have their origin in esthatic judicial sources; the right is the positive esthatic fact, that is the right is validated by the state; the right is born from outer wills of the individual and righten his exterior condition; the state is tied only by rules created by itself; it is thus promoted the state self-limitation.

Extremely interesting is the state self-elimination theory as the only corrective possible of the entire state power. Self-elimination of the power is necessary because „*if we absolutize the state power, and then it will be able to do everything from the legal point of view, it cannot suppress the entire legal order so as to found anarchy because it would only be destroying itself."*[13]. The state is limited by the judicial order the supreme expression of which is constitutional order „*for the Constitution determines the shapes of conditions to exert public power, excluding any power exerted outside these conditions of shape (...)".*[14]

From the perspective of the law, the will of the people who created the state was determined by forces coming from their own instincts of sociability and this is why these natural impulses, the *causa remota* of the State, should not be taken for the act of effective creation of the state, which is *causa proxima*. Thus, in Malberg's vision*, „The state is a human institution, holding its generating cause in people's will".*[15]

"*Like all positivists, we accept the thesis stated in the Romanian doctrine according to which Carré de Malberg, cannot fundament the state power as positive legal power without making appeal to an origin and intermediary factor which is not of legal nature, in this case, politics*".[16]

Because the state and the law are one and the same phenomenon, to refer to a rule of law becomes a pleonasm. The state is nothing but the personification of the constraint

[10] Mircea Djuvara, op.cit., p. 357 and the following.
[11] Gaston Jèze (1869-1953) a French professor of public Law.
[12] The main representative of the esthatic positivism is **Carré de Malberg**, who highlights the interaction between the judicial and moral in insuring social cohesion. With his work he tries to conciliate two opposite concepts: that of voluntarism who claims that the state is a purely human creation, with the one belonging to the ones sustaining that the state is a natural and spontaneous organism.
[13] René Carré de Malberg*, Contribution à la théorie générale de l'État*, Paris, Librairie du Recuil Sirey, 1920, p. 229.
[14] Idem, p. 232.
[15] Idem, p. 51.
[16] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, op.cit., p. 382 and the following

order. The doctrine rightfully believes that *„the Kelsian theory targeted the total dissolution of the State – Law dualism"*.[17]

The Weberian sociology was called a *„sociology of domination"*[18] because the concept of domination rests in the middle of the state administration model created by ***Max Weber***. Weber makes the distinction between domination and power. The power – Macht - is, in Weber's opinion, *„any chance to make triumph within a social relationship one's own will, even against external oppressions"*.[19] Domination - Herrschaft - designates, on the other hand *„the opportunity to find the people ready to obey an order with a determined content"*.[20]

Thus, we notice that power and determination, if they refer one to the other, to a relationship command/ obedience, are clearly distinguished one to the other with the fact that while – in the first case – *„the command is not necessarily legitimate and neither is obedience necessarily a duty"*[21], domination, on the contrary, involves the existence of people ready to listen, that is their acknowledgment and acceptation – regardless of their rations – of the orders they receive. In consequence, there is a legitimacy of the domination relationship the relationship of power doesn't always have. The members of a group subjected to such a relationship of domination form a political group (politischer Verband) by complying with three conditions:

- of *territoriality*: there must exist a territory where to exert this domination;
- of *continuity*: this relationship must be permanently exerted;
- of possibility of physical constraint: the domination relationship must be guaranteed *„in a permanent way within a geographical territory which can be determined with its application and the threat of a physical constraint"*[22].

A political group tends the rank of a state *„when (...) its administrative direction successful claims (...) the legitimate physical constraint monopole"*[23]. The definition is famous; it is a part of the common places of the administrations science. On this definition it was raised the Weberian analysis of the state and its administration, of its origins and structures.

If the state consists in a man-by-man domination rate based on the legitimate physical constraint approach, it can exist *„only if the dominated people obey the authority claimed by the dominators. Then the following questions rise: in what conditions do they obey and why? On what internal justifications and what external means does this domination rely on?"*[24] The problem of the state origins generates the double question: Which are the justifications and what means does the domination rely on?

We won't be insisting much with the justifications. The question is, surely, tied to the one about the origins, but the exposition Weber makes is not a historical one and – distinguishing several types of justifications for domination – he doesn't describe neither the succession nor the evolution of domination. Moreover, the analysis, become a classical one, also became a public field.

There are three possible grounds for legitimacy, three types of legitimate domination. First of all, *„traditional domination: the one finding its origins in the authority of the eternal yesterday (...), that of sanctified customs with their immemorial validity and*

[17] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, op.cit., p. 394 and the following
[18] Julien Freud, *Sociology by Max Weber*, P.U.F., 1966, p. 190.
[19] Max Weber, *Economie et société*, vol. I, Plon, 1971, p. 56
[20] Idem.
[21] Raymond Aron, *Les étapes de la pensée sociologique*, Gallimard, 1967, p. 553.
[22] Max Weber, op. cit., p. 57.
[23] Idem.
[24] Max Weber, *Le savant et la politique*, Plon, 1959, p.113-114

with man's rooted habit to follow them"[25]: the domination exerted in the past by the patriarch or by the landlord. Later on, the charismatic domination, based on and individual's personal and extraordinary will and can be translated with *„the extraordinary obedience towards the sacred character, towards heroic virtue or exemplary value of a person"*.[26] The individual gifted with this charisma is the chosen leader in war, the sovereign designated by plebiscite, the great demagogue and the head of a political party. Furthermore, rational domination which imposed *„in virtue of legality, of the faith in a legal statute and of a positive competence based on rules rationally settled, in other words the authority founded on obedience and which pays its dues according to the established stature"*.[27] It is, as presented in the doctrine, that type of domination characterizing the modern state.[28]

In Max Weber's opinion, the state holds the legitimate constraint monopole because it builds its act on legitimacy. Law and state identify one another and the concept of „*rule of law*" is tautological. For Weber, the expression *„rule of law"* has no value at all, because the identification of the two concepts does not represent but an ideal model in permanent offset with social reality.

Proposing himself the total dissolution of the dualism State – Law, ***Hans Kelsen*** claimed that talking about a rule of law is a pleonasm. For Kelsen any law is a rule of law and any state is a rule of law and the idea of law prevalence is a formal principle designating the total procedures to generate the law. The rule of law becomes, thus, a constraint order, an order justifying the police state.

The Kelsian normativism was the one producing a significant change in the traditional judicial mentality. This is why this theory got the attention of law theoreticians and drew many critics from them.

Among these the one drawing our attention is the first direction – identification of the state with the law – which led to conceiving a rule of law. **Kelsen's** theory regarding the rule of law is characterized by objectivism. This objectivism result from the importance Kelsen gives to the judicial norm itself and to constructivism elaborated based on a concept of norm ranking in the legal system based on the constitutional set of rules. Starting from this objectivism it can be said that the essence of the rule of law is. „*This is not People's Government, it's the rule of norms. After the inferno of the arbitrary Power and the Purgatory of the controlled Government, the pure existence of the Law rule represents the judicial paradise*".[29] Proclaiming the power of the norm, the rule of law is nothing but order promoted as prime-principle and all this in the name of eliminating the Power. In supporting this normative order order-norms and fundament-norms are not enough anymore. The state, as a personified law order, makes its presence in absolutely every field with an order of systematized legality, the norms being „*the narrow gate of legality*".

As the rule of law is the normative order in application, *„it essentially tends towards a normative perfectionism, without the norms determining the order except as a part of a certain degree of intensity and normative extensions"*.[30] The rule of law tends towards the perfect being that should be everywhere. Normative perfectionism proclaims legality as

[25] Idem, p.114.
[26] Idem.
[27] Idem.
[28] Ioan Alexandru, *Public Administration: theories, realities, perspectives*, Lumina Lex Publishing House, Bucharest, 2002.
[29] W. Leisner, *L'État de Droit – une contradiction?,* in Recuil D'Études en Hommage a Charles Eisenmann; Editura Cujas, Paris, p. 66.
[30] Idem, p. 67.

absolute, which is equal to proclaiming it in a totalitarian way, the rule of law representing, in this respect, the concept of absolute value. All these attributions of the Senate of law are conceived in the name of democracy, so as to guarantee the human rights and for a preview of the obstacles that may come in proclaiming a legitimate power.

The critics of the Kelsian theory of the *Rechtsstaat* signal the contradictions of this theory. We show in brief a part of them:[31]

Normativism tried to eliminate any contradiction that might come up between edicting norms and applying them, intensively and extensively proclaiming the normative absolutism. This is not possible because the judge's application of the norm is a real recreation work according to actual needs, the rule of law also proclaiming the power of application. Although each time, with the application work in which the norm is recreated according to each particular case, it is always created a real breakage within the rule of law. The one applying the norm becomes an unknown force;

The idea of rule of law has as first condition the elaboration of concrete norms. The norm abstractization level, though, remains at the law giver's will. The idea of the rule of law targets the concrete norm, but the concept of norm allows an increase of the abstractization level according to the needs of the power, which might create at all times a very dangerous arbitrarium;

The rule of law normative perfectionism allows it to normatively set right the exceptions in its own principles, because exceptions are norms as well. What the citizen does not accept as a man, it accepts under a normative shape. „*The normative technique is freedom' surrogate*";

The normative-type rule of law is the state of how it is supposed to be. Faith in the state targets what it is, and not what it must be as the norm implies;

The essence of the norms consists in the fact that they don't foresee but the future that is they don't retroactivate. Based on the principle of judicial perfectionism, the rule of law can change its own norms which can potentially be a threat for non-retroactivity. The more we norm, the less we stop in front of the past in which many times the future has already begun. In sharp retroactivity we kill trust itself pointed towards the future;

The rule of law, in **Kelsen's** theory, must insure complete preview that is the State is tied in all its actions to the general norms according to which the citizen will be able to calculate subsequent risks. But predictability is often compromised by the density of the norm canvas. Reality doesn't remain unchanged, and law must adapt to changes. The law giver, the one making the laws, makes these normative changes without allowing the executive to lead the details. The judicial imperative issued by the legislative, apparently under a general shape, shall actually be more and more detailed, closer to the actual case. „*Normativism doesn't produce but a single result: it transposes legislatively the dynamics of adapting the law which, like this, will make the state act in the administrative field*".[32]

Kelsen's theory with regard to Law, is an „*objectivist doctrine of the pure condition* for, for **Kelsen***, Law is a system of rules valid in their selves, valid through relations to another rule which is superior to those. But it is incapable of limiting the State through Law, for an individual lacks his whole objective liberty in front of the State of which force is the essential legal virtue*".[33]

[31] W. Leisner, quoted by Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, op.cit., p.397 and 398.
[32] W. Leisner, op.cit., p. 71.
[33] A. Brimo, op.cit., p. 313.

Within such a system in which the State and the Law identify to each other, an individual possesses liberty only to the extent in which the State does not enact laws. As for the rest, everything is under the rule of legal standards, of which domination is absolute: imperatively normativist.[34]

If **Kelsen** claimed an imperative normativism and the identification of the State with Law and his critics fought against these by supporting the Rule of Law, we further propose to prove that the Rule of Law has not been conceived as having an axiomatic character, but a concept with a main character in the state of the XXIth century, with a flexible structure, susceptible of evolution and change.

The juridical literature constantly underlined over the course of time that the notion of Rule of Law has its own universal dimension, being expressly approved in several international and European documents[35], the existence of the Rule of Law essentially depends on the national realities, those which contributed to the defining and inculcation upon the Rule of Law as a basic concept of the modern state existence.

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[34] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, op.cit., p. 399.
[35] European Convention of Human Rights, the Instauration Treaty of a Constitution for Europe etc..

ONE CANNOT BE TRIED FOR THE SAME DEED TWICE

Silvia Elena OLARU[*]

Abstract: *The principle of applying a single sanction for a single wrongful act. This principle involves the application of a single penalty for a single wrongful act; who has ignored the rule of law his conduct will meet once for illegal acts, violation of law for a corresponding one legal sanction. It does not preclude the simultaneous existence of several forms of legal liability for the unlawful act committed by the same person, when the same act is violated several rules of law. Article 4 of Protocol 7 of the Convention enshrines the "right not to be tried or punished twice", known as traditional „ne bis in idem": "Nobody can be tried or punished by the criminal jurisdiction of the same State for an offense for which has already been acquitted or convicted by a final decision under the law and penal procedure of that State. (...)" In two cases this will expose the principle settled by the European Courts non bis in idem.*

Keywords: *liability, wrongful act, offense, offense, conviction, final decision.*

Legal order is not based solely on coercion, but rather its essential feature is that it requires primarily through voluntary compliance with the rules of law, and this aspect is the legal responsibility.

In general sense, responsibility is seen as an obligation to bear the consequences of breaches of rules of conduct and therefore violates or ignores when responsibility.

Legal liability is also seen as a constraint on state power exercised by the individual, as a response to breaches of law, thus making him suffer the consequences of his act default (to repair the damage caused, to undergo a criminal or contravention etc.).[1]

In conclusion, it appears that the complex social relationship of which is the determination of liability under it is that which violates a rule of law, called the action illegal and the penalty is the means by which coercion is performed.

Legal liability is circumscribed branches of law and is linked to other specific rules of each of these branches. Thus, criminal liability shall commit a criminal offense specific, with guilt as provided by law, a penalty called punishment, administrative liability and administrative deviation are characteristic specific penalty, liability for damages available through material creates an obligation, etc. Legal liability principles guiding ideas are those that find their expression in all the rules of law governing the various forms in which that principle is presented.

It envisages common features of all cases of legal rules governing the conditions, how involved various forms of legal liability.

Of the principles enshrined in the legal literature and results of rules of law include:

a) The principle of employing only legal responsibility under the law.

The principle of legality is a fundamental principle of criminal law. In the area of criminal liability, this rule expresses the principle by which the whole activity of criminal liability of those who violated the law by committing crimes, based on the sole legal basis. The legality of criminal responsibility involves the legality of conviction and the legality of criminal sanctions: „*nullum crimen sine lege*" and „*nulla poena sine lege*".

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[1] M.Eliescu - Răspunderea civilă delictuală, Editura Academiei, 1972, pag. 8-31.

However, we believe that the legality principle applies to all forms of legal liability, as in every branch of law and the legal liability of any form of legal penalties may be imposed only for illegal acts, whether of crime or civil illegal administrative irregularities.

b) The liability for the acts committed by guilt

This principle requires that any matter of law can be punished only when he is guilty and only within the limits of his guilt. Legal liability occurs because a matter of law failed to comply with legal rules of conduct prescribed for the conduct of several possible just chose the one which violates social interests protected by legal rules. By law, society condemns those of its members who conduct contrary to its interests, and the perpetrators know that their conduct contrary to these interests.

Under this principle, the liability comes only material facts of conduct that is unlawful for the legal facts. It does not affect people's ideas, embodied in acts of conduct, according to the Roman maxim: „*de internis non judiciat praetor*".

The idea of guilt illegal act involving the author's attitude to decide its own behavior and consciousness through the act of violation of its legal norms of conduct.

In principle, tort liability for acts committed by guilt, but, in the Romanian law the presumption of innocence operates illicit offender so that guilt must be proven by the injured party, or by the prosecution for criminal liability. However, the law governing the presumption of guilt in some cases the responsibility of individuals, such as presumption of guilt of the parents for their minor children's actions, which will still protect from liability if they prove that they could prevent injurious act.

c) The principle of personal responsibility

According to this principle sanctions effects occur only on the person who has violated the legal standard, committing the unlawful act.

The extent of liability is determined by personal circumstances of the offender, which is assessed on the occasion of determining the penalty.

There are exceptional cases expressly provided by law, vicarious liability occurs when - liability objective, indirect, such as liability of principals for the acts of servants, and artisans of primary school pupils and apprentices for the acts or facts parents for their minor children.[2]

In the case of joint liability, it operates several subjects in person, so the injured can be compensated by any of them, and thus recovered the entire loss, as one who will rise to full compensation for the injury to be able to recover through an action for recourse against the other co-debtors more than what he paid as due to himself, according to his degree of guilt.

d) The principle of accountability for speed

The achievements of legal liability largely depends on the extent and speed of implementation of the principle, which expresses the requirement for accountability to be appropriate, such as failing to produce the effects of repressive and preventive - Educational.

Sanction is the reaction of society through state coercion against illicit act, so it is necessary for punishment to occur in a short time after the date of the deed, as if the coercion does not occur promptly, not longer obtain desired aims, either in the offender, or in relation to society.

[2] Gh.Mihai,R.I.Motica - Optima justiția, Ed.ALL BECK, Bucureşti, 1999., pag.201

Undoubtedly, the timing punish the perpetrator causes a feeling of insecurity in interpersonal relations and social ones, and a sense of confidence in the ability of institutional factors required to ensure law and order [3].

As is known, accountability is not only educative effect, but also lead to restoring the rule of law, impaired by committing illegal acts, and the passage of time can lead to the loss of evidence or to determine the real impediments to actually establish the actual state. Therefore, by law, often set time limits for implementation or prescription of the penalty.

e) Principle „non bis in idem"

The principle of applying a single sanction for a single wrongful act.

This principle involves the application of a single penalty for a single wrongful act, one that has ignored the rule of law his conduct will meet once for illegal acts, violation of law for a corresponding one legal sanction.

It does not preclude the simultaneous existence of several forms of legal liability for the unlawful act committed by the same person, when the same act is violated several rules of law.

For example, according to art.208 of the Criminal Code, making a movable possession or detention of another person without consent constitutes theft and is punishable by law, intervening criminal liability and, on the other hand, civil law, that protects the holder's ownership, the entitlement to restitution and compensation for damage to property which constitutes a civil penalty.

So the same offense in violation of a rule violation and a rule of criminal law and civil penalties for each branch of law whose rules were ignored accumulate on this path several will and forms of legal liability.

Another example, by committing a traffic offense on the road, but the author be liable for civil criminally liable if he committed a civil wrongful act of another person causing harm. Thus, the violation by the same unlawful conduct as a rule of criminal law and a rule of civil penalties for each branch of law whose rules were ignored accumulate.

Criminal liability can be combined with disciplinary liability in the performance when the employment contract employee commits an act which is unlawful, while a disciplinary offense and a crime, and thus applying both criminal penalty provided by law, as and disciplinary sanction. In these cases no principle in defeat (*non bis in idem*), because it consolidates two types of responsibility of a different nature, which entail different penalties.

Disciplinary liability may be combined with administrative responsibility if the act is unlawful while misconduct and negligence, thereby applying a disciplinary penalty and a sanction.

This principle but excludes the application against the same person, for the same unlawful conduct of two or more sanctions identical in nature: either criminal or civil, administrative or so., since restoring the rule of law violation for each violation requires violated a rule of law applying a single penalty, which depends exclusively on the nature of such legal provision violated.

Therefore, when there is a multiple violation of the rule of law, aimed at legal regulation of different and overlapping occurs two or more of the same kind of legal sanctions that would apply the same person for a single wrongful act, does not violate the principle of applying a single sanction for a single wrongful act.

[3] Gh.Mihai - Argumentare şi interpretare în drept, Ed.Lumina Lex, Bucureşti, 1999

If a person commits an act that is qualified as a crime, can not be held accountable and administratively for the same offense as an act can not be the same for both offense and offense, the offense is defined as potentially act as a lesser offense than.

In conclusion overlapping criminal liability is excluded administrative responsibility.

This principle is proclaimed in both the civil procedural law and criminal procedural law, the legal texts providing for specific penalties for the same kind of overlapping failure.

One of the main effects of judgments shall cease to be entitled to take legal action in a material way and that preventing a new prosecution for the same offense and against the same person.

Court when the court finds that there is a final and res judicata, it will accept the final solution and will comply with the ban to judge or decide a case is finally resolved. And as it tends to respect this principle, because the final judgments and various sanctions can not be different or the same kind by one or more courts.

We believe that the approach should take into account the rights established in the European Convention on Human Rights as interpreted and applied solutions CEDO Court.[4]

Article 4 of Protocol 7 of the Convention enshrines the "right not to be tried or punished twice", known as traditional "ne bis in idem ", "No one shall be tried or punished by the criminal courts for committing the same State offense for which has already been acquitted or convicted by a final decision under the law and penal procedure of that State. (…)"

In two cases this will expose the principle settled by the European Courts *non bis in idem.*

In the first case, on 11 November 1999, plaintiff was involved in an incident in which, according to the police report called on the spot, broke a neighbor's door, entered his apartment and punched.

Following the police report, Mayor of Gabrovo to the applicant a fine for disturbing the public order of 50 leva (25 euros). The sanctions became final, not being challenged in court.

Subsequently, the prosecutor began criminal and prosecuted for trespassing, battery and other violence. Gabrovo District Court acquitted him for trespassing and battery and other violent convicted to imprisonment for 18 months. The solution was Gabrovo Court upheld on appeal and the appeal by the Supreme Court of Justice of Bulgaria.

The European Court, the plaintiff alleged violations of Articles 6 of the Convention and 4 of Protocol. 7 to the Convention (which guarantees the right not to be tried or convicted twice for the same facts – *ne bis in idem*).

Court in its Judgement delivered on 14 January 2010, found violations of both articles.

Regarding Article 4 of Protocol 7 to the Convention, the Court stated that:

– contravention penalty imposed by the Mayor of Gabrovo applicant can be considered as having a "criminal" in the autonomous meaning of that term which the Convention accords, given that, on the one hand, violated the prohibition imposed by the legal text is addressed to all persons and that, on the other hand, the purpose of punishment is to punish and prevent the future commission of similar acts;
– there is identity of facts between those who rise to the penalty for minor offenses and that those who have caused criminal proceedings against the applicant, regardless of the legal definition of domestic law gives offense, that the two offenses;

[4] Legea nr.30/1994 privind ratificarea Convenției pentru apărarea drepturilor omului şi a libertăților fundamentale (încheiată la Roma la 4 noiembrie 1950) şi a protocoalelor adiționale la această convenție, publicată în M.Of.nr.135/31.05.1994.

– there was a doubling of legal proceedings against the applicant, given that criminal proceedings were preceded by sanctioning its contravention, which became final by neapelare.

In conclusion, the applicant had been "convicted" in the administrative proceedings (contravention) to be treated as a "criminal" autonomous meaning of that term in the Convention. After this "conviction" became final, had been brought against him in another criminal indictment which concerned the same conduct and essentially the same facts. Given that art. 4 of Protocol 7 to the Convention prohibits both the prosecution and conviction of a person for acts which have already led to the imposition of a permanent criminal penalties, the Court found a violation of this article to Bulgaria.

In the second case, the Judgement of 11 December 2008 the Court of Justice (CJCE) ruled in Case C-297/2007 Staatsanwaltschaft Regensburg / Klaus Bourquain, and that the prohibition from being tried twice for the same act also applies to a conviction which could never be enforced directly.

According to the CJCE, "this interpretation seeks to ensure that a person is prosecuted for the same offense in several contracting states resulting from the exercise by it of the right to freedom of movement".

In Case C 297/07, regarding a reference for a preliminary ruling under Article 35 EU Landgericht Regensburg (Germany), by decision of 30 May 2007, the Court received on 21 June 2007, criminal proceedings against Klaus Bourquain.[5]

Reference for a preliminary ruling concerns the interpretation of Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and France on the gradual abolition of checks at common borders.[6]

The request was made in criminal proceedings brought in Germany on 11 December 2002 against Mr Bourquain, a German national, in terms of murder, while the criminal proceedings initiated for the same acts by a judicial authority in another Member contractor against the person had already mentioned, on 26 January 1961, by a conviction in absentia.

Legal

First Article of the Protocol integrating the Schengen acquis within the European Union annexed to the Treaty on European Union and the Treaty establishing the European Community by the Treaty of Amsterdam (hereinafter "the Protocol"), 13 Member States of the European Union including Germany and the French Republic, is authorized to establish enhanced cooperation between themselves in areas covered by the scope of the Schengen acquis as defined in the Annex to this Protocol.

Since the Schengen acquis thus defined, in particular, the Agreement between the Governments of the Benelux Economic Union, the Federal Republic of Germany and France on the gradual abolition of checks at their common borders signed at Schengen on 14 June 1985 and the CAAS.

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[5] Prin Hotarârea din 11 decembrie 2008 Curtea de Justiție a Comunităților Europene (CJCE) s-a pronunțat în cauza C-297/2007 Staatsanwaltschaft Regensburg/Klaus Bourquain, şi a stabilit că interdictia de a fi judecat de două ori pentru aceeaşi faptă se aplică şi în cazul unei condamnări care nu a putut fi niciodată executată direct.
Potrivit CJCE, "această interpretare urmăreşte a evita ca o persoană să fie urmărită penal pentru aceleaşi fapte pe teritoriul mai multor state contractante în urma exercitării de către aceasta a dreptului la liberă circulație".

[6] JO 2000, L 239, p. 19, Ediție specială, 19/vol. 1, p. 183), semnată la Schengen (Luxemburg) la 19 iunie 1990 (denumită „CAAS").

Under Article 2 (1) second paragraph, second sentence of the Protocol, the EU Council adopted on 20 May 1999 Decision 1999/436/EC establishing, in accordance with relevant provisions of the Treaty establishing the European Community Treaty on European Union, the legal basis for each of the provisions or decisions constituting the Schengen acquis. In Article 2 of this decision in conjunction with Annex A thereto, that Articles 34 EU and 31 EU were designated by the Council as the legal basis of Articles 54-58 of the CAAS.

Under Article 54 of the CAAS, which is in Chapter 3, entitled "Implementing *ne bis in idem*", Title III of the Convention, entitled "Police and security"

„A person against whom a final decision was rendered in a trial by a Contracting Party can not be prosecuted by another Contracting Party for the same acts provided that, where a sentence was pronounced, it have been enforced, is being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

For information concerning the date of entry into force of the Amsterdam Treaty, published in the Official Journal of the European Communities, 1 May 1999 (OJ L 114, p. 56) that the Federal Republic of Germany made a declaration under Article 35 (2) EU accepting jurisdiction to decide the manner prescribed in Article 35 (3) (b) EU.

The facts in criminal proceedings and the question.

On 26 January 1961 at the Bone (Algeria), Mr. Bourquain engaged in the French Foreign Legion, was sentenced to death in absentia by the Permanent Military Tribunal for crimes of Constantine the eastern zone of desertion and intentional homicide.

The application of the French Code of Military Justice for the Army, the military court held it proved that, on 4 May 1960, while trying to desert on the Algerian / Tunisian border, Mr. Bourquain shot dead another Legionary all of German nationality, who tried to prevent defection.

Lord Bourquain, refugee German Democratic Republic had not learned of the decision notice given in absentia and given the punishment imposed by the decision considered in adversarial proceedings could not be executed.

Bourquain Lord did not subsequently prosecuted or Algeria, or France. Moreover, in France, all in connection with war crimes in Algeria were given amnesty by the laws mentioned above. In contrast, Germany has opened an investigation against him for the same facts and, in 1962, a warrant was sent to authorities in the former German Democratic Republic, which rejected.

In late 2001, it was discovered that Mr Bourquain lived in the area of Regensburg (Germany). On 11 December 2002, Staatsanwaltschaft Regensburg (Regensburg floor) in terms prosecuted murder, the court, for the same acts under Article 211 of the German Criminal Code.

In these circumstances, by letter dated July 17, 2003, the court of France Ministry of Justice requested information in accordance with Article 57 (1) of the CAAS to determine if the decision of the Permanent Military Tribunal of Constantine the eastern zone, delivered on 26 January 1961 to prevent the commencement of criminal proceedings in Germany for the same offense, given the prohibition of double prosecution, under Article 54 of the CAAS.

Prosecutor's Office Military Tribunal in Paris responded to this request for information, indicating in particular the following:

„Judgement rendered in absentia on 26 January 1961 against [Mr Bourquain] has power *res iudicata*. The decision to sentence to death penalty has become final in 1981. Since the French law, the limitation of the sentence in criminal cases is 20 years, the decision can not be enforced in France."

That court asked the Max Planck Institut für ausländisches und internationales Strafrecht (Max Planck Institute for international criminal law and comparative criminal law) an advisory opinion on the interpretation of Article 54 of the CAAS in the circumstances of the main proceedings. In the opinion of 9 May 2006, the institute concluded that, although enforcement of the conviction in absentia was not possible because of procedural peculiarities of French law, however, in the main, the conditions under Article 54 of CAAS and therefore can not be triggered new criminal proceedings against Mr Bourquain. The same institute, in response to the request for additional comments, and maintained its position in the letter of 14 February 2007.

Landgericht Regensburg, holding that Article 54 of the CAAS could be interpreted as meaning that in order to prevent a new proceedings in a Contracting State, the first conviction in a trial conducted in the territory of another Contracting State shall have been performed at a given moment past, decided to stay proceedings and refer the following question:

„A person against whom a final decision was rendered in a trial by a Contracting Party may be prosecuted by another Contracting Party for the same acts, if the sentence was never applied could not be enforced under the laws State in which he was convicted?"

It should be added that in any case, Article 58 of the CAAS authorizes the Federal Republic of Germany to apply broader national provisions on the principle *ne bis in idem*. Thus, it allows Member States to apply this principle to judicial decisions other than those falling within the scope of Article 54.[7]

The question

Question referred under Article 35 EU - Schengen Agreement - Convention implementing the Schengen Agreement - Interpretation of Article 54 - Principle ne bis in idem – Conviction in absentia - res judicata - non-punishment condition.

By this question, the court asks, essentially, whether the principle *ne bis in idem*[8] enshrined in Article 54 of the CAAS is applicable in the case of criminal proceedings in a Contracting State for the facts on which a final decision has already ruled against a defendant in the trial by another Contracting State, even if the sentence was never applied could not be enforced under the laws of the State in which he was convicted.

It should be noted, on the one hand, as the Commission stated in its written observations, that, in principle, a conviction in absentia can be within the scope of Article 54 of the CAAS and can therefore constitute a procedural bar to the commencement of new procedures.

First, the actual wording of Article 54 of the CAAS that judgments in absentia are not excluded from its scope, the precondition for the implementation of this Article 54 is only that there has been a final decision in a trial by a Contracting Party.

Secondly, it should be noted that Article 54 of the CAAS is not subject to harmonization or approximation of criminal laws of the Contracting States in respect of judgments rendered in absentia.[9]

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[7] Hotărârea din 11 februarie 2003, Gözütok şi Brügge, C-187/01 şi C-385/01, Rec., p. I-1345, punctul 45.

[8] Curtea s-a pronunţat cu privire la acest principiu cu şapte ocazii: Hotărârea din 11 februarie 2003, Gözütok şi Brügge (C-187/01 şi C-385/01, Rec., p. I-1345), Hotărârea din 10 martie 2005, Miraglia (C-469/03, Rec., p. I-2009), Hotărârea din 9 martie 2006, van Esbroeck (C-436/04, Rec., I-2333), Hotărârea din 28 septembrie 2006, van Straaten (C-150/05, Rec., p. I-9327), Hotărârea din 28 septembrie 2006, Gasparini şi alţii (C-467/04, Rec., p. I-9199), Hotărârea din 18 iulie 2007, Kretzinger (C-288/05, Rep., p. I-6441), şi Hotărârea din 18 iulie 2007, Kraaijenbrink (C-367/05, Rep., p. I-6619).

[9] A se vedea în acest sens, în ceea ce priveşte procedurile de stingere a acţiunii penale, Hotărârea Gözütok şi Brügge, citată anterior, punctul 32.

In these circumstances, Article 54 of the CAAS, applied to the case of a decision by default, given in accordance with national legislation of a Contracting State, or to an ordinary decision, necessarily implies the existence of mutual trust with the Contracting States their criminal justice systems and the acceptance by each state of the application of criminal law in force in the other Contracting States, even where their national law enforcement would lead to a different solution (see this Gözütok and Brügge, cited above, paragraph 33).

How many Member States have argued, and the Commission in their written comments, should be checked conviction in absentia by the Permanent Military Tribunal for the eastern zone of Constantine's "final" within the meaning of Article 54 of the CAAS, taking into account the impossibility of enforcement of the penalty determined by the requirement imposed by French law to pursue if he were to reappear in absentia, a new trial, this time in his presence.

It is clear that the Prosecutor of the Military Tribunal in Paris, without making any reference to the fact that crimes were committed by Mr Bourquain amnesty in 1968, notes that the sentence against him became final in 1981, ie before the onset second criminal proceedings in 2002 in Germany.

Should be added that, although Law no. 68 697 French amnesty consequence that its entry into force, Mr Bourquain crimes not subject to any penalty, the effects of that law, as described in particular Articles 9 and 15 of Law no. 66,396, can not be interpreted as meaning that there is an initial decision under Article 54 of the CAAS.

Judgement rendered in the absence of the person concerned must be considered final within the meaning of Article 54 of the CAAS, must determine whether the condition of execution referred to in that Article, namely that the penalty can not be enforced, and where, in any time in the past, even before the amnesty or prescription, the first conviction the penalty imposed could not be directly enforced.

In these circumstances, the answer to the question that the principle *ne bis in idem* enshrined in Article 54 of the CAAS applies to criminal proceedings brought in a Contracting State for the facts on which a final decision has already ruled against a defendant in the trial by another Contracting State, even if the laws State in which he was convicted, the sentence was never applied could not be directly enforced, due to features such as those of the main procedural.

Thus, the court said, the principle *ne bis in idem*, enshrined in Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and France on the gradual abolition of checks at common borders signed at Schengen (Luxembourg), 19 June 1990, applies to criminal proceedings brought in a Contracting State for the facts on which a final decision has already ruled against a defendant in the trial by another Contracting State, even if the laws of the State was convicted, the sentence was never applied could not be directly enforced, due to procedural features such as those in the main proceedings.

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UNILATERAL ADOPTION OF THE EURO IN 2015/2019 SOLUTION OR TRAP FOR ROMANIA

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Abstract: *This paper aims, after a brief overview of European Law of Economic and Monetary Union, to produce a synthetic radiograph of economic and financial situation of Romania in 2010, in terms of adopting the euro in 2015 or 2019 (the new target), according to recent forecasts by experts in the field. Is Romania ready to give up it's national currency in favor of the Euro currency? It would be beneficial or hasty decision? Analyzing the current situation of the Romanian economy and the different views of the parties involved we can make some conclusions presented in this document in which the author doesn't claim to have exhausted all the views for and against adopting the Euro!*

Keywords: *convergence criteria, real convergence, nominal convergence, ERM II (Exchange Rate Mechanism Exchange), European Central Bank.*

1. Introduction

The emergence and entry into force of the Maastricht Treaty in 1992-1993 was considered a true reform for the moment in the evolution of Community law. It is with good reason! Among other elements of reform one important provision was to create the Economic and Monetary Union (EMU). Nobody would predict what will happen: giving up national currencies for Member States had to meet convergence criteria stipulated by treaty, creating a "Euro Zone" created in order to facilitate economic exchanges between those countries using the same currency with the same value in all Member States. No one could predict when that will be challenges for the Eurozone, but also for those who would like to join the euro zone, according to a global economic crisis that here "makes his head" in the world for years!

In early 1999, Yves-Thibault de Silguy, a former European commissioner responsible for economic, monetary and financial said: "The emergence of the euro as an important presence in the international European monetary system, creating new opportunities for cooperation in economic policy main global economic regions. [...]

Reasons which prompted the launch of a single currency is:

1. increasing economic prosperity and employment of labor, thanks to solid economic foundations that were fundamentally Economic and Monetary Union, and the building of a genuine single market.
2. substantial cost savings, simplicity for individuals and companies in business and euro zone travel,
3. European presence in the international financial scene.

In thinking of initiates, the euro is a first step in introducing World Coins-mundo-"[1]

If we were to attempt an assessment of reasons, we did not find too many reasons to be optimistic, even in the simple man:....

Useless to save on trips, if your first cuts off on the list in moments of crisis are spending holidays and vacations abroad. For businessmen and specialists in economic, monetary and financial seeing things optimally, although optimism is reserved here.

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[1] See Emilian M Dobrescu, Modern Monetary Systems, Ed Wolters Kluwer, economic Collection, 2010, chapter 3 Euro Zone, p 101-102

2. Convergence criteria stipulated by the Treaty on European Union, known as the "Maastricht Treaty"

On 2 May 1998 the EU countries were selected to participate in the Euro after an analysis of how these countries have met the following criteria for convergence[2]:

– inflation <3%

– Long-term interest rate <8.5%

– Deficit <3% of GDP

– Government indebtedness <60% of GDP

– National currency to join the European Monetary System for at least two years

Exchange rate stability, ie the exchange rate of the national currency in the last two years had maintained the margin of fluctuation agreed exchange rate mechanism of the EMS (2.25%), but not do the realignment.

Application of the convergence criteria was not "purely mechanical", but took into account the efforts employed by governments and future prospects.

All those European countries have made efforts to meet these criteria. "Culture of stability" as he called Herve Carre, Director of Monetary Affairs at the EU Commission, is illustrated best economic performances of the Member States of the euro area. In 1993 these countries had an average inflation of 4% and average inflation in 1998 was around 1%. In 1993 the average budget deficit reached 5.5% of these countries, but at the end of 1997 was reduced to 2.5%.

3. The global financial crisis and its effects on Eurozone

The financial crisis that erupted in late 2008, with the collapse of Lehman Brothers, a U.S. investment bank, has spread worldwide, becoming the most serious economic crisis since the "Great Depression of 1930". EU and euro area currently facing consequences.

To avoid cases like this European Parliament considers necessary to strengthen financial market regulation. Collapse of 2008 and the subsequent global crisis highlighted the need for closer monitoring of the European financial system through better coordination at EU level. New financial supervision package proposed introduction of a European Systemic Risk Board and a European System of Financial Supervisors.

The aim of the new package is to prevent future crisis and investor protection without overloading the market.

These mechanisms contribute to the surveillance, in close coordination with national authorities at EU level, to:

– wider economy

– specific institutions of systemic importance

– alternative investment vehicles such as hedge funds.

The purpose of these mechanisms is to avoid a repeat of the financial crisis in the coming years.

Convergence criteria (Maastricht) become irrelevant. Thus, the Maastricht criteria on budget deficits and levels of public debt are not respected and penalties do not apply.

[2] Data published in the Quarterly Report no. 2 of EMI no. 2/1998, see the criteria detailed in principle irreversible monetary unification process, under Chapter VII, the euro-euro between dream and reality, section 3, Author Roxana Paun, "European Monetary Law", Ed "Tomorrow Foundation Romania", Bucharest, 2006.

Deficits of states, be they even the euro area far exceed the maximum limit of 3%, which will increase over time and public debt ceiling of 60%.

Greece's budget deficit reached 12.7% of GDP and the UK (which is not part of the euro area) from 12.8% have nothing in common with the convergence criteria. Even this approach is not statistical convergence. It would be wrong to make a parallel between the two countries, according to a statistics only. The British economy has strong resource potential "rolling" of credit and monetary policy - independent bank that ranks better in the EU than Greece, the latter lacking economic power and the levers of intervention.

When referring to a different convergence criteria in Germany, government debt to GDP will reach 83% in 2014, with the prospect of return in the 60% of Maastricht just over 25 years. Some states already had excessive debt even before the crisis, Belgium, Italy and Greece exceeding even 100%.

Lack of money in the treasury of affecting states and European and national social budgets, assistance programs for citizens in need will arise from the sums allocated increasingly smaller.

As in any crisis, whether economic-financial or" nerves ", treatment varies in relation to the patient, and the physician providing immunization to subsequent crises, or even a surplus of force.

Looking at the core of European integration, to a certain part of the" euro zone ", ie to Greece glimpse another question: lest beyond therapy requires a new diagnosis? Felt only a "social impact" of economic recession, or we are doomed to a real "social crisis"? We will see it in a real heterodox economic theories and the paradigm shift? "[3]

And concerns about Greece were true unfortunately! Greece, unprepared upon entering the Eurozone and negestionand prudent internal situation in relation to external difficulties, Greece had also needs further European financial help to expand not in the eurozone crisis. And after Greece came to Ireland, Portugal and Spain!.... and it can be sure that the list will stop here?

Recent developments in Cyprus confirms worries experts on the future of world finance, given the known economic theories and applied so far, especially the monetary and banking does not work!

4. Under these conditions we analyze the progress of Romania in the equation of euro adoption in 2015, summarized[4]: *(see Annex 2 – Fullfilling convergence criteria by Romania)*

Tackling euro adoption: key issues

- Economic landing: the theory of optimum currency areas, the need for adequate macroeconomic management tools (the orderly adjustment of imbalances in an economy with rapid convergence), the consequences of adoption adjustment (hypothetical) an irreversible parity displaced from the equilibrium exchange rate, need for decision on euro adoption may not match the risks induced by the presence of only one phase of the business cycle.

[3] These are the pertinent questions of Radu Serban, doctor of economic sciences, participate actively in negotiations for the accession of Romania to the EU, as co-secretary of the Association Council EU - Romania during 1998-2002 in Review: "The social impact of the economic crisis in the EU. Pensions under the weight of recession "in economic Tribune, March 2010, see

[4] According to central bank estimates and data provided by Deputy Governor Cristian Popa in person at a Colloquium of Monetary Policy on 30 April 2009. See www.bnr.ro

- The level of European regulatory framework: Decision on adopting the euro (sustainability assessment of compliance with the convergence criteria, time, level of course) is the EU institutions; ERM[5] 2 and accepted in the exchange rate regimes
- Institutional level: the issues of liquidity needs, interconnection payment systems in the euro area
- Adopting the euro is the purpose of a complex process of convergence, not its beginning, in particular, it does not eliminate the need to address macro-economic imbalances in the Member States.

Addressing euro area entry

- Entry into the euro area is the end result of a process of convergence, not a prerequisite for carrying out its
  – Substantial progress is needed before the euro convergence plan in Romania
  – The minimum period of participation is two years ERM2
- Unilateral adoption of the euro is not an valid option
  – European Central Bank discourages definitely appealing to such a solution adopting the euro
  – Case of Montenegro is irrelevant, since it is a small economy which is not in the situatione of adopting the euro in the EU accession process

Interpretation of the Maastricht criteria

- There is no question of the Maastricht Treaty revision => Nominal Convergence Criteria will be relaxed and will not be granted exemptions from these.
- Fulfillment involves ensuring sustainability of nominal convergence indicators
  – Lithuania was denied entry into the euro area on the First January of 2007, because it did not fulfill the criterion on the price stability
  – in the base year, the inflation rate marginally exceeded permissible limit (which is not known until after the fact, is a moving target)
  – it was appreciated that the sustainability of low inflation is insufficient, being threatened by many risks

Real convergence

Maastricht Treaty does not mention explicitly the real convergence criteria:
– Real convergence can be achieved by: GDP/capita
– structure of national economy sectors
– openness of the economy
– foreign trade and its degree of integration into the EU
– labor costs

Long long term postponement of euro adoption (1) Benefits

– Extended period of structural adjustment still outstanding achievement
– Progressively increased in nominal re-elected convergence plan
– Romania's business cycle synchronization with the euro area (prior to reducing the risks of asymmetric shocks)
– Keeping for longer autonomy of monetary policy and exchange rate

[5] ERM= Exchange Rate Mechanism

Long-term postponement of euro adoption long (2) Disadvantages

– Persistence higher transaction costs associated with currency risk, which could inhibit investment and growth
– Possibility of delaying structural reforms and macroeconomic policy easing (in particular fiscal and wage) when establishing a distant horizon target euro adoption
– Unclear message sent to international capital markets, the delay can be attributed to structural weaknesses or economic policy less visible to investors rather than authorities' decision

Accelerating the adoption of the euro in a relatively short horizon (1) Benefits

– Earliest manifestation of the disappearance of currency risk benefits, the effect of stimulating sustainable economic growth
– Minimizing relaxation motivations pace of structural reforms
– Stimulation of all time consistency of macroeconomic policies

Accelerating the adoption of the euro in a relatively short horizon (2) Disadvantages

– Loss of monetary autonomy and exchange rate that would move the entire burden of structural adjustment on the level of economic activity and employment, given the still limited flexibility Romanian economy
– Lack of synchronization of business cycles in Romania and the euro area, which would increase the danger of asymmetric shocks, hard-countered in the absence of independent monetary policy and exchange rate
– Difficulty on splitting a representative central parity rate balance leu / euro, which could lead to substantial extension of the duration of participation in ERM2
– Stronger probability of the Balassa-Samuelson effect in the first part of the process of economic adjustment after the accession to the EU, with consequences on limitation of disinflation and / or the domestic currency
– Limitation period in which inflation targeting efficiency can be perfect as monetary policy regime

Equilibrium solution: ERM2 entrance in 2013-2014?

– Combines the advantages of the two extreme options and limit their drawbacks, achieving complementarity between desirability and feasibility of the proposed trajectory
– Provides an adjustment period required: Completion of most structural reforms and flexible the labor market
– Near sustainably annual inflation rate levels compatible with: specific criteria of Maastricht, with the ECB's definition of price stability
– Overcoming peak capital inflows
– Business cycle synchronization with the economy of the euro area and the substantial progress of real convergence
– Creating the conditions for ex ante duration of the ERM 2 is limited to two years

Establishing the duration of the period of adjustment

• Adjustment period should be consistent with decreasing relative risk from asymmetric shocks:

1. The rapid development of private sector credit
2. The persistence of large current account deficits

– Choosing a Relatively ambitious but credible adjustment period anchored inflation expectations and encourages better mixuluide consistent macroeconomic policies, helping to facilitate inflation convergence

– Postponing euro adoption target in some new EU member states were determined by failure of some of the criteria, particularly in terms of public finances and not an assessment of the horizon optimal entry changed in the euro area

Timing of euro adoption

– **Entry into ERM2 mechanism must be prepared so that**:

1. To provide flexibility for monetary policy and exchange rate (limited time) necessary to facilitate the ongoing process of structural adjustment
2. Maintain motivation for the continuation of reforms to be strong and to strengthen macroeconomic discipline
3. To enable a more precise estimate of the equilibrium rate, after exceeding the maximum capital inflows

– **Entry into ERM2 should provide ex ante probability of remaining minimum period required under this facility (2 years), taking into account the following:**

1. Credibility afforded by the final stage (the euro) and speed adjustment during this process
2. Possible volatile capital flows in the context of limited flexibility of the exchange rate in the period before entry into gear
3. Inflation targeting strategy, which will be clearly subordinate exchange rate

Time of euro adoption was planned for early 2015 (in the optimistic scenario, that removes as time passes, according to EU decision will be taken in 2014 - but we'll see....

5. Conclusion on Romania

It is easy to see, if we analyze the time frame in which to achieve the above presented analysis by specialists NBR and 30 April 2010, the Central Bank of Romania for a long time know what to do, as he knows very well that benefits of euro adoption but adoption risks at a time when Romania's economy and finances are not prepared, and especially not meet the Maastricht convergence criteria, as they are established since 1992!

And we can not say that Romania was not in financial crisis in 2010.... As in 2011 and will certainly be in 2012.

Paradoxically, the dollar-euro fluctuations not surprise anyone. Financial market is vulnerable to changes, syncope, fluctuations in world markets and even oscillations oil products on the market... which is regulated dollars. Natural disasters such as the nuclear accident that caused the tragedy at Fukushima (from now on http://en.wikipedia.org/wiki/Fukushima_I_nuclear_accidents reference point) of Japan has destabilized all financial markets. In such situations, the man can not provide, but can speculate!

And the rest of the world.... Become actors in a never-ending drama known by many people, but well defined by those who thought triggered and generated the current global

economic crisis, and a few comedy characters, elite world of finance, who directs the behind the curtain directing the further financial and social economic evolution of the world!

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Annex 1

Maastricht criteria (nominal convergence indicators)

Nominal convergence indicators	Maastricht criteria
Inflation rate (HICP) (percent, annual average)	<1.5 pp above the average of the three best performing EU members (4.1% *)
Long-term interest rates (percent per year)	<2 pp above the average of the three best performing EU members in terms of price stability (6.2% *)
Exchange rate against the euro (appreciation (+) / depreciation (-) maximum percentage of the average two-year **)	+ / -15 Percent
General government deficit (percent of GDP)	under 3 percent
Public Debt *** (percent of GDP)	below 60 percent

*) Reference level

**) Calculated as the maximum deviation, in percent, the exchange rate against the euro during 2007-2008 than the average in December 2006, based on daily data. A deviation upward / downward indicates appreciation / depreciation compared to the exchange rate recorded in December 2006

***) According to ESA95 methodology, the excessive deficit procedure (service tax) - April 2009

Source: Eurostat, European Commission, National Institute of Statistics, Ministry of Finance, National Bank of Romania

Annex 2

Fullfilling Convergence criteria by Romania

Convergence criteria						
Assessment month	**Country**	**HICP inflation rate (12-months average of annual rates)**	**Budget deficit to GDP**	**Debt-to-GDP ratio**	**ERM II member**	**Long-term interest rate (12-months average of 10yr bond yields)**
2012 ECB Report	**Reference values**	**max. 3.1%** (as of 31 Mar 2012)	**max. 3.0%** (Fiscal year 2011)	**max. 60%, or declining** (Fiscal year 2011)	**min. 2 years** (as of 31 Mar 2012)	**max. 5.80%** (as of 31 Mar 2012)
	Romania	4.6%	5.2%	33.3%	No	7.25%
March 2013	**Reference values**	**max. 2.6%** (as of 28 Feb 2013)	**max. 3.0%** (Forecast of fiscal year 2012)	**max. 60%, or declining** (Forecast of fiscal year 2012)	**min. 2 years** (as of 28 Feb 2013)	**max. 4.89%** (as of 28 Feb 2013)
	Romania	3.8%	2.9%	38.0%	No	6.48%

Source: http://en.wikipedia.org/wiki/Romania_and_the_euro

ARTIFICIAL IMMOVABLE ACCESION. THE OPPORTUNITY OF CLASSIFICATION OF WORKS ACCORDING TO THE CRITERIA OFFERED BY ART. 578 OF THE NEW CIVIL CODE

Adriana Ioana PÎRVU*

Abstract: *When preparing the new Civil Code, the judicial practice had a significant function, being one of the main quality indicator of a law. One of the problems caused by the application of the norms that regulated the accession in the initial Civil Code was that of establishing the nature of the performed works, as well as of determining the legal specific consequences for each type of works. The general interpretation of art. 492-art. 494 was that one of the necessary condition for the operation of the real estate accession is to buil up a new construction and not to improve an already existing construction. The lack of certain rules for the classification of the constructions as new constructions, stand-alone units or supplemented constructions caused, time to time, to the law court, serious difficulties in deciding upon the type of such constructions. For avoidance of some opposite court rulings, the legislator took the initiative to define through Art. 578 of the current Civil Code some concepts such as: independent constructions; additional constructions; permanent or temporary constructions; necessary or superplous constructions; concepts with which the law courts and practitioners already worked for some time. The legislator's initiative, although meritorious, did not bring the necessary clarifications. Therefore, our intention is to analyse the new regulations in order to find out their presumably practical implications.*

Keywords: *accession, property, independent constructions, additional constructions, judicial practice*

When drafting the new Civil Code, the judicial practice stage played an important part as it was one of the main efficiency indicators of a normative act.

One of the problems generated by the enforcement of norms regulating accession in the former Civil Code was to qualify the nature of works accomplished, as well as to establish the legal effects generated by each situation in this regard.

As resulting from art. 492 – art. 494 of Civil Code, for accession to operate, one of the requirements is to make a new final autonomous or added construction, and not to amend the existing one.

In order to avoid issuing contrary, ambiguous or confused decisions, the lawmaker has taken the initiative to clearly define these notions that courts and practitioners have been operating with for quite some time.

By art. 578 of the new Civil Code, the lawmaker achieved two useful classifications of the types of works that can be accomplished upon an immovable asset, land or construction. The first classification has as criterion the independence, the freestanding character of the work. By applying this criterion, works can be ranged in two different categories: autonomous works and added works. The second classification achieved by the lawmaker uses as criterion the extension in time of the usefulness of works. According to this criterion, works can have either a sustainable or a temporary character.[1]

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[1] Fort he same classification, a splitting criterion is considered that of durability of the work, see Florina Morozan, Comment, The New Civil Code. Comments, doctrine and case law, Vol.I, Art. 1-952, Ed.Hamangiu, 2012, p.868

The lawmaker's initiative, although commendable, has not brought all the necessary clarifications yet. The lawmaker outlined the notions of „added works" and „autonomous works", but did not offer any clue for an exact qualification of a work as sustainable or temporary. At first sight, these notions, „sustainable" and „temporary", are easy to outline. In construction field, these notions are extremely important. Granting a sustainable or temporary character to a construction shall incur significantly different consequences. „Only for the sustainable-character works there is the problem of acquiring the ownership right by accession, because temporary works can always be removed by their author".[2] ". To achieve a correct qualification of a construction as being sustainable or temporary, the court needs certain relevant clues or criteria. In our opinion, the lawmaker should have offered these clues or criteria to the court, as it did for added or autonomous works.

In default of these clues, practitioners will be able to turn to the special law in matters of constructions, Law no. 50/1991. Although this law does not define the sustainable-character works, too, these could be conceived by reference to the legal provisions regarding temporary- character works. Thus, temporary-character works are defined in Annex 2 to the Law as „these authorised constructions, regardless of the nature of the materials used which, due to the specificity of the function sheltered or due to urbanistic requirements imposed by the public authority, have a limited life, also provided by the construction authorisation". We consider that it is specific to these constructions the fact that they are made „from materials and formations which allow rapid demolition in order to bring the land to its initial condition (...) and have reduced sizes" (annex 2). As an example, the lawmaker included in this category the kiosks, display panels and bodies etc.

Virtually, the temporary works made upon an immovable asset belonging to another person who is not the builder, without a previous agreement with the owner, will not become the object of accession because its legal conditions are not met. The temporary character of such works makes the union of the two assets be one that can be easily undone, each owner keeping only the asset belonging to him. Although none of the parties suffers any prejudice apparently, still the owner of the immovable asset can be deprived of the usage of his asset as long as it is affected by temporary works. That is why the lawmaker maintains in such case the distinction between the builder's good and bad faith. The good faith builder will only be liable at the end of construction, his good faith keeping him away from the payments of damages. On the contrary, the bad faith builder can be liable to pay damages.

The legal situation of the temporary works can be established by the two parties' agreement. Although the law allows the owner of the immovable asset to ask for the removal of the temporary works erected over the immovable asset belonging to him, he also has the possibility to keep such work, subject to the approval of the author of the work in exchange for the payment of some amounts of money offered to him.

To classify the works in autonomous and added works, the lawmaker used the criterion of correlation which can exist between two works. The lawmaker seems to have taken over this criterion used by doctrine to classify things in main and accessory things. According to this classification, the main assets are those that can be used independently, without being meant to be used for the usage of other goods. According to the same classification, the accessory assets are those meant to be used for the usage of other assets.

[2] E.Chelaru.Comment, Fl.Baias, E.Chelaru, R.Constantinovici, I.Macovei (coord.), The New Civil Code. Comments on articles. Art.1-2664, Ed. C.H:Beck, Bucureşti, 2012, p.644

The importance of dividing the assets in main and accessory ones comes from their submission to the phrase from Latin law „*accesorium sequitur principale*". „Applied in this situation, it means that, when it is the object of a legal act, the accessory asset has the fate of the main asset."[3]

Although the accessibility report occurs between two works belonging to different owners, this classification is important „only in case of works accomplished on somebody else's immovable asset, not when the owner of the immovable asset uses somebody else's material".[4]

In the new context of the new Civil Code in matters of land register book, this classification has a significant importance regarding the obtainment of ownership on such works[5]. As resulting from the provisions of art. 885, „subject to some legal contrary provisions, the real rights over the immovable assets contained in the land register book are obtained both between parties, and in relation to third parties, only by their inscription in the land register book, based on the document or the deed that justified the inscription". By applying such provisions, autonomous works could be acquired into property, on principle, only by their inscription in the land register book. Thus, the accession right that the land owner has over the works accomplished on it shall be considered exerted by starting the inscription procedure of his right in the land register book. Added works, as they do not have a freestanding character and their existence is well connected to an autonomous work, shall make common body with it, and, on principle, a separate inscription related to their property is not necessary.

Autonomous works are, as resulting from the provisions of the Civil Code, the constructions, plantations and any freestanding works accomplished upon an immovable asset (art. 578 of Civil Code), immovable asset that can be either land or construction.

The freestanding character is missing to the added works which cannot exist in absence of an autonomous work. Therefore, the replacement of the trees from a plantation after fruiting with younger ones was considered as having an added character.[6]

Added works fall under three categories: necessary, useful and voluptuary works. This classification, by the notions used, remembers the classification of expenses that can be reimbursed following the admission of an action for recovery of possession. We consider that this classification made by doctrine finds now a legal support, since the character of the expenses made is determined by the character of the works they have generated.

Thus, the doctrine[7] considered that such expenses were necessary which were made for the preservation of the asset. Similarly, they consider as added works those works without which the immovable asset would perish, totally or partially, or would be damaged. Therefore, these works are used to preserve the immovable asset.

The useful expenses are those made for the augmentation of the fund. Correlatively, the useful works, those involving the useful expenses, are those which „enhance the economic value of the immovable asset" (art. 578 para.2 lett. b). Added works are those „by which a specific function is created or modernized, always assuming a value added of the fund, too"[8].

Finally, the voluptuary expenses were considered those „that the owner had made for his/her own pleasure without augmenting the value of work in this way".[9] In order to

[3] E.Chelaru, Civil Law. General Part, Ed. C.H.Beck, Bucureşti, 2007, p.87
[4] E.Chelaru, Comment, 2012, p.644
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[7] E.Chelaru, Civil Law. Main Real Rights, Ed.C.H.Beck, Bucureşti, 2009 p.268
[8] V.Stoica, Civil Law. Main Real Rights, Ed.C.H.Beck, Bucureşti, 2009, p.328
[9] G.Boroi, C.A.Anghelescu, B.Nazat, Course in Civil Law. Main Real Rights, Ed. Hamangiu, Bucureşti, 2013, p.129

specify which the voluptuary works were, the lawmaker, by analogy, took over such character outlined by doctrine for voluptuary expenses. Pursuant to art. 578 para.2 lett. C, the voluptuary works are those which „were made for the mere pleasure of the person/entity who accomplished them, without augmenting the economic value of the immovable asset".

In case of an action for recovery of damages, this classification is necessary in order to establish which of the expenses made by the party – against which the judicial judgment is issued – can be recovered by such party. Pursuant to art. 566 from the new regulation, which is not different from the old one in this regard, in case the action for recovery of damages is admitted, the defendant can obtain the full reimbursement of the necessary expenses and of the useful ones, within the limit of the value added brought. But the defendant will never be able to make the owner reimburse the voluptuary expenses.

In case of accession, the situation is similar. The expenses generated by the accomplishment of the necessary and of the useful works will be reimbursed differently according to the builder's good or bad faith. In both situations, when „the ownership right is acquired directly by incorporation and it is not pre-conditioned by its inscription in the land register book, the sale of the immovable asset shall transfer the payment obligation of the compensation into the asset patrimony of the new owner. In such cases, the payment obligation of the compensation shall be transmitted *propter rem*".[10]

The good faith builder shall obtain the „reasonable expenses" (art. 583 para.1) generated by the necessary added works, even if the immovable asset does no longer exist at that moment. This happens because „the owner of the immovable asset became the owner of the work even from the moment of its accomplishment"[11]. On the other hand, even if such norm seems to be an application of the *res perit domino* principle, though it would have been useful to have made a distinction between the different cases that can determine the disappearance of the thing. For instance, if „the immovable asset disappeared due to the cause for which the works had been made, it means that the works did not reached their goal, so they can no longer be considered necessary."[12] Moreover, although the works have a necessary character, if they are made in a defective manner, thus leading to the disappearance of the asset, then the author of the work can be held liable on the grounds of tort liability.

Some gradations should have been achieved by the lawmaker. In default of them, it is likely that court solutions in similar cases will be different, the norm being interpretable.

The „reasonable" character of expenses clearly highlights a high margin of subjectiveness in their appreciation. We consider, like other authors[13], that the court shall have a crucial role in the appreciation of the „reasonable" quantum of expenses when the parties do not get along well in such regard.

As they are works „that the owner himself of the immovable asset should have accomplished"[14], even if they were made in bad faith, they shall not be removed or demolished on the builder's expense. As they are essential for the existence or the integrity of such immovable asset, such claim raised by the owner of the immovable asset would be abusive and vexing.

[10] I.Sferdian, Notes on artificial immovable accession in regulating the new Civil Code (Law no.287/2009).Law, no. 2/2011, p.28
[11] E.Chelaru, Comment, 2012, lucr.cit., p.650
[12] G.Boroi, C.A.Anghelescu,B.Nazat, lucr.cit., p.219
[13] F.Morozan, Comment, lucr.cit., p.876
[14] Idem

Having to keep the works accomplished by a bad faith builder, the owner of the immovable asset has also to compensate him by the same „reasonable expenses" from which he „can deduct the value of the usufruct of the immovable asset, diminished by the cost necessary to obtain them" (art. 583 para.2 NCC [*new civil code*]). It is considered that the lawmaker understood to sanction the bad faith builder in this way also for the failure to use the immovable asset, making a distinction in this regard compared to the treatment applied to the good faith builder. This regulation is based on another regulation, i.e. the one provided by art. 948 NCC, according to which the good faith owner acquires the ownership right over the usufructs of the possessed asset.

It is not the same situation in case of useful added works. Lacking the „necessity" character, they will be demolished by the will of the owner of the immovable asset when they find out that they were made in bad faith. Complying with the provisions of the special law (Law no. 51/1991 regarding the authorisation of execution of construction works), when there are works which needed a previous administrative authorisation for execution, such authorisation shall be necessary also for the demolition of such works. For the same hypothesis, the lawmaker also provides the possibility of requesting recovery of damages from the bad faith builder. These damages should cover the prejudice caused by the execution of the work that was or was to be demolished. Obviously, the claimed prejudice has to be proved.

The owner of the immovable asset also has the possibility of keeping such added works if they are useful. Exerting his option to keep the works, the owner of the immovable asset shall have to pay damages to the builder, to whom the owner, upon his choice, shall reimburse either the expenses corresponding to the value of materials and labour, or the augmentation of value brought to the immovable asset.

We find an interesting aspect in case of the treatment applied by the lawmaker to the bad faith builder. Virtually, such builder shall receive also, like the good faith builder, the reasonable expenses borne by him in the execution of the necessary added works. Out of this amount, the owner of the immovable asset can obtain the deduction of the value of usufructs of the immovable asset, diminished by the costs necessary to their procurance (art. 583 para.2). For useful added works, the bad faith builder shall only get either half of the expenses incurred with labour and materials, or half of the augmentation of value brought to the immovable asset.

We see that, in establishing the compensations owed by the owner to the builder as result of accession, the lawmaker tried to make a clear treatment distinction, according to his good or bad faith. Although this legislative amendment was long-expected, by choosing this form of compensation, the lawmaker makes discrimination towards the bad faith builder compared to the bad faith defendant from the action for recovery of damages. From our perspective, between a person who acquires in bad faith an immovable asset owned by some other person (the case of the defendant in the action for recovery of damages) and a person who performs a work in bad faith, with his materials or somebody else's materials, on a piece of land not belonging to him (the case of the bad faith builder from the case of accession), there should not be any differences of legal treatment regarding the reimbursement of the necessary and useful expenses incurred with the immovable asset which was or entered into the property of another person. Nevertheless, the lawmaker provides a different treatment. While the bad faith defendant from the action for recovery of damages can obtain the reimbursement of the necessary expenses within the limit of the augmentation of value brought to the immovable asset, the bad faith builder can only obtain half of such augmentation.

Another interesting aspect regarding the same useful added works is the possibility offered by the lawmaker to the owner of the immovable asset, in case of the bad faith builder, to acquire the ownership right over the work „with or without inscription in the land register book" (art. 584 para.2 lett.a). From the point of view of legal effects specific to accession, they will be produced differently for sure compared to this aspect. In case of works where inscription in the land register book is necessary in order to get it into property, the ownership right over such works will be born in favour of the owner of the immovable asset only from the inscription date. For the works where such formalities are not necessary, the owner of the immovable asset shall get them into property while accomplishing them.

As well noticed in doctrine[15], the lawmaker did not specify for which works the inscription in the land register book shall be necessary and for which not. Moreover, the lawmaker could have indicated at least one criterion of distinction of such works, according to the necessity of inscription in the land register book or not. Possible criteria of distinction could be identified by analysing the special law, in matters of land register book, Law no. 7/1996 respectively, regarding cadastre and real estate publicity. Another question concerning such regulation is what made the lawmaker create such delimitation in case of the bad faith builder and not in the case of good faith builder.

The doctrine[16] identified a possible answer to the problem identified by this regulation. It is considered that those works leading to the modification of the extension of the immovable asset should be subject to inscription in the land register book in order to obtain the ownership right over them. According to this opinion, only useful added works can involve an augmentation of the extension of the fund, the necessary works and the voluptuary ones lacking such effect. We consider this last claim as groundless, since there is no reason for which the voluptuary added works could not involve an augmentation of the extension of the fund. Within the doctrine, they say that „the exception from inscription in the land register book is a consequence of the added character of voluptuary works"[17]. The useful works also have the same added character, for which the lawmaker expressly provided the two alternative situations regarding the inscription in the land register book or not.

But the lawmaker does not specify what the effect of non-inscription of such works in the land register book by the owner of the immovable asset is.

The specialized doctrine has not found an answer yet to the second question raised by this regulation.

Similarly to the regulation achieved for autonomous works, when the value of the work is considerable, the owner of the immovable asset shall be able to ask for the builder, either good faith or bad faith one, be obliged to buy the immovable asset for the price it would have had if the works had not been made (art. 584 NCC).

Finally, neither the defendant from the action for recovery of damages can make the owner reimburse the voluptuary expenses incurred for the asset, nor the builder from the accession case, good faith or bad faith one, can obtain the expenses made for the accomplishment of some voluptuary added works. But there are also treatment differences in this matter of voluptuary works, between the good faith and the bad faith builder. The lawmaker offers to the good faith builder the possibility to remove such works before returning the immovable asset to its owner, provided that he brings the immovable asset

[15] E.Chelaru, Comment, 2012, p.652
[16] V.Stoica, Civil Law. Main Real Rights, 2009, p.329
[17] F.Morozan, Comment, 2012, lucr.cit., p.878

back to its initial condition (art. 585 NCC). The bad faith builder can also be obliged to bring the immovable asset back to its previous condition and furthermore he can be made pay damages.

Regarding sustainable autonomous works, we find in the new Civil Code most of the regulations on artificial immovable accession from the old one.

The legal practice and doctrine will highlight the degree in which the lawmaker, through the new regulation, succeeded in meeting the requirements imposed by the achievement of a necessary, efficient and coherent regulation. The lawmaker's initiative should be appreciated for the extra strictness brought in this matter, thus reducing significantly the possibility of some arbitrary interpretations of the texts of law.

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EVOLUTION OF COMMON LAW NORMS IN INTERNATIONAL HUMANITARIAN LAW

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Abstract: *Common law is the oldest source of humanitarian law and for a long time it was the only law of this nature. Conventional humanitarian law was based on common law, as unwritten rules led to the settlement of several international problems. Some practices of humanitarian law, such as warning the opponent before attack, suspending the hostilities for gathering the dead and nursing the wounded and so on preceded by millennia the written laws. Even at present, the international humanitarian law, especially the one applied to naval and air war, is based on norms originating in common law.*

Keywords: *common law norms, practice of the states, humanitarian law*

1. Evolution of common law norms in international humanitarian law

Common law is the oldest source of humanitarian law and for a long time it was the only law of this nature. Conventional humanitarian law was based on common law, as unwritten rules led to the settlement of several international problems. Some practices of humanitarian law, such as warning the opponent before attack, suspending the hostilities for gathering the dead and nursing the wounded and so on preceded by millennia the written laws. Even at present, the international humanitarian law, especially the one applied to naval and air war, is based on norms originating in common law.

Common law, according to an expert[1], does not base its authority on formal international documents, such as the conventions, as the core of its compulsory character is the very essence of the decisional process of the state, in its feeling that a humanitarian practice is in accordance with the law. Determining the material contents of the common law norm consequently depends on the judgement of the states in their practice.

In the opinion of the Court[2], a practice in accordance with the general principles of international humanitarian law, encouraged and supported by the international public opinion and by the humanitarian bodies, such as the International Committee of the Red Cross (C.I.C.R.), may become a common law rule, binding on all states, under all circumstances[3]. The material application range of the common law was thus extended to the humanitarian law also in terms of the categories of persons by recognizing as a legal fact the influence of the public opinion and humanitarian organizations on the practice of the states that are parties in an armed conflict[4].

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[1] M. Griffin, Ending the impunity of human rights atrocities: A major challenge for international law in the 21st century, International Review of the Red Cross. 2000, no. 838, pp. 369–389.

[2] See the decision of the ICJ of 1986 in the case of military and paramilitary activities in Nicaragua and against Nicaragua, ICJ Reports, 1986, p.14, para. 183 şi 207.

[3] The documents of the International Conferences of the Committee of the Red Cross (statutes, resolutions, declarations) whose variety is generated by the structural particularities of this organization, to which participate with voting rights all the states parties to the Geneva Conventions are regarded as sources of international humanitarian law. This participation provides the decisions of the international Conferences with a legal power similar to the one of the decisions made by the international governmental organizations in the field of development and interpretation of international humanitarian law.

[4] M. Griffin, op. cit., 2000, no. 838, pp. 369–389.

The states that are not parties to a humanitarian convention are obliged to observe its provisions, in accordance with the general principles of law and with the common law norms it contains[5].

In the case of the military activities in Nicaragua, in the declaration of acceptance of the compulsory jurisdiction of the International Court of Justice, the states limited their agreement to all the facts deriving from a multilateral treaty, provided that all the parties had accepted to compulsory jurisdiction of the International Court of Justice, the United States raised an objection to the jurisdiction of the Court, relying on the fact that Nicaragua had not accepted the clause provided in the Statute[6]. The Court asserted its jurisdiction based on the international common law, as art. 3 common to the four Geneva Conventions of 12 August 1949 states certain rules which must be applied in conflicts that do not have an international character, as these are rules complying with the elementary humanitarian considerations. So the Court may consider them applicable to the aforesaid dispute without any need to rule on the role of the reserve made by the United States [7].

Every state has the obligation to observe the international common law norms, regardless of whether they participated in the creation of or expressed their consent to such norms. The legal argument consists in the fact that the common law norms were formed because they were compliant with the ideas of justice, equality and independence.

Certain customs were codified and included in the conventional law, preserving however their value of common law norms. Such common law norms are the rules written in the Hague Conventions of 1907, the four Geneva Conventions of 12 August 1949 as well as, partially, the ones contained in the Geneva Protocols of 1977[8].

Mahomedan law made a distinction between five categories of just, namely: war against the nonbelievers, war against those who separated from the Islam, punishment of those who disagreed with the interpretation of the Quran[9], fight against the warriors and the Christians.

Although it generated essential changes in the laws and traditions of war, the 18th century did not put an end to the practice of violence. The principles and norms of international law instituted after the peace of Westphalia laid the foundations of the international law of those times[10]. The next stage in the development of this branch of law, due to the French Revolution of 1789, is characterized by the waiver of the old laws and customs of war, immersed in violence and absolutist spirit and by the institution of rules according to which war may be declared only by means of a special decree passed by the legislative body.

The concept of law source defines the form of expression of the norms in the international humanitarian law. The importance of the sources of international humanitarian law consists in the fact that they explain who may create norms applicable in case of armed conflicts, where such norms are to be found and which is the exact time when their observance becomes compulsory[11]. In a general context, traditional sources of international

[5] The interpretation is in accordance with art. 60 of the Vienna Convention on the law of treaties, from which it results that the provisions of the huma nitarian conventions are rules of *ius cogens gentium*, otherwise the states cannot derogate.
[6] See art. 36, par. 2 if the ICJ Statute
[7] CIJ, Recueil des arrets, 1986, p. 114, par. 218.
[8] V.S.Bădescu, Umanizarea dreptului umanitar, Ed.C.H.Beck, Bucharest, 2007, p. 22.
[9] Quran (Alcoran), Arabian word meaning reading, sacred book of the Muslim religion, a textbook of myths, religious dogmas, moral and legal rules, prepared and adopted during the Osman caliphate. The Quran is divided into 114 chapters (sure), written in various periods. According to the Islamic b elief, the Quran was transmittted by revelation by Allah to Mohammed.
[10] V.S.Bădescu, op. cit., 2007, p. 46.
[11] S.Scăunaş, Răspunderea internațională pentru violarea dreptului umanitar, Ed.AllBeck, Bucharest, 2002, p.27.

humanitarian law are the international treaty and the international custom, while the auxiliary means to determine such law are the internal acts of various states[12], as well as the doctrinaire works. From 1864, when the first Geneva Convention was adopted, until 1977, when the additional Protocols to the 1949 Geneva Convention were adopted, the international humanitarian law had an ascending evolution[13].

The four Geneva Conventions and the 1977 Additional Protocols provided legal protection to the persons who did not participate or ceased to participate directly in the hostilities (wounded, deceased and shipwrecked persons, persons deprived of freedom on reasons related to the armed conflict and civilians).

Among the recent examples we can list the Copenhagen Appeal launched by the UN High Commissioner for human rights at the International Rehabilitation Council for Torture Victims (I.R.C.T.) in Copenhagen, on 28 June 1994, and the Common Declaration of the Committee Against Torture, the Board of Directors of the Voluntary Fund for Torture Victims and the Special Report on torture issued by the High Commissioner for human rights, the UN meeting at the UN office in Geneva, on 19 May 1998.

The treaty law is well developed and covers a large number of aspects of the armed conflicts, providing protection to certain categories of persons in times of was and limiting the permitted means and methods of war. The Geneva Conventions and the Additional Protocols provide for an extensive regime of protection for the persons who do not participate or no longer participate directly in the hostilities[14]. The regulation of warfare the means and methods by rules contained in treaties started with the Sankt Petersburg Declaration in 1868, it continued with the Hague Conventions of 1899 and 1907 and with the Geneva Protocol of 1925 on the prohibition of asphyxiating gases, them with the 1972 Convention on the prohibition of the development, production and use of biological, bacteriological and toxin weapons, the 1977 Additional Protocols, the 1980 Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, and its five Protocols, the 1993 Convention on the prohibition of chemical weapons and the 1997 Ottawa Convention on the prohibition of anti-personnel mines[15]. The 1954 Hague Convention and its two Protocols regulate the protection of cultural property in case of armed conflict. The Charter of the Nürenberg Tribunal makes provisions regarding the category of war crimes, namely the violation of the war laws and customs, while the 1998 Statute of the International Criminal Court includes the category of war crime among the four crimes which, according to art. 5 of the Statute, are in the ICC jurisdiction and art. 8 of the ICC Statute lists, defines and details the substantial elements of war crime and the war crimes in the jurisdiction of the Court[16].

Firstly, the treaties are applicable only to those states which ratified them. It means that in different armed conflicts different treaties of international humanitarian law are applied, pen ding on the treaties that had been ratified by the states involved. While the four Geneva Conventions have been ratified worldwide, this is not the case of other humanitarian law treaties, such as the Additional Protocols.

[12] The military manuals and instructions and the internal laws of application are taken into account.
[13] S.Scăunaş, op.cit., p.14.
[14] V.S.Bădescu, op.cit., 2007, p.48.
[15] Idem., p.49.
[16] M.N.Shaw, op.cit., 2008, pp.410-417.

Secondly, conventional international humanitarian law does not regulate in sufficient details the non-international armed conflicts, as those conflicts are the object of some treaties less detailed than the ones regulating the international conflicts. Only a limited number of treaties are applicable in case of non-international armed conflicts, namely the Convention on certain categories of conventional weapons, the Statute of the International Criminal Court[17], the Ottawa Convention on the prohibition of anti-personnel mines, the Convention on chemical weapons, the Hague Convention on the protection of cultural property and its second Protocol and the Additional Protocol II and the common art, 3 of the four Geneva Convention. The common art. 3 is of a fundamental importance, but it provides only a general framework of minimal standards. Additional Protocol II completes that common art. 3, yet it remains less detailed than the norms of the Geneva Conventions and of the Additional Protocol I, which govern the international armed conflicts.

Selection of the practice of states. In international humanitarian law there are three categories of practice, namely: the diplomatic practice, which consists of the positions adopted in the codification conferences or in certain bodies of the international organizations; the legislative practice, which refers to the ratification of and adhesion to conventions; and the military practice, which consists of military regulations and manuals[18].

Evaluation of the practice of states. In order to generate a rule of international common law, the practice of the states must be as uniform, frequent and representative as possible[19]. The practice of the states may create a rule of international common law when it is as uniform as possible[20].

This fact is even more relevant for some of the rules of international humanitarian law in whose case there are many elements proving a practice of the states in support of that rule, but also repeated cases of violation of that rule. In the cases where the violations were followed by apologies or justifications by that state and / or by denunciation by other states, the existence of that rule is not questioned. The states which wish to change an existing rule of international common law must do so by their official practice and by maintaining the fact that they act in accordance with a rule of law.

Secondly, in order for a new rule of general international common law to be created, that practice must be both frequent and representative, but such practice does not need to be followed by a pre-established number of states. This criterion is rather qualitative than quantitative. It is not only the number o states that is important, but also which are those states[21]. In terms of the case in the matter of the North Sea continental plateau, the International Court of Justice showed that the practice should include those states which are „particularly concerned" [22].

[17] The ICC Statute specified the provisions with are applicable to the non-international armed conflicts, as well as to which acts they are applicable, e.g. art.8, para.2, letters c,d,e.

[18] In order to identify the customary rules, one must take into account the UN Resolutions, especially those of the Security Council, of the General |Assembly and of the Committees for human rights; ad-hoc investigationsof the United Nations, reports of the UN Secretary General; thematic procedures, procedured according to countries of the UN Council for Human Rights; preparatory works for the treaties, practice of the international organizations, history manuals, activities of the research institutions, decisions of the international cours. At an internal level, declarations of general politics, diplomatic correspondence, military manuals, military releases in war times, answers and comments of the government issued to the reserves to international treaties or to the refuse to adopt, sign or ratify a treaty, press releases.

[19] M.N.Shaw, op.cit., 2008, p.82.

[20] C.Gray, International Law and the Use of Force, 3rd edition, Oxford University Press, Oxford, 2008, p.44.

[21] R.Miga-Beşteliu, op.cit., 2010, p.63.

[22] See the cases in the matter of the North Seal Continental Plateau*,* ICJ Reports, 1969, p. 43.

This approach has two implications: (1) if all the states „particularly concerned" are represented, it is not the active participation of the majority of states that is essential, but their acquiescence to the practice of the states „particularly concerned" and (2) if the states „particularly concerned" do not accept the practice, it cannot become a rule of international common law even if – as explained above – unanimity is not necessary. In the case of international humanitarian law, the circumstances indicate the states „particularly concerned". For example, in the case of laser weapons which cause permanent blindness, the „particularly concerned" states include those identified as being in the process of developing such weapons, although the states supposed to be affected as a result of the use of such weapons would be other states. Similarly, the states whose population needs humanitarian assistance are particularly concerned, as well as the states which provide frequently such assistance. With reference to any rule of international humanitarian law, the countries which took part in an armed conflict are particularly concerned in case that their practice examined in the report on a certain regular basis was relevant in that armed conflict[23]. Although in certain branches of international humanitarian law only some states may be particularly concerned, it is equally true that all the states, even if they are not part in a conflict, have a legal interest to request compliance with the international humanitarian law by the states involved in that conflict[24]. Although many authors deem that in case of the *jus cogens* norms there cannot exist a persistent contester, there also are authors who question the very validity of the notion of persistent contester[25]. If we accept the existence from a legal point of view of a persistent contester, that state should have brought objections against the new norm, during the process of its formation and subsequently should have continued to object persistently; the position of „subsequent contester" is not possible[26].

Longstanding, constant practice followed by as many states as possible is expressed by legal documents at a national or international level, that are issued by the state, as well as by international organizations such as the International Committee of the Red Cross, which, being subjects of international law, can create o certain custom in the rules governing the intervention of the Red Cross in armed conflicts[27].

In the Nicaragua case, the court also referred to other written texts, such as the resolution of the General Assembly of the United Nations, articles of incorporation or international organizations and treaties, for the purpose of establishing the common law nature of a rule[28]. In the advisory opinion on the legality of the threat or use of nuclear weapons, the court resorted to the „conditions of adopting a decision to establish the legal character of a custom"[29].

The multitude of decisions and documents of the UN General Assembly and of its committees, of the International Law Commission and of the diplomatic conference makes the analysis of the state practice difficult. The verbal declarations may provide hints on the *opinio juris* of the states. As a matter of fact, such declarations can erode the *opinio juris* on an old legal regime and can provide a starting point for new evolutions.

[23] C.Gray,op.cit., p.55.
[24] Idem.
[25] M.H.Mendelson, op.cit., p.227-244.
[26] C.Gray, op.cit., p.58.
[27] Ch.Dominice, La personalite juridique internationale du CICR, in vol. Etudes et essais sur le droit international et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet, p.663-673.
[28] ICJ Reports, 1986, p.104, para.196.
[29] ICJ Reports, 1996, p.26, para.70.

The diversified framework of the verbal acts cat include the written comments of the states on the texts elaborated by the UN bodies or committees, such as the comments made during the annual debates of the 6th (Legal) Committee of the General Assembly or of the International Law Commission[30]; the declarations in other commissions of the General Assembly or in other UN bodies; declarations at the diplomatic conferences[31], amendments presented in such debates; voting explanations; interpretative declarations, as well as reserves made in connection with the adoption of a text.

The value of the votes in the analysis of the practice of states becomes irrelevant if a state does not apply or delimit the content of a rule. So, the number of affirmative votes in the Vienna Conference of 1968-1969 on the law of treaties provides important indications in connection with the degree of acceptability of certain rules and principles discussed by the participating states[32].

***Opinio juris* in the context of separation from the practical element.** The *opinio juris* in determining the existence of a rule of international common law refers to the legal conviction of the states that a certain practice complies with a rule of law. Many times one and the same act reflects simultaneously both the practice and the legal conviction.

In the field of international humanitarian law, where many rules require refraining from a certain conduct, omission raise a special problem in determining the existence of the *opinio juris*, as it has to be demonstrated that refraining is not a coincidence, but it is based on a legitimate expectation[33]. When the requirement of refraining is provided in international instruments and official declarations, the existence of a legal requirement not to resort to that conduct can be demonstrated. In addition, such refraining can take place after that conduct having caused certain controversies, which is helpful in demonstrating that the refraining is not a coincidence. However, it is not easy to demonstrate that the refraining was based on the awareness of a legal obligation.

In case of armed conflict, the public opinion at the international level can help the development of a practice, causing the states to adopt a certain conduct which, after a while, would become compulsory for all the members of the international community[34].

As a conclusion, starting from the fact that humanitarian law was at its origins a common law, many of such customs are still in force at present. It must be emphasized that any state has the obligation to observe the international customs, regardless whether it participated or not in their creation. Starting from the idea that an international custom reflects in its content the idea of justice, we can consider that in the absence of a formal acceptance, a state has the obligation to observe any rule which governs the international community.

A proof of the fact that international liability emerges in case of violation of the customary rules results from the penalty imposed on the war criminals[35]. In the Report of the UN Secretary General on the constitution of the International Tribunal for the Former

[30] Advisory Opinion on the reserves of the Convention on the repression of genocide, ICJ Reports, 1951, p.26.
[31] See the case of Morocco in the matter of the US citizens, ICJ Reports, 1952, p.209; case of the North Sea Continental Plateau, ICJ Reports, 1969, p.38, para.62.
[32] R.McCorquodale, M.Dixon, op.cit., 2003, pp.30-31.
[33] V.S.Bădescu, op.cit., 2007, p.88.
[34] Such a thesis was stated by the ICJ in the case of the North Sea Continental Plateau, where it was found that the documents not only have to represent a constant practice, but they must testify, by their nature or by the manner of their execution, the conviction that this practice became conpulsory by the existence of a rule of law, and the states concerned must have the feesing that they comply with what is equivalent to a legal rule. See the ICJ Reports, 1969, p.44, par.77.
[35] See the jurisprudence of the Military Tribunal of Nürnberg. An example in this sense is Germany, who violated the customary rules contained in the Hague Conventions in spite of being a party to them.

Yugoslavia, there were listed as part of the common law the Hague Regulations of 1907, the Charter of the International Military Tribunal of Nürenberg of 1945, the Convention on the prevention and punishment of genocide, the Geneva Convention of 1949. The confirmation of the customary character of such instruments may be considered as being binding on all the states, since the Security Council approved the report of the Secretary General. In the doctrine it is considered that in the international law new rules can operation in a customary way[36], although there is a risk of developing dispensatory customs liable to block the stability of humanitarian law.

Due to practice, there are many customary rules identical or resembling the ones contained in the law of treaties. As an example of rules whose customary character was determined and for which there are corresponding provisions in the Additional Protocol I, we can refer to the principle of distinction between civilian population and combatants and between civilian property and military objectives[37]; prohibition of indiscriminating attacks; the principle of proportional attack; the obligation to take all the practically possible precautions in an attack in connection with the effects of the attack; the obligations to respect and protect the medical and religious staff, the medical transportation units and means; the staff and property of humanitarian assistance and the civilian journalists; the obligation to protect medical services; the prohibition to attack non-defended localities and demilitarized areas; the obligation to spare life and to protect the enemy out of battle; the prohibition of starvation; the prohibition of attacking property indispensable to the survival of the civilian population; the prohibition of the improper use of emblems and the prohibition of treachery; the obligation to observe the fundamental guarantees of the civilians and of the persons no longer in battle; the obligation to search for the missing persons and specific measures of protection provided to women and children[38]. Most of such rules have been introduced in the Statute of the International Criminal Court[39].

During the past decades the emergence of an important practice was noticed in connection with the protection provided by the international humanitarian law. This group or practices influenced in a decisive manner the formation of customary rules applicable in the non-international armed conflicts. Like the Additional Protocol I, the Additional Protocol II had a significant effect on this practice and, for this reason, some of its provisions are considered as part of the international common law. As an example of rules whose customary character was established and which have a correspondent in the provisions of the Additional Protocol II, we can quote: the prohibition of the attacks against civilians; the obligation to respect and protect the medical and religious staff, the medical units and transportation means; the obligation to respect the medical services; the prohibition of starvation; the prohibition to attack property indispensable to the survival of the civilian population and of the persons no longer in battle; the obligation to search for, respect and protect the diseased, the wounded and the shipwrecked; the obligation to search for the dead; the obligation to respect the persons deprived from freedom; the prohibition of forcible displacement of civilians and specific protection measures for women and children.

The International Court of Justice established in its Advisory Opinion in the case of the legality of the threat or use of nuclear weapons that „at present, the states must take into

[36] R.Miga-Beşteliu, op.cit., p.53.
[37] J.M.Henckaerts, L.Doswald-Beck,op.cit., 2009, pp.3-25.
[38] Idem., pp.475-485.
[39] Art. 8 entitled War Crimes, para.2, lit.b (V), attack against the dwelling or undefended construction para.2 lit.b(ix) atack against buildings dedicated to religion, education, arts, sciences, hospitals etc.

account the ecological reasons when they decide what is necessary and proportional in the pursuit of the legitimate military objectives"[40]. In addition, in the conduct of the hostilities, the parties to a conflict must take all the reasonable practical measures to avoid and mitigate the loss incidentally caused to the environment. The absence of scientific certainty with reference to the effects of the military operations on the environment does to exclude the obligation of a party in conflict to take precautions. It is an essential component of the principle of precaution which operates also in the environment law[41]. As a matter of fact, there are issues that have not been approached in the Additional Protocols. The Protocols do not contain any specific provision on the protection of the staff and materials used in the peace maintenance missions. However, in practice, such staff and property enjoyed protection against attacks, equivalent to the protection of civilian persons and property. Hence a rule developed in the practice of the states, prohibiting the attacks against the staff and materials used in peace maintenance missions approved by the Security Council in accordance with the United Nations Charter, to the extent that they are entitled to the protection provided to civilian persons and property, in accordance with the international humanitarian law. This rule was included in the Statute of the International Criminal Court and it is part of the international common law applicable to any type of armed conflict[42].

The general principles prohibiting the use of weapons deemed to be excessively injurious or to have indiscriminate effects are of a customary nature, regardless of the type of armed conflict. Further, due to these principles, the practice of the states prohibited to a great extent, as international common law, the use (or certain types of use) of certain specific weapons: poison or poisonous weapons; biological weapons; chemical weapons; agencies for the control of public revolts as a method of warfare; herbicide as a method of warfare; bullets which easily expand or flatten in the body; anti-personnel bullets which explode in the human body; weapons whose main effect is to wound with fragments non-detectable by X-ray in the human body; traps attached to or in any manner associated with other objects or persons who enjoy special protection under the international humanitarian law or with objects susceptible to draw the attention of the civilians; and of laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision [43]. The International Court of Justice examined the legality of the threat or use of nuclear weapons, as a response to the request of an advisory opinion made by the UN General Assembly. In its advisory opinion, the International Court of Justice unanimously considered that „the threat with the use or the use of nuclear weapons must be compatible also with the requirements of the international law applicable to armed conflicts, especially with the principles and regulations of the international humanitarian law"[44]. This conclusion is important, given the fact that certain states had involved by that time in the negotiation of the Additional Protocol I, understanding that this Protocol would not have been applicable in the context of the use of nuclear weapons. The opinion of the Court showed that the rules regarding the conduct of the hostilities and the general principles regarding the use of weapons are applicable also in case of use of the nuclear weapons. According to the Court, in the application of these principles and rules the threat to use or the use of the nuclear weapons is, in general,

[40] Advisory Opinion on the legality of threat to use of use of nuclear weapons, ICJ Reports,1996, p. 30.
[41] M.Duțu, Tratat de dreptul mediului, Ed. C.H.Beck, Bucharest, 2007, p.253-257.
[42] Art. 8 (war crimes) para.2, lit.b (iii).
[43] V.S.Bădescu, op.cit, 2007, p.49.
[44] Case of the legality of the threat to use or the use of nuclear weapons, ICJ Reports, 1996, p.226; D.Popescu, Problema regimului juridic privind armele nucleare, in R.R.D.I., no.8, 2007, p.31.

contrary to the rules of international law applicable to the armed conflicts, especially to the principles and rules of the humanitarian law.

We must emphasize the common action 2008/307/PESC of the Council of the European Union of 14 April 2008 in support of the activities of the World Health Organization in the domains of biosafety and biosecurity within the Strategy of the European Union against the proliferation of mass destruction weapons.

The WHO programme of biological risk reduction management provides guidance regarding the conditions for the operation of laboratories, by the mediation of the regulating orientations, of workshops and of professional training in the domain of biosafety practice, of biosecurity in laboratories and of conduct codes regarding the responsible research in the field of biosciences, It also has an important rile in the elaboration of the UN orientations regarding the transportation of toxins[45].

The international law of human rights continues to be applied during the armed conflicts, as expressly provided in the very contents of the treaties regarding human rights. However, under certain circumstances, some of the provisions may be subject to derogation, in case of exceptional public necessity[46]. The fact that the human rights continue to be applied also in times of armed conflicts was repeatedly confirmed by the practice of the states, by the bodies which supervise the observance of human rights and by the International Court of Justice. In its advisory opinion on the legal consequences of building a wall in the occupied Palestinian territory, the Court confirmed that „the protection provided by the conventions on the human rights does not cease in case of an armed conflict" and that, while some of the rights are subject exclusively to the international humanitarian law or exclusively to the human rights, there are also rights which can at the same time be subject to both branches of international law"[47].

[45] V.S.Bădescu, op.cit.,2007, p.102.
[46] Ibidem., p.54.
[47] See the case on the legal consequences of building a wall in the ocupied Palestinial territory, Advisory Opinion, 9 July 2004, ICJ Reports, 2004, para.106.

THE SWEDISH NATIONAL COURTS ADMINISTRATION

Doina POPESCU[*]

Abstract: *The National Courts Administration is a central administrative authority for authorities within the Swedish Judiciary: the general courts, the general administrative courts, the regional rent and tenancy tribunals and the National Legal Aid Authority. The National Courts Administration create the conditions necessary for cases and other matters to be dealt with efficiently and according to due process, among other things through the efficient and appropriate allocation of resources. The starting points for the work of the National Courts Administration are the instructions of the National Courts Administration and the Terms of Reference issued by Parliament. There are three types of court in Sweden: the general courts, which comprise district courts, courts of appeal and the Supreme Court, the general administrative courts, i.e. the county administrative courts, the administrative courts of appeal and the Supreme Administrative Court, as well as the special courts, which resolve disputes within special areas, e.g. the Labour Court and the Market Court.*

Keywords: *Swedish Judiciary, National Courts Administration, Supreme Court*

1. Introduction

The history of the Swedish legal system goes back a long way and as early as the 14th century our modern court system began to take shape. At that time Sweden was divided up into a number of smaller realms, which were in turn divided up into härads ('hundreds'). Each härad had a district court. The district court was the court of first instance in the legal chain, whilst the county court was the highest authority and court in each county. The county court was both a political institution and a court and in time the judicial part acquired the name lagmansrätt.

The King also had judicial power – the King was often the person people turned to if they wished to appeal against a decision reached by the 'popular' law courts. In rural areas in particular, the King's judicial power was exercised by a storman holding a räfsteting, which pronounced judgment in disputes. In the towns, however, the courts were linked to the town council – the mayor and the councillors who controlled the town often acted as judges, a system which had strong similarities to the German court system The establishment of the first Court of Appeal in Stockholm in 1614, following efforts lasting more than 100 years, marked the starting point for what was to be the present-day court system.

The task of the Court of Appeal was to pass judgment on behalf of the King, although the King very quickly reserved the right to personally re-examine certain cases. Even so, the inception of the Stockholm Court of Appeal meant that a permanent system was introduced for the hearing of disputes and cases in different courts. Civil cases could be appealed from the *häradsrätt* and *rådhusrätt* to the *lagmansrätt* and then to the Court of Appeal. Criminal cases, however, were appealed directly from the *häradsrätt* and *rådhusrätt* to the Court of Appeal.

Alongside the *häradsrätt*, *rådhusrätt*, *lagmansrätt* and the court of appeal –which pronounced judgment in civil cases and criminal cases – the need arose in the 17th century for courts within different special areas. *Kommerskollegiet* wassuch a court, charged with

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responsibility for passing judgment in disputes of an administrative and financial nature. *Kommerskollegiet* was the forerunner of the present-day administrative court of appeal.[1]

2. The 1971 Court Reform

In 1798, a long-standing idea of having a supreme court could finally be realised and at the same time it was deemed appropriate to separate cases into legal and administrative. Ideas regarding how the general courts could be reorganised into the system we have today came about during the latter half of the 19th century and the early part of the 20th century. Minor changes and simplifications were also made although it was not until 1971 that the *häradsrätt* and *rådhusrätt* systems were actually merged into district courts. Since 1971, 'district court' has been the standard designation for the court of first instance in the general court system.

Alongside this there was also a reform of the work involving administrative cases and disputes.[2] This commenced at the end of the 19th century and in 1909 the Supreme Administrative Court was established. Prior to this it was the government that was responsible for resolving disputes of an administrative nature. This was now the responsibility of the Supreme Administrative Court although the government retained responsibility for examining suitability. Gradually, a system of lower administrative courts was also established and in 1979 the administrative courts acquired their present form. Alongside this, a number of new specialist courts were established during the 1900s.

Even if the present-day court system has a history dating back 1,000 years we can see that its present form is no more than 30 years old.

3. Swedish Judiciary

Sweden follows the civil law tradition, common to Europe, founded on classical Roman law, but has been further influenced by the German interpretation of this tradition. The Romano-German legal influence is manifested in the dependence on statutory law. Sweden has both General and Administrative Courts. General Courts deal with both criminal and civil cases. Each of the forty-eight judicial districts has its own District Court (Tingsrätt). There are also six Courts of Appeal (Hovrätt), and the Supreme Court (Högsta domstolen), which is based in Stockholm.

Administrative courts are seperate from General Courts, and include twelve County Administrative Courts (Förvaltningsrätt), four Administrative Courts of Appeal (Kammarrätt) and one Supreme Administrative Court (Högsta Förvaltningsdomstolen, formerly Regeringsrätten).

As well as the General and Administrative Courts, there are three Special Courts - the Labour Court (Arbetsdomstolen),the Market Court (Marknadsdomstolen) and the Court of Patent Appeals (Patentbesvär).

The Swedish Judiciary, which comprises some 80 different agencies and boards, is an important part of the judicial system. It is vital that the courts remain independent and free from the control of Parliament, Government and other authorities. The judicial system also includes crime prevention agencies and authorities with an investigative role, such as the Swedish Police, the Prosecution Authority and the Swedish Economic Crime Authority as

[1] Jan Andersson,. *A History of Sweden*, Weidefield and Nicolson, London,1955,307
[2] Christian Diesen, Observations on the Swedish legal system, Stockholm's University,2010,pg.81

well as the Prison and Probation Service, the National Board of Forensic Medicine and Swedish Customs. Other authorities may also carry on work related to the judicial system

Sveriges Domstolar is the collective name for the Swedish Judiciary. The Swedish Judiciary comprises the general courts, the general administrative courts, the regional rent and tenancy tribunals, the National Legal Aid Authority and the Swedish National Courts Administration.

The work of the courts is governed by Parliament by means of legislation.

Responsibility for preparing matters for the Swedish Judiciary rests with the Ministry of Justice, which is also the ministry with primary responsibility for constitutional laws and other legislation within:

- constitutional law and administrative law,
- procedural law and civil law, and
- criminal law.

The police service, the prison and probation service, the prosecution service and the National Council for Crime Prevention also come under the Ministry of Justice. The Ministry is also responsible for matters relating to, among other things, democracy and integration.

Each year, the government issues Terms of Reference, which include overall rules and guidelines for how the National Courts Administration, the courts and the tribunals should work.

4. National Courts Administration

The National Courts Administration is a central administrative authority for authorities within the Swedish Judiciary: the general courts, the general administrative courts, the regional rent and tenancy tribunals and the National Legal Aid Authority.[3] The National Courts Administration create the conditions necessary for cases and other matters to be dealt with efficiently and according to due process, among other things through the efficient and appropriate allocation of resources. The starting points for the work of the National Courts

Administration are the instructions of the National Courts Administration and the Terms of Reference issued by Parliament.

The Swedish National Courts Administration is a state authority reporting to the Government and functions as a service organisation for the Swedish courts. The Swedish National Courts Administration does not have any powers to make decisions over the final judgments or decisions of the courts.The function of the Swedish National Courts Administration is to be responsible for overall coordination and common issues within the Swedish Judiciary. The work also involves providing service to the courts, the regional rent and tenancies tribunals and the National Legal Aid Authority.

This may involve issues concerning personnel development, education and information, preparation of regulations, advice and instructions and responsibility for the operation being conducted in an efficient and easily accessible way for the citizens. The operations of the courts should proceed in the best interests of the citizens. This involves, among other things, reducing times from crime reports to judgment and the enforcement of penalties.

For the courts, the objective is to determine cases and matters in a legally secure and efficient way. The function of the Swedish National Courts Administration is to create the preconditions for the courts to be able to satisfy the goals set by the Government and the Riksdag.

[3] Christian Diesen, Observations on the Swedish legal system, Stockholm's University,2010,pg.109

The goals that the Swedish National Courts Administration must satisfy relate, among other things, to efficient and appropriate allocation of resources, to promoting increased collaboration, both within the Swedish Judiciary and between the courts and with other public authorities, and similarly to be a driving force and a support in work with reforms and improvements within the courts. The document that governs the Swedish National Courts Administration and the operations of the Swedish Judiciary is the Government´s Terms of Reference.

The Terms of Reference is a document issued annually that contains overall rules and guidelines for how the Swedish National Courts Administration, courts and boards should work. The Government states in the Terms the objectives of the operation and what appropriations have been made available to the Swedish Judiciary. Special assignments are also commissioned through the Terms of Reference.[4]

Current Status

There are three types of court in Sweden: the general courts, which comprise district courts, courts of appeal and the Supreme Court, the general administrative courts, i.e. the county administrative courts, the administrative courts of appeal and the Supreme Administrative Court, as well as the special courts, which resolve disputes within special areas, e.g. the Labour Court and the Market Court.

The regional rent and tenancy tribunals resolve disputes between, for example, tenants and landlords. The National Legal Aid Authority deals with matters that arise under the Legal Aid Act and which are not resolved in a court of law. Under the Swedish constitution the courts have an independent position. Neither Parliament nor any other authority can decide how the courts pronounce judgment in individual cases.

5. District court

The district court is the first court that you come into contact with in criminal cases, in civil law disputes and in bankruptcies. The district court also resolves disputes between private persons, family cases for example, as well as various other matters, such as adoptions.

Typical cases in the district court

Cases in the district court are divided into three categories: contentious cases, criminal cases and other matters. *Contentious cases* Many disputes relate to matters concerning various kinds of economic relations and could, for example, deal with demands for money, the interpretation of a contract or some other financial undertaking. Another large group of contentious cases comprises family law disputes, such as divorce cases or cases concerning children's custody, residence, access and maintenance.

[4] Sonkam Strömholm, *An Introduction to Swedish Law*, vol. 1, Kluwer, Netherlands,1981,31

Criminal cases

The district courts also deal with and adjudicate in criminal cases. A criminal case arises when a crime has been committed, i.e. when a penalty can be imposed under the Penal Code or other penal provisions. This could, for example, involve crimes of violence and theft, narcotics offences, tax offences and traffic offences. If it is suspected that a crime has been committed, the police are under a duty to look into the suspicion by conducting a preliminary investigation. The prosecutor is responsible for the preliminary investigation, and will also decide whether the case should be brought to court. The prosecutor is not part of the Swedish Judiciary and is instead part of a separate authority.

Other matters

Besides contentious cases and criminal cases, the district court also decides on matters such as adoption, division of marital property, administrators and special representatives.

Registration matters

The registration authority, which falls under the district court, is the authority responsible for registration of title in the land register. The registration authorities are currently1 located at seven district courts in Sweden: Hässleholm, Eksjö, Uddevalla, Norrtälje, Mora, Härnösand and Skellefteå.

6. Court of appeal

Judgments made by the district court can in the majority of cases be appealed to the court of appeal. The court of appeal is the court of second instance in matters relating to criminal cases, contentious cases and other judicial issues that have already been dealt with by a district court. However, in certain cases leave to appeal is required for the court of appeal to consider an appeal.

7. Supreme Court

A final judgment of either the district court or the court of appeal can be examined by the Supreme Court, which is the final instance. However, it is not possible to appeal to the Supreme Court in all cases. Leave to appeal is required for a case to be considered. This is granted by the Supreme Court itself, although by and large only in those cases where it is important to establish a judgment that could provide guidance for the Swedish district courts and courts of appeal. Such judgments are called 'precedents'. Even if you feel that the court of appeal has adjudicated incorrectly in a matter, it is still not sufficient for leave to appeal to be granted. This means that the court of appeal is in effect the final instance in most cases.

8. County administrative court

The county administrative courts are general administrative courts and deal with cases relating, among other things, to disputes between private individuals and the authorities. This could, for example, relate to a tax case, aliens and nationality cases or disputes with the Swedish Social Insurance Agency, the municipality or the social welfare committee. The county administrative court also makes decisions regarding applications to take young people or substance abusers into care.

Typical cases in the county administrative court

More than 500 different kinds of cases are dealt with by the county administrative courts, including:

- Tax cases – appeals against a decision regarding, for instance, income, wealth or property tax, a VAT decision or other decision made by the Swedish Tax Agency.
- Cases under the Social Services Act – these could, for example, relate to decisions concerning social welfare allowance and other decisions reached by a municipal social welfare committee.
- Social insurance cases – disputes with the Swedish Social Insurance Agency in matters relating to occupational injury compensation, parents' allowance or, for example, a car allowance for disabled persons.
- Cases under the Care of Young Persons (Special Provisions) Act ('LVU cases') – often relate to the county administrative court deciding whether a minor needs to be taken into compulsory care outside his/her own home.
- Cases under the Care of Abusers (Special Provisions) Act ('LVM cases') – relate to whether the county administrative court should decide on compulsory care for substance abusers.
- Psychiatric cases – matters related to compulsory mental care and forensic mental care.
- Review of legality under the Local Government Act – relates to having a decision reached by a municipality or county council reviewed, a right which is enjoyed by the inhabitants of all the municipalities in Sweden.
- Aliens and nationality cases – if you wish to appeal against a decision made by the Swedish Migration Board regarding, for example, deportation, refusal of entry or a rejection of an application for Swedish nationality. Only the county administrative courts in Stockholm, Skåne and Gothenburg are Migration Courts and which deal with these cases.
- Other cases – could relate to driving licence measures, licences to serve alcohol or matters relating to the Animal Welfare Protection Act. Cases with EC law implications, such as cases concerning public procurement or agricultural subsidies, are also dealt with by the county administrative courts. LVU, LVM and mental care cases are almost always so-called application cases. This means that it is an authority that applies for a decision by the county administrative court regarding some form of compulsory measure directed at a private individual and not a private individual appealing against a decision already reached by an authority.[5]

[5] Dinedl Buttery "Sweden." Encyclopedia of Play in Today's Society, Stockholm's University 2009,433

9. Administrative court of appeal

A judgment in the county administrative court can normally be appealed in the administrative court of appeal. The vast majority of cases in the administrative courts of appeal have first been considered and decided by a county administrative court.

For a case to be reconsidered by an administrative court of appeal, leave to appeal must be granted. Leave to appeal is granted if there is reason to change the county administrative court's decision or if the decision of the court could act as guidance in similar cases (a so-called precedent). However, in tax cases and cases concerning care of young people, substance abusers and people who are mentally ill, leave to appeal is not required.

Typical cases in the administrative court of appeal

The administrative court of appeal deals with disputes appealed against between individuals and businesses and state and municipal authorities. The most common cases are tax and social insurance cases. The administrative court of appeal also considers secrecy cases (generally related to the matter of whether someone is entitled to access to an official document) and appeals in cases regarding decisions made by Swedish authorities located outside Sweden, such as Swedish embassies.

10. The Supreme Administrative Court

The Supreme Administrative Court is the supreme general administrative court and considers decisions on appeal from the four administrative courts of appeal in Sweden.

The most important function of the Supreme Administrative Court is, through its decisions in concrete cases, to create precedents, which could provide guidance for the courts and other bodies that are required to apply current law. Not all appeals are considered by the Supreme Administrative Court, only those where the Supreme Administrative Court grants leave to appeal. The main rule is that leave to appeal is only granted if the Supreme Administrative Court's decision could be of importance as a precedent, i.e. provide guidance for how other similar cases should be decided. An incorrect judgment by the administrative court of appeal is not normally sufficient for the Supreme Administrative Court to take up the case.

Typical cases in the Supreme Administrative Court

The most common types of cases in the Supreme Administrative Court are casesconcerning taxes and social insurance although in total the Supreme Administrative Court deals with approximately 500 types of cases. In effect, the administrative court of appeal is the final instance in most cases. Leave to appeal is only granted in a small percentage of the cases that are referred to the Supreme Administrative Court. In certain administrative matters, where the government or an administrative authority would otherwise be the final instance, the Supreme Administrative Court, if the government was the decision-maker, and the administrative court of appeal in other cases, considers whether the decision in the matter is in contravention of any legal rule. This process is known as 'legal review'. A prerequisite for legal review is that the decision involves the exercise of public authority in relation to a private party and cannot be considered judicially in any

other way. If the Supreme Administrative Court or administrative court of appeal considers that a decision is in contravention of law and it is not manifestly clear that the error was insignificant to the decision, the decision should be revoked and the matter referred to the authority that made the decision. In other cases, it is declared that the decision should stand. The Supreme Administrative Court (and the Supreme Court) cannot, as in the case of the supreme courts in other countries, declare an enactment or an individual regulation invalid.

11. Regional rent and tenancy tribunals

The regional rent tribunal mediates in disputes relating to domestic premises and business premises. The regional rent tribunal also makes decisions in certain issues, such as the right to sublet an apartment. If a dispute arises between a tenant and a landlord or between a tenant-owner association and a tenant-owner occupier, and the parties cannot reach agreement between themselves, the regional rent tribunal may mediate in the dispute. Such a dispute could, for example, relate to terms and conditions, transfer or subletting. Tenancy disputes that are not dealt with by the regional rent tribunal are considered by a general court. The regional rent tribunal can also assist with information about, for example, tenancy legislation and other legislation relating to issues falling within its area of responsibility. The task of a regional tenancy tribunal is the equivalent of the regional rent tribunal when the case involves the application of tenancy legislation.

Conclusions

In recent years extensive development work has been conducted at a large number of courts. The development work has mainly entailed changes in the courts' internal organisation and working forms. Responsibility for the development of the internal organisation and working forms rests with the individual head of the court. The National Courts Administration has a supporting role in this work and shall also, according to the operational objectives laid down by the government, initiate changes within these areas. To utilise the collective resources of the National Courts Administration optimally, the National Courts Administration will co-ordinate more extensive support for the courts. Even if there have been relatively major changes in the internal organisation and working forms at many courts there still remains a great deal to be done which, among other things, can be seen from the questionnaires that were recently completed by district courts and county administrative courts. Questionsregarding amended working forms will therefore also continue to be a particular focus of attention. To increase efficiency it is important to continue to work on the potential for further refinement of professional roles and bring about greater specialisation, delegation and reinforcement of the courts' case preparation organisations.

The National Courts Administration supports and pursues modernisation of the courts in many ways, among other things through operational dialogue and support for the courts in development projects dealing with internal organisation and working forms. The National Courts Administration participates in seminars and start-up meetings at courts that have been merged and arranges seminars and educational visits to facilitate an exchange of experience and to follow up and evaluate changes that have been implemented.

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THE TERM OF APPEAL AGAINST THE DECISION OF DISCIPLINARY SANCTIONING

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Abstract: *The decision of disciplinary sanction can be appealed in courts by the employees who consider themselves wronged by it. Contesting a decision of disciplinary sanction is a right of employees, based in the Romanian Constitution, expressly stated by the Labor Code and by other special laws. According to Art 252 Para 5 of the Labor Code „the decision of disciplinary sanction may be appealed by the employee before the competent courts within 30 calendar days from the notification". The Civil Code states about the calculation of this important term, provisions which were analyzed in this paper. This paper is also trying to emphasize different opinions regarding the seemingly inconsistency between the term of declaring the appeal stated by the Labor Code and the term stated by the Law on Social Dialogue.*

Keywords: *decision of disciplinary sanction, Labor Code, procedural term, appeal*

According to Art 252 Para 5 of the Labor Code „the measure may be appealed by the employee before the competent courts within 30 calendar days from the notification"[1].

In accordance with the above mentioned provisions, Art 268 Para 1 Let b), Title 12 (Labor Jurisdiction), Chapter 1 of the same law states that: „the demands to settle a labor dispute may be submitted within 30 calendar days from the notification of the disciplinary measure".

Title 12 (Labor Jurisdiction) of the Labor Code amends Art 252 Para 5 pointing the court materially and territorially competent and the special procedure rules, derogating from the common law, the civil procedural law, completing the labor law.

There must also be considered for an accurate picture of the topic, the provisions of Law No 304/2004 on judicial organization.

In a seeming inconsistent with the Labor Law, Art 211 Let a) of the Law No 62/2011, the Law on Social Dialogue, settles a term of 45 calendar days from the moment the person interested was notified about the measure, for claims against unilateral measures of performance, modification, suspension or termination of the employment contract, including certain payment arrangements.

The opinions issued by doctrinaires regarding the inconsistency of the mentioned provisions shall be analyzed in this paper.

Chapter VI of the Law No 62/2011 on Social Dialogue amends the Labor Code regarding labor jurisdiction, being identified a few seeming inconsistencies between these two laws.

Regarding the term for appeal against the decision of disciplinary sanction, as we have already shown, the Labor Code[2] establishes 30 calendar days from the notification of the

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[1] For an analysis of the decisions issued by the Constitutional Court settling disputes regarding disciplinary liability, see Carmen Nenu, Andreea Drăghici, *Contractul individual de muncă- elemente definitorii*, Pământul Publishing-house, Piteşti, 2007, pp.137-140

[2] Art 252 Para 5 and Art 268 Para 1 Let b)

decision of disciplinary sanction. The calculation of this term is subjected to civil rules, as common law in this area.

The term for bringing the action before the court is a prescription term, subject to the rules laid down by the New Civil Code in Book VI, "On the statute of extinctive prescription, loss and calculation of terms."

The prescription consists of extinction of the material right to action due to non-exercise it in the term set by law. In this way, by non- exercising it, the liability is removed.

In the doctrine[3] was shown that extinctive prescription, as legal sanction, operates only on the material right to action, not on the subjective right as a whole.

According to art.2506 par. 1 of the New Civil Code, the prescription does not operate as of right, but as a result of invoking the extinctive prescription by the interested party.

The prescription of the right to action may be applied only in the first instance. The moment by which it may be invoked is either with the contestation, either no later than the first term at which the parties are legally summoned[4].

If the interested party, in this case the employer, does not invoke the prescription, the penalty that occurs is the loss of this right. The consequence is the judgment of the appeal against the decision of sanctioning as the employee would have made this appeal within the prescription term of 30 days set by the Labor Code.

According to the provisions of art.2522 of the New Civil Code, if the employee does not exercise the right to appeal the decision of disciplinary sanctioning within the period provided by law, for good reasons, he may request the court to restore the term and to trial the cause.

But the revival in term cannot be ordered unless the employee exercises his right of action within 30 days from the time when he knew or ought to know the reasons justifying the overcome of the prescription term.

This period of 30 days is also a prescription term being subject to the same rules as the term for the appeal against the disciplinary sanctioning decision.

In judicial practice[5] has been shown that "by the duly justified causes, you must understand those circumstances which, without having the gravity of major force, are exclusive of any fault of the right holder, for overcoming the prescription term. In other words, the revival in term is a notion that exclude the major force and the fault. "

The general rule regarding the commencement of the prescription[6] states that it begins to run from the date the holder of the right of action, in our case the employee, knew, or should have known the birth of his right.

According to the provisions of the Labor Code mentioned above, the beginning of prescription is marked by the communication of the disciplinary sanctioning decision.

In this regard, the Labor Code Art.252 paragraph 3 sets that the sanctioning decision shall be communicated to the employee within 5 calendar days from the date of issue.

The date on which the sanctioning decision takes effect is not the date it was issued, but according to the same provisions of the Labor Code, the date on which it was communicated to the sanctioned employee.

From these legal provisions it is inferred that the no-communication of the decision involves the lack of effect of it, the communication date matches both with the date on

[3] Viorel Terzea in *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publishing House, Bucureşti 2012, p. 2511
[4] art. 2513 from New Civil code
[5] ICCJ, decision no. 5280/2006, www. legalis.ro
[6] Art. 2523 from New Civil code

which the employer may proceed to enforcement of the sanction and with the date from which starts to run the term of 30 days during which the employee may appeal the sanctioning decision.

The communication of the disciplinary sanctioning decision will be made by handing, the employee signing the receipt, or, in the case of refusal of receipt, by registered mail, at the domicile or residence address communicated to the employer (Art.252 paragraph 4 of the Labor Code).

Calculating the prescription term of 30 days is subject to rules imposed by Articles 2553, 2554 and 2556 of the New Civil Code.

In this situation should not be taken into account the first and last day of the period, and it shall be deemed fulfilled at 24.00 hours on the last day. As an exception, if an act that must be fulfilled in a job place, such as the case of appeal of the disciplinary sanctioning decision which has to be submitted to the court, the term shall be deemed fulfilled at the time it ceased normal working hours at the competent court or at which the post office finishes it activity, in the case of documents communicated by mail.

The course of prescription may be suspended[7] or interrupted[8] in the legal and limited cases regulated by the New Civil Code.

The suspension of prescription involves changing its course by rightful stopping the flow of the term as long as the suspensions cases persist, meaning as long as the owner of the right to action is unable to act. After this situations ends, the prescription restarts it course, being taken into account for calculating the term also the elapsed period before the suspension.

It is necessary that the prescription has already begun to flow in order to intervening the suspension. If the prescription did not begin to run and it appear a case provided by art. 2532 of the New Civil Code, it will be postponed the begining of the prescription until this cause will end.

Unlike the suspension, in the case of abeyance, will begin to flow a new term from the date when the abeyancy case ends, without taking into account the time elapsed before.

Contradictions in doctrine were generated by the seeming inconsistency regarding the term in which the decision for sanction may be appealed, between the Labor Code and the Law on Social Dialogue, as emphasized in the previous section.

A major importance is held by the judicial practice which shall generate a jurisprudence regarding the interpretation and application of these legal provisions.

There is the opinion according to which the purpose of the legislator stated by the Law No 62/2011 is to prolong for the employees the terms for initializing the procedures, in the meaning that the term for appeal is different, depending on the specific situation, being applicable either the Labor Code or the Law No 62/2011. Thus, for the appeal of disciplinary sanctions is applicable the term of 30 calendar days stated by Art 268 Para 1 Let b) and Art 252 Para 5 of the Labor Code[9].

Another opinion states that though both laws regard labor jurisdiction, what must be considered is the fact that Law No 62/2011 does not modify or repeals the so-called opposite provisions of the Labor Code. Furthermore, none of these laws is preeminent

[7] art. 2532 from New Civil Code
[8] art. 2537 from New Civil Code
[9] Alexandru Țiclea, *Codul muncii – comentat*, 2nd Edition reviewed and amended, Universul Juridic Publishing-House, Bucharest, 2011, p.301

neither by its judicial force (organic-ordinary law), nor by the specialization of its object (general law – special law)[10].

It is also considered that in opposite situations between these two laws must prevail the provisions subsequently adopted, namely those stated by Law No 62/2011, as an effect of applying Law No 24/2000 on the legislative technique norms for drawing up regulatory acts which in Art 62 states that „the provisions comprised in a regulatory act that are contrary to a new regulation of the same level or of a higher level, shall be repealed. Repeal may be total or partial"[11].

There are also opinions according to which are excluded from the area of application of Law No 62/2011 the possibilities to appeal against disciplinary sanctions. It is considered that Art 268 Let b) of the Labor Code „are not taken, nor make any reference in Law No 62/2011 to the procedure and/or terms applicable in case of appealing a disciplinary sanction (including disciplinary firing). Therefore, it is equivalent with the elimination from the Law No 62/2011 of the possibility to appeal disciplinary sanction, which represents a violation of the constitutional right to protection and of the international documents to which Romania is party. As a consequence, the term to appeal a disciplinary sanction is 30 calendar days, according to Art 268 Para 1 Let a) and b) corroborated with Art 252 Para 5 of the Labor Code, being an exception from the rule established by Law No 62/2011 and applicable for the appeal against any disciplinary sanction, including firing"[12].

We do not agree with this last opinion, considering that Law no.62/2011 refers to the „requests submitted against unilateral measures of execution, modification, suspension or termination of the employment contract", the measures stated for disciplinary sanction being included in one of the above mentioned hypotheses, the most serious one, disciplinary firing, leading to the termination of the employment contract.

In this sense, we consider that the provisions of art.211 letter a of Law 62/2011, The Social Dialogue Law, do not exclude the possibility to contest the measures taken by the employer if the employee committed one or more misconducts.

We consider that in order to submit an appeal against the decision for disciplinary sanction shall be applied Art 252 Para 5 and Art 268 Para 1 Let b) of the Labor Code for the following reasons: though the Law on Social Dialogue is special and according to the rules stated by Law No 24/2000, it shall prevail before the Labor Code, because regarding the appeal against the decision for disciplinary sanction the legislator aimed for an express and special regulation.

Thus, art. 268 paragraph 1 letter a) regulates the general situation of contesting unilateral decision of the employer regarding the conclusion, performance, amendment or termination of the individual employment contract, case taken by Social dialogue law, but with the increasing of the term from 30 days to 45 days.

As we argued above, the disciplinary decision falls within one of the decisions regulated in this way.

Nevertheless, the legislator emphasized the importance of the decision to sanction as a unilateral measure adopted by the employer, by expressly stating the term for submitting an

[10] Coord. Alexandru Athanasiu, *Modificările Codului muncii şi ale legii dialogului social*, Universul Juridic Publishing-House, Bucharest, 2011, p.190

[11] Monica Gheorghe, *Considerații privind termenele de sesizare a instanței judecătoreşti în materia conflictelor individuale de muncă*, Romanian Labor Law Review, No 5/2011, p.73.

[12] Monica Novac, www.avocatnet.ro, also referring to coord. Alexandru Athanasiu, *Modificările Codului muncii şi ale legii dialogului social*, Universul Juridic Publishing-House, Bucharest, 2011, p.194

appeal, separated from the general situations mentioned by Let a), even though the term does not derogate from the general one.

We also consider that if the legislator aimed for an express regulation for submitting an appeal against the decision to sanction, both in Art 252 Para 1, as well as Art 268 Para 1 Let b), and this regulation was not taken by the Law on Social Dialogue, but only the general situation stated by Let a), the Labor Code being applicable in such situation.

Though, in our standpoint, we are talking only about a legislative omission, we consider as *lege ferenda*, that the legislator should have mentioned in the Law on Social Dialogue the term for submitting an appeal against the decision to sanction, either to repeal the provision of the Labor Code regarding it, for an unitary practice of the courts regarding the lateness in submitting an appeal against the disciplinary sanctioning decision, if it is submitted within the term stated by the special law, but also to ensure warranties and liabilities appropriate to constitutional law stipulated by art. 41 paragraph (1) of the Fundamental Law[13].

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[13] Carmen Nenu, *Dreptul muncii*, University of Piteşti Publishing House, Piteşti, 2010, p. 66

EMPLOYMENT OF TEACHING STAFF ACCORDING TO LAW NO. 1/2011 REGARDING THE STATUTE OF THE TEACHING STAFF

Andreea RÎPEANU

Abstract: *The general framework of legal relations between teachers, teaching assistants and research institutions and the public education system, called the employment relationships and service, is governed by the Law no. 1/2011 on the regulations teaching staff.*

Keywords: *teaching staff, individual employment contract, education management contract.*

1. Individual employment contract

1.1. Regulation

The individual employment contract is the contract based on which a natural person, referred to as *employee*, undertakes to perform the work for and under the authority of an employer, natural or legal person, in exchange of a remuneration called a salary (art.10 of the *Labour code*[1]).

The individual employment contract is mainly regulated by the *Labour law,* which contains an entire Title (II), entitled *Individual employment contract* (nine chapters, art.10 – 110).

Initially, the individual employment contract was regulated by art.1470 section 1 of the *Civil code*, under the name of employment lease contract (art.1413 of the *civil code*). It was distinctly provided, for the first time, by the *Law of employment contracts* of the year 1929. It subsequently became the main regulation object, both for the previous *Labour codes* (of 1950 and 1972), and for the *Labour code* of 2003, characterised as a *law of this contract*[2].

The labour code adopted the terminology of *relation*[3] *of employment*[4] (art.1 para.1 and 2), and the *employment relations* were materialized terminologically by the notion of employment contract, individual or collective (art.2 letters a-d).

The general framework of the legal relations between the teaching, auxiliary teaching and research personnel with the public authorities and institutions in the education system, hereinafter referred to as employment and job relations, is regulated by the *Law of national education no. 1/2011*[5].

Thus, at the Title IV, *the Status of the teaching staff* regulates the conditions and manners of occupation of the teaching, auxiliary teaching positions, of the management, direction and control positions in the pre-university education (art.232 letter c) and superior (art.293).

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[1] *Law no.53/2003,* republished in the Official Gazette of Romania, Part I, no. 345 of May 18th 2011.

[2] See Alexandru Ţiclea, *Labour law treaty*, Universul Juridic Publishing House, Bucharest, 2011, pag.330.

[3] Signifies among other things the connection between several persons, relations, according to the *Explanatory dictionary of Romanian language*, p.885.

[4] The word *work* in this context is synonymous with service, representing an occupation someone has, as an employee; assignment undertaken by someone as employee, the performance of such task, according to the *Explanatory dictionary of Romanian language*, p.978.

[5] Published in the *Official Gazette of Romania*, Part I, no. 64 and 64 bis of January 30th 2013. It was amended and supplemented by the Order of the minister of national education no*. 327/2013*, Official Gazette of Romania, Part I, no.113 of February 27th 2013.

Additionally, the Ministry of National Education has the obligation to establish each year the education subjects, the fields and specializations, as well as the contest subjects valid for the employment of the teaching staff.

In this respect, the *Framework methodology regarding the mobility of the teaching staff in the pre-university education in the school year 2013-2014*, Annex to the *Order of the ministry of education, research, youth and sports no. 6239/2012*[6] as well as the *Framework methodology for the occupation contest of the vacant teaching and research positions of higher education*, approved by the Government Decision no.*457/2011*[7] were elaborated.

Also, the provisions of the University charter for higher education will be also considered in this respect. Based on the above mentioned framework methodology and of the applicable law, the universities establish their own methodology for the occupation of the teaching and research positions, approved by the university senate, without discriminating the persons outside the institution or the country and without reference to seniority (art.297 para.1).

1.2. Parties and duration of the individual employment contract

According to the specialized literature[8], the conclusion of an individual employment contract involves the existence of two parties: employee, natural person undertaking to perform a work for and under the authority of the employer, and the employer - legal or natural person who in turn undertakes to pay the remuneration, called a salary and provide adequate conditions for the performance of the activity and maintaining the occupational health and safety.[9]

In education, the quality of employee belongs to the teaching staff, the auxiliary teaching staff and the research staff.

In the pre-university education for the teaching and practical training staff, the individual employment contracts are concluded between the school inspectorate, represented by the manager of the education institution, with the approval of the board of directors (art.90 para. 2) and the employee. For the auxiliary teaching staff and the non-teaching staff the individual employment contract is concluded between the education institution with legal personality, represented by the manager, with the approval of the board of directors and the employee (art.91 para. 2).

In view of concluding the individual employment contracts of the teaching and practical training staff, the manager of the education unit will sign the individual employment contract based on a decision to delegate competences, issued by the general school inspectorate, and the seal/stamp applied will be that of the employer (school inspector).

In the higher education units and institutions the individual employment contracts are concluded between the rector/manager and the employees.

For pre-university education, according also to the situations provided by the law (art.80-83 of the *Labour code*), the individual employment contract is concluded for an indefinite or definite period, of at least one school year, with the possibility to extend the respective contract by per hour payment, according to the law.[10]

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[6] Published in the *Official Gazette of Romania*, Part I, no.18 of January 10th 2011.
[7] Published in the *Official Gazette of Romania*, Part I, no.371 of May 26th 2011. It was amended by the *Government Decision no. 36/2013*, published in the *Official Gazette of Romania*, Part I, no.88 of February 11th 2013.
[8] Alexandru Țiclea, *Labour law treaty*, Universul Juridic Publishing House, Bucharest, 2007, p.341-342.
[9] Alexandru Țiclea, *New normative acts - Labour code*, in the „Romanian magazine of labour law", no.1/2003, p.8-9.
[10] Art.254 para.1 of the *Law on national education no.1/2011*.

The law on national education no. 1/2011 provides such exceptional cases, in which an employment contract can be concluded for definite period, namely:

- for a period of one school year or until the position holder returned to service, for the candidates who were selected based on a validated contest, in the conditions of the methodology, by the board of directors of the education unit with reserved teaching position. In the situation in which the position remains reserved, the board of directors of the education unit can decide to extend the individual employment contract also in the following school year (art. 254 para. 15);
- on a duration of no more than one school year, for the candidates who obtained the entry level degree in education, the debutant teachers, but who were selected by validated contest, according to the methodology, by the Board of directors of the education institution, on a vacant teaching position (art.254 para.14);

In higher education learning the employment in a teaching or research position is made after the effective date of this law, for a definite or indefinite period.

The teaching positions and the number of positions is established taking into account the following: the education plans, the study formations and the university norms (art.286 para.2).

The employment for indefinite period in any teaching or research position is only possible by public contest, organized by the higher education institution, after obtaining the PhD title (art.294 para.1).

As a consequence, *The law on national education no. 1/2011* provides the cases in which an employment contract can be concluded for indefinite period, namely:

- for a cumulated period not exceeding 5 years, for a person holding the position of university assistant in a certain higher education institution, but who has not obtained a PhD diploma (art.301 para. 2); the persons who at the effective date of the hereby law hold the position of university assistant, but who have not obtained the PhD diploma, and whose employment contract ends after 4 years are exempted from these provisions;
- for a period of 4 years (from the effective date of the hereby law), for the persons holding the positions of university assistant or research assistant and are not PhD degree students or who have not obtained the PhD diploma (art.362. para.3);
- for a period of 4 years (from the effective date of the hereby law), for the persons holding the positions of university lecturer/head of works or a higher university position or did not obtain the PhD diploma (art.362. para.5);

Also, the employment contract for definite duration concluded between the university and the members of the teaching and research staff following a contest can be renewed[11], according to the personal professional results, evaluated based on the criteria adopted by the university senate, as well as according to the employment needs and the necessary financial resources of the institution, observing the legal provisions in this respect (art.294 para.5).

The employment contracts of the teaching and research staff include the undertaking of minimum standards of the results of the teaching and research activities, as well as clauses regarding the termination of the contracts in the conditions of failure to meet these minimum standards (art.302 para.4).

According to the own academic needs, the university senate may approve for a definite period the invitation in the higher education institution of university teaching staff and other

[11] In this respect, see also the provisions of art.82 para. 3-5 of the *Labour code*.

specialists with recognized value in the field, in the country and abroad, as invited associated university teaching staff.[12]

Also, the teaching staff may conclude a part time individual employment contract for indefinite or definite duration, according to the law (see art.103-107 of the *Labour code*).

2. Management contract

For the management positions from the education units the appointment is made based in management contract, regulated in its turn by the *Law on national education no.1/2011*.

In the pre-university education units the management positions are manager and deputy manager (art.256 para.1).

Following the promotion of the contest these shall conclude a management contract with the mayor/district mayor of the administrative territorial unit, respectively the president of the county council in the jurisdiction of which the education unit is located (art.257 para.3).

The manager and the board of directors of the education unit with legal personality are responsible for framing within the approved budget, according to the law (art.108 para.3).

According to the provisions of art. 97 para.2 of the *Law on national education no. 1/2011,* the manager of the state education institution has the following attributions: is the legal representative of the education unit and performs its executive management; he/she is the credit release authority of the education unit; undertakes, jointly with the board of directors, the public responsibility for the performances of the education unit manager by them; proposes for approval to the board of directors the organization and functioning regulation of the education unit; proposes for approval to the board of directors the draft budget and the budget execution report; is responsible for the selection, employment, periodic evaluation, training, motivation and termination of the work relations of the personnel from the education unit; performs other attributions established by the board of directors, according to the law; presents annually a report on the quality of education in the unit or in the institution managed by them; coordinates the collection and sends to the school inspectorate the statistic data for the national system of indicators regarding education.

The manager and the deputy manager of the pre-university education units cannot hold, during the exercise of their mandate, the position of president of vice-president in a political party, at local, county or national level (art.257 para.4).

The framework form of the management contract is established by order of the minister of education, research, youth and sports.

The duration of this appointment is of no more than 4 years.

This contract is nothing else than a document which presents the education strategy and directions of development, according to the objectives of the reform at national level.

In the higher education institutions the management positions are: the rector, pro-rectors, the administrative general manager, at the level of the university; the dean, the pro-deans, at the level of the faculty; the department manager at the level of the department (art.207 para.2).

The rector confirmed by the minister of education, research, youth and sports concludes with the university senate a management contract which includes the criteria and

[12] Art.285 para.5 of the *Law on national education no. 1/2011*.

indicators of management performance, the rights and obligations of the contract parties (art.211 para.3).

The university rector has the obligation to present each year, the latest until the first working day of the month of April each year, a report, component of the public responsibility and a fundamental condition for the access to public budget funding, regarding the condition of the university. The report is made public on the web site of the university and is sent to all the interested parties. This report includes: the financial situation of the university, on financing sources and types of expenses; the situation of each study program; the situation of the institution staff; the results of the research activities; the situation of quality assurance for the activities within the university; the situation of observing the university ethics and the ethics of the research activities; the situation of vacancies; the situation of professional insertion of the graduates from the previous graduation years (art.130 para. 2,3).

The attributions of the pro-rectors, the number and duration of the mandates are established by the *University charter* (art.213 para.8).

The keeping in position of the administrative general manager is made based on the written consent of the latter of executive support for the management plan of the new rector (art.211 para.5).

The deans are selected by public contest organized by the new rector and validated b y the university senate (art.211 para.4). They represent the faculty and are responsible for the management and leadership of the faculty (art.213 para.9).

The appointment of the pro-deans is the responsibility of the dean, after his/her appointment by the rector (art.207 para.5 letter c)

The department manager performs the management and operative leadership of the department (art.213 para.11).

Referring to its legal nature, in the specialized literature[13], it is considered that this management contract is represented also by an individual employment contract, statement strengthened by the analysis of the other types of contracts (theoretically possible) in which it could be classified, because the respective education units are not national companies with majority state capital or autonomous administrations, and as a consequence, the respective contract, despite its similar name, cannot be considered as a special mandate contract, as was the management contract, regulated by *Law no.66/1993*[14].

If one also adds the fact that the execution teaching staff and the management teaching staff both have the quality of employees, and as a consequence, the same disciplinary or patrimonial responsibility, the conclusion is that, in this situation we are facing an accumulation of functions, within the same entity; the management contract coexists with the other individual employment contract of the person with teaching position, for the duration of the management mandate.

[13] Such as: management contract - is aimed exclusively at the trade companies with majority state capital and those resulted from the privatization of autonomous administrations; the commercial mandate contract - the pre-university public education unit does not have the position of trade agent; the administrative contract - the management positions in education are not public positions, an administrative contract having as object to perform a work with permanent title representing currently only an implicit creation of the specialized doctrine and not a legal reality; the civil or commercial mandate contract could lead to absurd conclusions, for example the application of disciplinary sanctions on a person who is party in a civil or commercial contract, in Ion Traian Ştefănescu, *Characteristic legal features of Law no.128/1997 regarding the status of the teaching staff*, in „Law", no.10/1997, p.6-16.

[14] In the case of the public culture institutions, the management contract of their managers is assimilated by law with the individual employment contract for indefinite period, art.1 para.2 of the *Government Ordinance* no.26/2005.

Also, the contents of the two contracts are different:

a). the educational management contract refers to the performance of the work specific to the respective management position;

b). the individual employment contract refers to the performance of the specific teaching position, representing the basic position.

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THE ESTABLISHMENT BY ROMANIA OF A 200 MILES OF ECONOMIC EXCLUSIVE ZONE

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Abstract: *This article seeks the detailed analysis of the Decree nr.142/1986 on the establishment of exclusive economic zone in the Black Sea by Romania, in comparison with Russian legislation and the UN Convention on the Law of the Sea 1982, legislation that clearly served to formulate general principles of law.*

Keywords: *exclusive economic zone, the 1982 UN Convention, Law of the Sea.*

A. Introduction

Romania was the first European country from the socialist block who followed the example of the Soviet Union, more than two years after the promulgation of the latter the decree "On the economic zone of the USSR"[1]. On 25 April 1986, Romania enacted the Decree no. 142, called the *Decree on the establishment of the exclusive economic zone of the Socialist Republic of Romania in the Black Sea*, Romania's geographical position, bordering the Black Sea only, allowing the title to be very exact. In contrast, the Soviet Union adopted a comprehensive name, given that its shores were bathed no more than 14 seas and three oceans[2]. This explains the speed with which the Soviet Union has taken internal measures as the first maritime power after the 1982 UN Convention on the Law of the Sea[3], held under the auspices of the United Nations, for the regulating its economic zone[4].

Romania, with an economic zone about 141 times lower than that of the USSR and 1,000 km2 less extensive than that of Bulgaria[5], was, however, the second to issue a decree on the economic exclusive zone.

B. Romania„s Exclusive Economic Zone

The purpose of this article is to give the reader a first analysis of the decree, comparing it with Soviet law, which clearly served to formulate general principles[6] and, where appropriate, by comparison with the 1982 UN Convention.

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[1] Decree of 28 February 1984, regarding *The economic zone of the USSR* (1984). The decree was ratified by the even by Supreme Soviet law and passed on 11 April 1984.

[2] Element used by the author to emphasize the importance of Law of the Sea for the Soviet Union. See, eg, F. Hartingh, *Les Conceptions soviétiques du droit de la mer*, International Revue de droit compare, Vol 12, No. 2, April-June 1960. p.8.

[3] United Nations Convention on Law of the Sea, signed at Montego Bay in December 1982. A/CONF.62/122 UN document dated 7 October 1982. Reprinted (1982) 11 International Legal Documents 1261-1354. Hereinafter 1982 UN Convention.

[4] For a chronological summary and analysis of state practice on the EEZ (Exclusive Economic Zone), see R. Smith, *Exclusive Economic Zone Claims*, Martinus Nijhoff Publishers (ed), 1986, pp. 29-40.

[5] Alastair Couper Times Books Limited (ed.), *The Times Atlas of the Oceans*, London, 1983, p 227. It is estimated that the exclusive economic zone of the Soviet Union stretched over an area of 4,490,300 km2, Romania - the 31,900 km2 and Bulgaria - the 32,900 km2.

[6] The Romanian Decree (18 articles) is less detailed than the Soviet one (25 articles), but all the important topics covered by the latter was mentioned in passing by the former, as will be explained. The only exception that can be found is on the right track, at least where no law respecting specific issues.

1. The title and preamble of the decree

Regarding the name used, it should be noted that Romania used the name "exclusive economic zone" as opposed to the Soviet Union, which uses in the entire law, the notion of "economic area". By using this concept, the Soviet Union was opposing to claims that could entail consequences that were made during some of the riparian states of the Third Conference on the Law of the Sea, held under the auspices of the United Nations, gathered in these countries which have called for an exclusive economic zone[7].

It also notes that both the Soviet decree preamble and the provisions of the Romanian covers major provisions of the 1982 UN Convention.

2. Scope and delimitation of the exclusive economic zone

We note that the Romanian decree has specifically title, exclusively covering the Black Sea. However, the wording of Article 2 states, as a general principle that the area may extend over a distance of 200 nautical miles. We note that the second part of Article 2 takes into account the small size of the Black Sea, stipulating in this context that will lead to delimitation with neighboring states that have coastlines bordering located in front or through agreements with neighboring states. In the listing of the delimitation principles to be applied, it is mainly refered by both Romanian decree and the soviet decree soviet, followed by agreements under international law, to arrive at an equitable solution.

However, it can not go unnoticed that in the Romanian decree are added to this list of ways of delimitation, the state practice and special reference is made to "specific circumstances of each sector delimited". During the work of the UN Committee on issues related to the sea and during the Third United Nations Conference on Law of the Sea, Romania has spared no effort in this regard by presenting several projects to reduce the importance of islands on the delimitation ocean spaces[8].

3. Jurisdiction in the exclusive economic zone and certain rights of the coastal State

We note that the Romanian administration at the time has given the importance of establishing sovereign rights and jurisdiction in this area. Article 3, which deals specifically with these issues, adds some elements to the formula used in Soviet decree. Although less explicit, in general, this section of the Romanian decree partly reflects the 1982 UN Convention in detail, adding sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, biological and non-biological, the examples given explicitly by the UN Convention 1982 - the production of energy from the water, currents and winds[9]. Furthermore, the decree complements the UN Convention 1982 by adding to the list, along with biological and non-biological natural resources, and the "other resources", whatever they may contain. Finally, the clause included in the Soviet decree[10], as in the 1982 UN Convention[11], which provides that the seabed and subsoil will be

[7] P. Barabolia, *The Problem of delimitation of Maritime Areas in the Baltic Sea*, M. Lazarev (ed.), Moscow, Nauka, 1984, pp. 132-133. This author asserts that only after the adoption of a precise definition of the rights and obligations of coastal states and other states in this region the term "exclusive economic zone", has proven to be accepted.
[8] V. Sebek, *The Eastern European States and the Development of the Law of the Sea*, vol.1, Oceana (ed.), 1979, pp. 535-537.
[9] Art. 56(1) (a).
[10] Art. 2.
[11] Art. 56(3).

managed in accordance with the regulations concerning the continental shelf will be replaced by a general declaration by which requires that the sovereign rights and jurisdiction shall be exercised in accordance with national legislation of Romania.

Also, it is noted that due to the specific geographical position of its economic exclusive zone, Romania has included a provision which is not provide for the Soviet decree concerning the notion of semi-enclosed sea. Article 4 is based especially on Article 123 of the 1982 UN Convention, which took over the terms of cooperation on marine biological resources[12]. Continuing our comparison, we note that both decrees, the Romanian[13] and Soviet[14] guarantees in identical terminology, freedom of navigation and overflight, freedom to submarine cables and pipelines and other uses of the sea related to these freedoms[15] in accordance with international law, subject to the domestic laws of both countries.

4. Biological resources

A detailed analysis of the 1984 Soviet decree and subsequent secondary legislation on this topic extensively illustrates the particular importance given by the Soviet Union anadromous problems. The Decree treats anadromous fish before general provisions that reffer to biological resources listed in the 1984 decree, the total allowable catch is being determined only by the Soviet Union either inside or outside the economic exclusive zone limits without reference to consultation with other interested states; ambiguity exists for the establishment or the Soviet Union control of the high seas in this regard. Treating this issue briefly in Article 6, the decree does not allow a profound analysis thorough Romanian, but it can not be overlooked the fact that this decree is offering, however, a list of anadromous species[16] before biological resources, in general[17].

The Romanian Decree does no retain an explicit provision as the Soviet decree which stipulates that conservation is ensured through the creation of appropriate and setting of total allowable catches "both within the economic zone and outside its borders."[18] This has little relevance taking into account the specific geographical features of the Black Sea. Unlike Soviet decree, however, is characterized by Romanian decree that envisages cooperation with other countries of origin where the latter reserves entering the economic exclusive zone of Romania[19].

With respect to biological resources in general, besides that the Romanian decree has added the adjective "appropriate" to the term "international organization", which may cooperate in establishing conservation and management of such resources[20], this decree is less explicit than the Soviet one. The latter has already reduced responsibilities within the coastal State making it the obligatory "will (have to).... give" regarding the access to surplus[21], in the more permissive clause "may..... grant." Romanian Decree total omits any reference to access to surplus by foreign countries and therefore also the issue of those who will be given this

[12] Although scientific research in marine represents another part listed in art. 123 of the 1982 UN Convention, it was not included here. It is useful in this context to examine the provisions of this decree read on marine scientific research.
[13] Art. 5.
[14] Art. 4.
[15] Art. 58(1) of the 1982 UN Convention.
[16] Art. 6.
[17] Art. 7.
[18] Art. 3, para.2.
[19] As provided in Article 66 (4) of the 1982 UN Convention.
[20] As provided in Article 61 (2) of the 1982 UN Convention.
[21] Article 62 (2) of the 1982 UN Convention.

access, as governed by the 1982 UN Convention o the law of the sea. We note that it simply regulates that vessels of other countries "can access the exclusive economic zone of the Socialist Republic of Romania on the basis of agreements, on condition of reciprocity."[22]

5. Artificial islands

With regard to artificial islands, Romanian decree is closely following the wording of the Soviet decree[23]. In three cases[24] it differs from the Soviet decree which, in turn, has reproduced the relevant provisions of the 1982 UN Convention on the law of the sea. First, it is not mentioned the right of coastal states to regulate installations and work situation that may prevent the exercise of the coastal State in the area. Secondly, regarding the establishment by the coastal state of security zones around them, the clause "when necessary" is not present in the Romanian decree. Third, the same can be said about the width of such security areas. Normally, the maximum distance is of 500 meters, except for an exemption authorized by generally accepted international norms "or recommended by the competent international organization."[25] This part of the latter it does not appear in Romanian decree. In addition, there is no provision for installation or removal of abandoned or disused works present in Soviet decree[26], that was not totally in accordance with the 1982 UN Convention on the matter[27].

6. Marine scientific research

No other part of the Soviet decree on economic zone does not reflect the 1982 UN Convention so closely as articles on marine scientific research do. Definitely, this is not look the same for the provisions of the Romanian decree[28]. One of the most important features of this decree lies in the fact that, in a system where consent is the general principle to be applied, it states that, under normal circumstances, such consent may not be withdrawn. On the contrary, it says, that even if the marine scientific research is carried out exclusively for peaceful purposes broadening scientific knowledge of the marine environment for the benefit of all mankind, such research "may be carried out by foreign states or international organizations, but only with the prior consent of the competent Romanian authorities"[29]. Soviet authors tend to label this type of research as fundamental research on which the coastal State shall respect the right of other countries to do research[30].

Moreover, the decree does not mention the Romanian limited cases in which the coastal State may refuse to give consent[31]. On the other hand, it should be noted that it

[22] Soviet decree favorable elements preserved only coastal state, while neglecting the others mentioned in Article 62 (3) of the 1982 Convention.
[23] Art. 7 (3).
[24] For an analysis of provisions relating to artificial islands on Soviet decree, see B. Kwiatkowska, *200-Mile Exclusive / Fishery Zone and the Continental Shelf - An Inventory of Recent State Practice: Part 1*, International Journal of Marine and Coastal Law no. 9 Ed.Martinus Nijhoff Publishers, 1994, pp. 199-234.
[25] Article 7 (3) of the Soviet decree, Article 60 (5) of the 1982 UN Convention.
[26] Art. 7 (4).
[27] There was no reference for the need to comply with generally accepted international standards established by competent international organization.
[28] For a detailed analysis of Soviet decree, as secondary legislation in this regard, see E. Sviridov, *Boundaries of the Continental Shelf*, Mezhdunarodnye Otnosheniia, Moscow, 1981, p.34.
[29] Article 10, paragraph 2 (emphasis added).
[30] Only for marine scientific research related to the exploration and exploitation of natural resources coastal State has exclusive powers.
[31] Article 246 of the 1982 UN Convention.

contains only part of the obligations imposed on countries involved in marine scientific research in the Romanian economic exclusive zone[32].

In the end, we can conclude that there is a considerable lack of interest in the Romanian government at the time, to marine scientific research, at least from the point of view of a country that itself undertakes such marine research. Therefore, it seems logical that Romania is willing to focus on the rights of coastal states in this regard, rather than the state that conducts research.

7. The protection and preservation of the marine environment

A closer examination of the provisions of the Soviet decree on this subject will be again used as the main reference point. The Romanian Decree starts with, as the Soviet decree, an introductory statement that presents the content of Article 194 para. (1) with the general provisions of Part XII (Protection and preservation of the marine environment) of the 1982 UN Convention on the law of the sea.

8. Jurisdiction

Unlike the Soviet decree, which did not follow the basic rules of the UN Convention of 1982 on pollution caused by ships[33] but immediately addressed the issue of special areas[34], Romanian decree does not even mention these issues therein. Article 11, para. 2 is prepared in a different way, because it includes the coastal State jurisdiction navigation safety rules. The latter is an issue that has been strictly regulated by the 1982 UN Convention so that only the territorial sea costal states have the right to regulate the safety of navigation (for example, through the establishment of sea routes and traffic separation schemes) and even then it is possible that these regulations do not include rules relating to design, construction and equipment of ships "unless they stem application of generally accepted international rules or standards"[35], when these territorial waters are part of a strait or path archipelagic sea, and arrangements should be applied narrowly[36]. Corresponding paragraph of Romanian decree was apparently inspired by the provisions on icy areas where strict rules of limited jurisdiction on navigation safety rules were challenged by some authors, and applied "specifically for economic exclusive zone of the Socialist Republic of Romania. "This is achieved without making any reference to internationally accepted regulations or approvals by the competent international organization. If this limited jurisdiction can be challenged when it comes to ice-covered areas[37], the same thing happens on the economic exclusive zone.

The Romanian decree has not any provision for the disposal of waste pollution.

[32] Compare the Article 10 (4 points) of Romanian decree with Article 249 of the UN Convention in 1982 (7 points).
[33] Namely the coastal state jurisdiction, although it does is not different from generally accepted international rules and standards established through the competent international organization or general diplomatic conference (Article 211 (5)).
[34] Closely reflecting article 211 (6) (a).
[35] Article 21, para. (1) and (2) of the 1982 UN Convention.
[36] See art. 41 and 42 para. (1) (a) to refer to archipelagic sea lanes and art. 52 and 53 on the straits.
[37] Article 14, which is in accordance with art. 234 of the 1982 UN Convention.

C. Conclusions

With the exception of Articles 14 to 16, which are characteristic to national provisions which apply general rules of jurisdiction and enforcement in Romania, the structure of this decree is mostly the Soviet decree of 1984.

Analyzing the contents of the decree, however, we have noticed some differences between the Soviet Decree and the 1982 UN Convention. In addition to the general observation that the provisions are drafted in the Soviet decree paying greater attention to detail, in the Decree of 1984 (in quantitative terms), Romanian decree differs from the latter in terms of essence / substance in some important points. Key features in this regard are, for example, are regulations on marine scientific research (to which coastal states have an interest), anadromous species (that rather lean towards the 1982 UN Convention), and fishing, which on the other hand, does not seem to give much attention to the 1982 UN Convention. In addition, because it was written by Soviet decree, the decree Romanian copied some elements of Soviet decree, which contradicts the purpose of the Convention of 1982.

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SETTLEMENT OF THE CONTESTATION REGARDING THE DELAYS IN THE PROCEEDINGS THROUGH THE NEW CODE OF CIVIL PROCEDURE

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Abstract: *The constant practice of the European Court of Human Rights was, and still is, to underline the necessity for the domestic law of states to provide both acceleratory and countervailing remedies for breach of the right to a fair trial, within a reasonable time, as guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Making a connection with the European legislation regarding the civil trial within a reasonable time or, as the Romanian legislator prefers to express itself, within an optimal and predictable time, the new Code of Civil Procedure introduces, for the first time, an acceleratory procedure – the contestation regarding the delays in the proceedings. Regulated by Articles 522-526, it allows to either of the litigating parties and prosecutor involved in the judicial process to make a contestation. Through this contestation, it may claim the infringement on the proceedings within optimal and predictable legal time, it may claim taking the legal measures needed in order to remove the situation, if it considers being in one of hypostasis provided by law. Being a sui generis legal institution, the contestation requires the examination of issues relating to litigating parties of the proceedings, conditions and stances in which the settlement procedure can be formulated, as well as the possibility of sanction the complainant in bad faith.*

Keywords: *acceleratory remedy, optimal and predictable term, contestation, complaint, panel of judges.*

According to Article 6 of the European Convention on Human Rights, the recent practice of the European Court of Human Rights has consistently emphasized the need for the domestic law of the Contracting States to provide individual remedies for the cases exceeding the reasonable length of the judicial proceedings. Thus, the Court held that the domestic law should provide at least a compensatory remedy, although the happiest combination formula is a formula that combines acceleratory remedies and compensatory remedies[1].

Also, the Venice Commission adopted a „Study on the effectiveness of national remedies in respect of excessive length of proceedings". Referring to this document, in the grounds of a judgment of conviction of the Romanian state[2], the European Court of Human Rights noted that, in general, most Council of Europe member states (except Armenia, Azerbaijan, Greece, Romania and Turkey) have a procedural tool that allows individuals to complain in the case of an excessive length of proceedings.

In this context, the new Code of Civil Procedure regulates in Articles 522-526, for the first time in the Romanian legislation, the contestation on the delays in the proceedings, a real translation into practice of the right to benefit from a judicial procedure conducted in a reasonable time, as it is understood in the light of the European Convention on Human Rights and its constant jurisprudence.

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[1] Brumar Catrinel, *Durata procedurilor şi dreptul la un recurs efectiv: schiță pentru un remediu compensatoriu*, *Transilvanian Magazine of Administrative Science no. 2(29)/2011*, pp. 34-35.

[2] E.C.H.R., *Decision of 24 february 2009, Abramiuc v. Romania case*.

The contestation regarding the delays in the proceedings represents an acceleratory remedy applicable only to the pending proceedings. Thus, it can be formulated only simultaneous with the litigation in question and it is unlikely to be the subject of a separate action brought about. From this perspective, the contestation regarding the delays in the proceedings represents a *sui generis* procedural mean, which seeks to resolve a procedural incident that had determined, according to the complainant, the infringement of the right to solve the dispute within an optimal and predictable time.

In the following, we will analyze the main characteristics of the contestation regarding the delays in the proceedings, focusing on topics, grounds and proceedings for resolving the contestation, and on the possibility of sanction of the complainant in bad faith.

a. Topics of the contestation regarding the delays in the proceedings

The first article intended for this legal institution, namely Article 522 paragraph 1 of the new Code of Civil Procedure, explicitly provides that either party, including the public prosecutor that takes part to the trial, may appeal. In other words, the following may be active parts in the contestation regarding the delays in the proceedings: the plaintiff, the defendant, the intervening third parties and the public prosecutor, in cases where he participates in the proceedings.

Standing to bring proceedings of the parties mentioned above is based on the identity between the capacity of party in the litigation fund and the capacity of holder of the right to have a process solved in a reasonable time. The generalization of the quality of complainant is the expression of the interest that all parties to the proceedings must show regarding the solution of the proceedings with respect of certain optimal and predictable terms[3].

Per a contrario, given its reasons, which we will analyze in the next section, the contestation cannot be raised *ex officio* by the court, because the failure to fulfil a certain legal or procedural obligation is blamed on the court itself.

Also, the contestation brought by a third party is to be dismissed as being formulated by a person with no *locus standi*, because the third party, even if justifies an interest in the process, has not the capacity to pursue the proceedings.

b. Reasons of the contestation regarding the delays in the proceedings

The contestation regarding the delays in the proceedings is admissible only if we find ourselves in the presence of one of the four cases with delayed effect, exhaustively listed in paragraph 2 of Article 522 of the new Code of Civil Procedure, namely:

1. although the law sets a deadline in proceedings, for delivering or reasoning a judgment, this term has been fulfilled without result;

Regarding the assumptions related to the completion of proceedings, it may be indicated, as an example, the following provisions: Article 665 paragraph 2 of the new Code of Civil Procedure, according to which the application for approving of enforcement shall be resolved by the court within maximum 7 days after its registration, by a conclusion in the council chamber without summoning the parties; Article 64 paragraph 4 of the new

[3] Dinu Mihail, *Contestația privind tergiversarea procesului în NCPC*, *www.juridice.ro/229205/contestatia-privind-tergiversarea-procesului-in-ncpc.html*.

Code of Civil Procedure, according to which the appeal or, as the case may be, the appeal on points of law against the decision to reject the application for intervention on grounds of inadmissibility shall be heard no later than 10 days after its registration; Article 399 of the new Code of Civil Procedure, according to which the divergence shall be heard on the same day or, if not possible, within a period that does not exceed 20 days from the emergence of divergence, and in cases considered urgent this term cannot be longer than 7 days.

Regarding the delivery of the judgement, usually, the provisions of Article 396 paragraph 1 of the new Code of Civil Procedure apply, according to which the court review cannot exceed a period of 15 days. However, in the new procedural regulation we identify shorter deadlines, too, by which the delivery may be delayed, such as: in the case of application for the enforcement approval, the delivery may not be delayed more than 48 hours (Article 665 paragraph 2); when talking about the presidential ordinance proceedings, the delivery may not be delayed more than 24 hours (Article 998 paragraph 4).

The aspects regarding the reasoning of the judgment must be, primarily, correlated with the provisions of Article 426 paragraph 5 of the new Code of Civil Procedure, which establishes for drafting the judgment a term of 30 days from the delivery, but in the situation of special proceedings there are other special terms, too, for reasoning, such as: 7 days from the delivery to complete the approval of the enforcement (Article 665 paragraph 2); 48 hours from the delivery, to reason the presidential ordinance (Article 998 paragraph 4).

2. the court set a deadline by which a trial participant had to meet a procedural act, and this term was fulfilled, but the court did not take, towards the person that had not fulfilled his obligation, the measures provided for by law;

Relative to this reason, it is outlined, in literature[4], that the notion of „trial participant" must be understood in a broad sense, denoting any person, regardless of quality, which is scheduled to fulfil its task of pleading: parties, lawyers or legal advisers, prosecutor, witnesses, experts, interpreters, etc.

By way of example, this reason is incident: where the expert report is not filed within the term established by the court, without the expert's punishment by the Court under Article 187 paragraph 1 of section 2 (d) of the new Code of Civil Procedure; where the party did not submit the list of witnesses or the interrogatory within 5 days after the evidence had been admitted and the court did not order during the following term the revocation of probation under Article 254 paragraph 4 of the new Code of Civil Procedure.

3. a person or an authority that has not the quality of party was required to notify to the court, within a specified term, a writ or some data or information resulting from its records and which were necessary to resolve the process, and this term had been fulfilled, but the court did not take, towards the one that failed to fulfil its obligation, the measures provided for by law.

In this case, the assumptions regulated by Articles 297-299 of the new Code of Civil Procedure are being pursued, respectively the obligation of a third party to produce a particular document hailed as necessary to the solution of the process or, if the document is in the preservation of an authority or public institution, the administrator's obligation of

[4] Spineanu-Matei Octavia, comment on *Titlul IV. Contestația privind tergiversarea procesului*, in Gabriel Boroi (coord), *Noul Cod de procedură civilă. Comentariu pe articole, vol. I., art. 1-526*, Hamangiu Publishing House, 2013, p. 1017.

those institutions to submit the document. The noncompliance penalty is a fine stipulated by Article 187 paragraph 1 item 2 (f) and (g) of the new Code of Civil Procedure.

4. the court has disregarded the obligation to solve the case within an optimum and predictable term, by failing to take the measures established by law or by failing its duty, when required by law, to fulfil some proceedings acts necessary for solving the case, despite having the available time for taking or performing the measure.

The first hypothesis – not taking the measures stipulated by law for the performance of an act required to the trial procedure - we can identify it, for example, in the divorce proceedings, when the court required to hear the minor child, according to the Civil Code's stipulations, fails to require the presence of the child for hearing. In the second hypothesis – the court did not fulfil itself *ex officio* a procedural act, although the law required it – for example its obligation under Article 427 of the new Code of Civil Procedure on communication *ex officio* of the judgment, as soon as it was drafted and signed under the conditions of the law.

Any of the four grounds invoked by the complainant as having the effect of delaying the process must subsist when formulating the contestation. If the alleged measures or acts were met before or after the introduction of the contestation, the application will be rejected as unfounded or devoid of purpose.

c. Proceedings for resolving the contestation regarding the delays in the proceedings

In accordance to Article 524 paragraph 1 of the new Code of Civil Procedure, the contestation may be made in writing, and orally, too, directly in front of the panel that resolves the cause. The grounds of the party that formulates it will be recorded in the minutes of the hearing. If the contestation is made in writing, it will be submitted to the court invested with solving the main dispute. Registering the contestation to the higher court or to another court draws the consequence of its dismissal for not being under the material competence of that court.

Although the code does not stipulate anything on the matter, the contestation should be filed as soon as the complainant was informed of the procedural incident with delay effect, or no later than the first hearing that follows the incident.

The jurisdiction to hear the contestation in the first instance returns to the same panel that was entrusted with the case. Also, after the debates, in which case the contestation may be formulated either for exceeding the time limit in which the delivery could have been delayed, or for reasoning of the decision, the same panel that remained to deliver or, where appropriate, had pronounced the judgment, will be notified of the contestation, as the one invested with solving the case.

Conferring the jurisdiction to resolve the contestation in first instance to the same panel of judges vested with solving the main case is, in our opinion, erroneous, because one of the oldest principles of law, according to which *nemo esse iudex in sua causa potest* (no one can be judge of his own cause), is being infringed. Or, the contestation regarding the delays in the proceedings is formulated by any party to the proceedings when the court entrusted with solving the case does not fulfil an obligation imposed by law or by its own will, in the act of judgment. The complainant points in this way, through this procedural tool, the fault of the court vested for judgment. Being assigned to itself the power to decide whether it is guilty or not of negligence or failure to observe the law, the court may lose its

impartiality, either, effectively, by refusing to recognize its error, or, apparently, by the complainant's distrust in the legitimacy of a possible dismissal of the solution. Moreover, even if the panel of judges establishes the merits of the contestation, it will indicate for itself the measures to be adopted, with no practical possibility for any authority to supervise the carrying out of the willing.

In our opinion, all these aspects depart the Romanian civil procedure regulation, on judging the cases within a reasonable term, from the demands made by the European Court of Human Rights.

Returning to the solving of the contestation, this will be made either on the date on which it was filed, or at the latest within 5 days, without the parties being summoned. Under no circumstances will the suspension of solving the case be ordered.

Judging the contestation, the court may deliver two solutions. Thus, according to Article 524 paragraph 4 of the new Code of Civil Procedure, the contestation brought before the court may be admitted by a minute that is not subject to any appeal, and by which all the necessary measures to eliminate the situation that caused the delay in judgment will be taken. The court is unable to grant a compensatory redress for the complainant.

According to Article 524 paragraph 5 of the new Code of Civil Procedure, when the panel of judges assesses the contestation as unfounded, it will reject it by a minute, too, solution that entitles the complainant to bring an action within 3 days of communication. Also, the complaint will be dismissed as devoid of purpose if in the period set for solving of the proceedings (i.e. within the maximum term of 5 days), the procedural act was achieved, the procedure that makes the object of the contestation was completed, or the delivery or the reasoning of the judgment have occurred[5].

Both the decisions of admittance, as well as those of rejection of the contestation shall be substantiated within 5 days of delivery.

The complaint against the decision to reject the contestation is settled by the higher court, a panel made of three judges, regardless the composition of the panel that delivered the contested conclusion. Also, Article 525 paragraph 1 of the new Code of Civil Procedure states that the higher court shall resolve the complaint within 10 days of receipt of the case file.

The complaint's solving is made by a judgment which is not subject to any form of appeal. By judgment, the court of judicial control may dismiss or admit the complaint, in which case, according to Article 525, paragraph 2 of the new Code of Civil Procedure, „it shall order that the court judging the trial fulfil the procedural act or take the necessary legal measures, indicating which they are and establishing, where appropriate, a term for their performance". The same Article 525 also provides in paragraph 3 what the judicial court shall not do, namely: to give guidance to the court of which conclusion it censors it; to provide dispensations on matters of fact or law that may anticipate the settlement of the case; to interfere with the liberty of the judge to decide according to the law of the solution to be given to the trial.

It has been argued in the literature[6] that, by these latter provisions, the legislature wanted to ensure that the complaint procedure will not be diverted from its sole purpose,

[5] Spineanu-Matei Octavia, comment on *Titlul IV. Contestația privind tergiversarea procesului*, in Gabriel Boroi (coord), *op.cit.*, vol. I, p. 1021.

[6] Spineanu-Matei Octavia, comment on *Titlul IV. Contestația privind tergiversarea procesului*,în Gabriel Boroi (coord), *op.cit.*, vol. I, p. 1022.

that of ensuring to the parties an optimal solving term for their dispute, by taking on time all the procedural measures prescribed by law.

d. Sanctioning the complainant in bad faith

According to Article 526 paragraph 1 of the new Code of Civil Procedure, where the contestation or the complaint was made in bad faith, the offender may be required to pay a court fine from 500 lei to 2,000 lei, and, at the request of the interested party, to pay compensation for the damages caused by the introduction of the contestation or the complaint.

From the very beginning, we cannot fail to notice the strong deterrent effect of this provision for the parties to the proceedings that would like to use the procedural instrument with acceleratory effect, represented by the contestation regarding the delays in the proceedings. Furthermore, we consider this provision unnecessary since the introduction of the contestation does not suspend the case, and the panel of judges is obliged to pronounce on the application within five days of the entry.

Returning to the analysis of the legal text, we see that there are stipulated two categories of financial sanction for the complainant in bad faith. On the one hand, the court has the *ex officio* possibility, finding out the manifestly unfounded character of the application, to compel the complainant to pay a judicial fine in amount ranging between 500 lei and 2,000 lei, and on the other hand, at the request of the concerned party, the complainant may be required to pay compensation for the damage caused „by introducing the contestation or the complaint". Therefore, the complainant in bad faith, who was not penalized once with the trial in the first instance of his application, may be sanctioned by the court for judicial review, of course, to the extent that he unfounded and manifestly formulated a complaint against the decision to dismiss the contestation.

The second paragraph of the Article 526 offers some pointers on which the court can determine whether there was bad faith or not. Firstly, the bad faith results from „the manifestly unfounded character of the application or complaint", namely the situation where there is currently none of the four reasons listed exhaustively in Article 522, paragraph 2 of the new Code of Civil Procedure (the application's author denounces the exceeding of a term still not reached or the non-enforcement of a procedure that was performed). Secondly, the complainant's bad faith may also result „from any other circumstances, which justify that its exercise (of the contestation or complaint) was made for a purpose other than that for which the law recognizes". Thus is to be considered when the contestation or complaint are introduced with the purpose of teasing or getting delays in the proceedings, or when they are used to require the solving of some questions of fact or law that are subject to the judgment of the main process.

Regarding the damage caused to another party to the proceedings by introducing the contestation, we consider that there is a rather small possibility to produce such an injury and, therefore, to engage the civil liability of its author.

Conclusions

We consider extremely useful the introduction in the new Code of Civil Procedure of the contestation regarding the delays in the proceedings, an institution that transposes in the Romanian legislation the EU legislation and case law on the trial of civil proceedings within a reasonable time.

De lege ferenda, we believe that with this acceleratory remedy, a compensatory remedy should also be regulated, opening, thus, the possibility of claiming compensation for an unreasonable length of proceedings, in full agreement with the European Court of Human Rights.

We also appreciate the need to modify Article 524 paragraph 3, which grants the jurisdiction to hear the contestation by the very panel of judges vested for hearing the main case, because this procedural provision effectively reduces the efficiency of this institution and it may even discourage its use together with the provisions for penalizing the complainant in bad faith.

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THE ROLE OF CONTRACTUAL PRINCIPLES IN THE NEGOTIATIONS, EXECUTION AND TERMINATION OF AGREEMENTS

Sorana POPA*

Abstract: *In an attempt to explain the formation mechanism of obligations, emerged in philosophical and personal autonomy of the theory under which the legal act is the expression of its author or the agreement of the contracting parties, who agree to be bound. So for training contracts is necessary to have an agreement of wills between the parties, whose will must be consistent. Contract is equivalent to the consent agreement will externalization (as being in tune). Training will agreement and therefore contract may occur, depending on the circumstances, progressively through negotiations. The importance of rules of conduct negotiations to form the contract is relevant European in "common contractual principles" developed by the Association "Henri Capital" Friends of French Legal Culture Society of Comparative Legislation, published in 2008. According to the authors, the negotiating parties are bound by three essential duties: the duty of good faith (Art. 2:101), the obligation to inform (Article 2:102) and the duty of confidentiality (Article 2:103). This study aims to examine how they are regulated in the Romanian Civil Code principles of European contract law.*

Keywords: *autonomy of will, freedom of contract, good faith, confidentiality, loyalty.*

Contractual principles are the guiding ideas that are developed according to the applicable legal rules regarding the formation, execution and termination of contracts within a legal system. Previously considered to have origin in the divine in human reason, in the collective consciousness or social reality[1], these guiding precepts can be formulated explicitly in the text of the legislation or may be deducted by way of interpretation based on social values promoted.[2]

1. The role of the will to the formation of contracts

Agreement is defined as the agreement of wills between two or more persons with the intent to establish, modify or extinguish a legally binding therefore produce legal effects.

Will is a psychological element, but, legally, has a complex structure made up of two elements: consent and cause or purpose[3].

In an attempt to explain the formation mechanism of obligations, emerged in Philosophy personal autonomy theory under which the legal act is the expression of its author or the agreement of the contracting parties, who agree to be bound[4]. The conclusion of the contract is equivalent to the consent agreement will externalization *(as being in tune).*

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[1] POPA, N., *General Theory of Law,* Ed Actami, Bucharest, 1996, pp. 117-118.

[2] Craiovan, I., *The philosophy of law and the right philosophy,* Ed. Universul Juridic, Bucharest, 2010, p 256.

[3] Beleiu, Gh, *Romanian Civil Law Introduction to civil law. Civil rights issue,* Casa de Editură şi Presă "Şansa" - SRL, Bucharest, 1993, p 130 et seq.

[4] VLACHIDE, PC, *The rehearsal of the principles of civil law,* vol II, Europa Nova Publishing, Bucharest, 1994, p 13.

2. Training contracts. The Civil law legal principles of the will *lato sensu*

Current Romanian Civil Code expressly establishes two basic principles of the legal will, namely: the principle of freedom of contract and the principle of real will or internal will.

The principle of freedom of contract, based on the theory of personal autonomy, which, however, is not the same, is regulated in art. 1169 Civil Code., called marginal "Freedom of contract". Under current rules, "the parties are free to enter into any contracts and determine their content within the limits of law, public order and morals." Thus, the subjects of civil law broadly participating in a specific legal relationship, may, by law, to conclude whether or not a particular contract and to determine the content and if it ends, the parties are obliged to respect the limitations imposed the provisions of the law, public order and morals. However, the contracting parties have the opportunity, through free agreement will, to amend or terminate the contractual legal relationship.

In relation to carry out the will, the question of legal significance of silence in circumstances in which a contract is entered into as a result of explicit manifestation of the will of either party and silence the other. Legal significance of silence is even more obvious if both contracting parties have not expressly manifested will, but "kept silent" is a common example of achieving agreement within the road where taxis stationed in facilities. Manifestation of will in this case not express but rather implied, from both sides, however, the contract ends. Current Civil Code assigns legally silence the acceptance of the offer of the contract if the recipient is worth accepting silence or inaction by law, agreement of the parties, practices established between them, according to the established or if it results in other circumstances (for example, certain habits the site).

Role wills concurring in the conclusion of contracts is emphasized in the article. 2:201 of C*ommon contractual principles* [5], which states that "(1) a contract is concluded as soon as: a) the parties have expressed their intention to be bound, b) and reached an agreement on the essential elements of the contract.[6] (2) Subject to the exceptions set out in these principles or the law of the contract, it should not be any concluded in or evidenced by the signed and is not subject to any formal requirements. (3) The contract may be proved by any means, including witnesses. "Notice as necessary to carry out the will of the essential elements of the contract. The essential character of a contract lies in the intention of the parties, and in the absence of such designation, those elements which the parties have not qualified will be considered as essential accessories (art. 2:203 of *Principles).* Essential elements of the contract are met when the main goal pursued by each of the parties is determined and can be reached by execution of the contract so designed, completed, possibly by applying contractual principles common. In the absence of agreement between the parties on an accessory, the contract could be completed by applying the principles and, where appropriate, may resort to court. In connection with the terms of consent, according to art. 2:202 intention to engage with the other party must be shown to be related to the agreement. Intention to engage in legal terms may result in statements or behavior so that they can understand the other party reasonably.

[5] FAUVARQUE - Cosson, Benedict (coord..), *Projet de cadre commun de référence, Principes contractuels communs,* Collection de droit privé et européen, volume 7, Association Henri Capitant des Amis de la Culture Juridique Française, Société de Législation Comparée, 2008.

[6] Formation consent is necessary and sufficient to the extent that covers the essential elements of the contract, even if the parties through negotiation or pure and simple acceptance of the offer, left side elements to be agreed later time to be determined by a third party (Art. 1182 para. 1 and 2 of the Civil Code.).

In terms of form of consent, the principle of contractual freedom manifests itself in freedom of choice manifestation of agreement of wills *(principle of mutual consent)*. So as we can see, the principle governing the mutual consent of both the expression of consent as a condition for the validity of the agreement as well as the legal act itself. Pursuant to art. 1178 Civil Code., The contract is terminated by the mere agreement of the parties, unless the law requires certain formalities for the conclusion to be valid. Thus, the mere expression of will of the parties, unaccompanied by any other formality, is not only necessary but also sufficient to conclude the contract. The exceptions are in the case of strict interpretation and application and must be provided by law. Furthermore, pursuant to art.1240-1245 Civil Code., Willingness to contract can be expressed verbally, in writing or may be manifested by a particular behavior. If the declaration of intent is found in a document, it can be authentic or under private signature. If legal provisions require a particular form for the validity of the contract, non-compliance is sanctioned by absolute nullity of the legal act.

The principle of real will (in litter) is expression subjective conception traditionally adopted romanian civil law [7] and reflected in the current Civil Code. According to the art. 1266 par. 1 Civil Code, interpretation of contracts is done by consensus between the parties and not in the literal sense of the terms. In order to establish concurrence of wills of the contracting parties will take into account a number of elements that precede the conclusion of the Convention (order contract negotiations conducted prior to its conclusion, the existing practice between the parties) and the conduct of the parties after the conclusion of the contract. Priority internal will to the will declared clear and the interpretation of art. 1289 par. 1 Civil Code which provides that, in the simulation, secret agreement between the parties and effect only if the nature of the contract or the stipulation is not apparent otherwise, between their successors universal or universal. In the same vein are art. 1206 Civil Code governing the vices of consent because consent is considered valid only uncorrupted, the result of a manifestation of free will, conscious and corresponding real intention of the contracting parties. As an exception to the principle of real will, in the case of simulation, to third parties will effect public act, which is not true, but that can be known (Art. 1290 par. 1 Civil Code.). However, third parties may rely on secret act and can claim against the parties in the event that this act prejudicial to them.

3. Principles applicable to the effects of the contract, regulated and current Civil Code are: the principle of compulsory labor *(pacta sunt servanda* - art. 1270 para. 1 Civil Code.) Irrevocability principle (Art. 1270 para. 2 Civil Code.) And principle of relativity *(res inter alios acta aliis neque nocere neque prodesse potest* - art. 1280 Civil Code.).

3.1. Principle of the binding force of the contract

Pursuant to art. 1270 par. 1 Civil Code. "Valid contract has the force of law between the contracting parties." The principle of the binding force of the contract can be considered as the general rule governing the effects of the contract and under which the contract is validly concluded between the contracting parties just as binding law. However, obviously, can not equate law and contract. While the law is a general rule of conduct mandatory and permanent while it is in force, the contract between the parties limit their effects. The law is

[7] See this article. 977 of the Civil Code of 1864: "Interpretation of a contract is made after the common intention of the contracting parties and not in the literal sense of the term."

impersonal, normative, while the contract is an individual act. Parties may amend the contract according to their common, as, indeed, I have concluded, however, can not change the law in this area is to intervene legislature. Moreover, the contract can be unilaterally revoked in certain circumstances (contract term, the lease agreement for an indefinite period, etc.). On these considerations, it is considered in the literature that use the phrase "the laws" related to the binding force of the contract between the contracting parties has a metaphoric character.[8] This principle is based on the need to ensure stability but rcuitului *lato sensu* civil and moral imperative of respect for the given word.[9]

An important limitation of the binding force of the contract if there is unpredictability *(rebus sic stantibus)*. In applying this institution is reached where the effects of the contract to be other than those established by the parties in the contract by their common or even premature termination of the agreement due to an exceptional change of circumstances which would manifestly unjust ordered the execution debtor performance as was stated in the contract (art. 1271 Civil Code.).

Binding of the contract may be extended beyond the limit set by the parties for legal extensions of contracts, and when the suspension of a contract involving successive benefits.

3.2. Principle of irrevocability shall be governed in art. 1270 par. 2 Civil Code., That "the agreement is amended or terminated only by agreement of the parties or cause authorized by law." Under this principle, the contract may be terminated, symmetrically, as it has founded: by agreement. Thus, the principle of irrevocability contract is the rule of law under which the contract may be terminated only by mutual consent of the parties, and R is the unilateral revocation. Irrevocability principle flows directly and naturally from the principle of the binding force of the contract and is at the same time, and a guarantee it. Therefore, the need for security fundamentals resulting from the civil circuit and the moral imperative of respect given word are common to both principles.

Of course, as provided in the Civil Code, contracts can be unilaterally revoked where "authorized" by law. Since the regulation contained in art. 1270 par.2 Civil Code., Shown exceptional character of the possibility of unilateral termination of the contract, since the exceptions are to be strictly interpreted and applied, cases of unilateral modification or termination of the contract are strictly regulated by law. We can illustrate this effect, revocation donations for ingratitude (art. 1023 Civil Code.) For failure load (Art. 1027 par. 1 Civil Code.) And revocation of donation between spouses (art. 1031 Civil Code), removal from office or waiver of the Trustee (art. 2030 letter a and b Civil Code) revocation maintenance contract (Art. 2260 par. 1 Civil Code) etc.

3.3. Principle of relativity effects of the contract defined in the legal literature specialist[10] as the rule that this act take effect only from the perpetrators of the act, it can not take advantage or harm others. Under this principle is found, as shown in the principle of freedom of contract, the volitional nature of the legal act and the need to respect personal freedom.

Relativity effects of the contract is governed by art. 1280 Civil Code, that "the contract takes effect only between the parties, unless the law provides otherwise."

[8] Beleiu, Gh, *op.cit.,* p. 177, footnote 7; VLACHIDE, PC, *op.cit.,* 1994, p 75.
[9] Beleiu, Gh, *op.cit.,* p. 169.
[10] Beleiu, Gh, *op.cit.,* 1993, p 172.

As social and legal reality, however, the contract is enforceable against third parties can not ignore this reality and can not affect the rights and obligations arising from the contract (art. 1281 C.civ.).

Under the *principle effects of the contract enforceability,* third parties may rely on the effects of this legal act, without having the right to demand his execution, unless otherwise provided by law.

Exceptionally, the contract may produce legal effects and to others who are not contracting parties. Production effects of the contract to anyone other than the parties constitute exceptions to the principle of relativity. Traditionally, sun t considered as exceptions to relativity effects of those entitled under the contract situation, vicarious promise, simulation, direct action and stipulation for another.

4. Protection principle of good faith is a fundamental principle of civil rights, governed by the Civil Code expressly current. Pursuant to art. 14 Civil Code, Exercise civil rights and obligations must be made in good faith, in accordance with public order and good-manners. In the absence of a legal definition of the concept of "Good faith", we can interpret those provisions to the effect that when the exercise of the right and obligation are not consistent with public order and good morals, was the condition of good faith. We believe, however, that the determination of 'good faith' can be considered including the elements that characterize the law as abuse, so is contrary to good faith, the right in order to harm or injure another or in an excessive and unreasonable. In this context therefore requires the exercise of good faith within the limitations of the subjective object and more, depending on the subjective purpose. Or, is prohibited as contrary to law and good faith in order to exercise a right to produce other illicit injury or to harm their interests. Moreover, good faith requires submission of all efforts to avoid excesses and reasonable exercise of subjective.

By virtue of this principle need care, good faith is presumed (art.14 par. 2 Civil Code). The presumption, however, is relative, as it allows evidence to the contrary. What must be proven to overthrow the presumption is either excessive or unreasonable exercise of the right and overcome its limits or fault as intent to harm. Analysis of the existence or not of good faith must be made on both Contracting Parties, not enough to be a party in bad faith in order to be declared a nullity of the contract.

In contract law, the parties must act in good faith to negotiate and conclude such contract and throughout its execution. While enjoying the ability to act according to the principle of freedom of contract, the parties by agreement may limit or eliminate their obligation to respect the principle of good faith. Violation of this rule is punishable by a mandatory contract clause invalid, especially since, we believe, is a rule of public policy.

In the contract it is generally considered that the parties acted in good faith when they have fulfilled their duty of loyalty and cooperation that. The debtor is deemed to fulfill the obligation of loyalty even if it failed to perform the obligation in the agreement foresaw although every effort. The doctrine is in this respect the distinction between means and the obligation of result. Thus, if the obligation is the means and the debtor has taken due care in the execution, it is thought it was bad faith for non-performance. Conversely, if the obligation is the result, good or bad faith is not conclusive and the debtor is bound to perform its obligation to fulfill the contract object. With respect to the creditor, it is considered that this is true if you do not do anything likely to hinder the performance (execution) of the obligation by the debtor. We believe that loyalty must be to the lender in a behavioral nature of the obligation not to obstruct the execution debtor.

The duty to cooperate also borne equally on both sides and is relevant, as it has been argued, especially in certain areas (employment contracts, editing, distribution and so on). This obligation implies the duty to inform and facilitate the enforcement of the obligation of the other party (eg a credit agreement, the banking institution shall inform the client about the risks or the impossibility of paying the loan installments even before the contract).

The imperative of mutual respect is a component of the principle of good faith[11] and ensures the balance and consistency contract. In *common contractual principles* developed by Association Henri Capitant and Society of the comparative law in 2008, the principle of freedom of contract is limited by the need to respect the rules of good faith and imperative: "P artists are free to enter into a contract and to determine its content in reserve requirements of good faith and mandatory rules established by these principles."

Loyalty or contractual loyalty manifests itself in fidelity to what the parties intended by the conclusion of the Convention (art. 1266 Civil Code). Loyalty contract involves not only the "absence of deception and fraud" [12], but also contractual obligation to cooperate in the sense that both partners have a duty to use all fair means to ensure the fulfillment of the other purpose of the contract.

Failure to comply with the principle of good faith and abusive exercise of freedom of contract is the foundation skills as unfair contractual clauses.

5. Termination of contracts takes place, under the law, by executing the agreement of the parties, the withdrawal by the deadline, by meeting or, conversely, non-compliance by the accidental failure of execution, as well as any other cases expressly provided by law.[13]

The principle of freedom of contract is applicable in respect of termination of contract is the need to ensure symmetry required legal act. If by free will consent agreement arose, so it is necessary to cease. We note, however, that pursuant to art. 1321 Civil Code, Performance is the first mode of termination of the contract, no mutual consent as contract ends in order to take effect, and not to a premature end, even by agreement. Termination by agreement of the parties *(mutuus dissenssus)* involves release parties obligations, with possibly caused damages or restitution of benefits received as a result of conclusion.

6. In the same vein, we will refer to as the **guiding principles of European contract law,** prepared by members of the Association Henri Capitant Friends of French Legal Culture and the Society of Comparative Legislation in the field of training, execution and termination of civil contracts *lato sensu* and added the Principles of European Contract Law as they have been reviewed. These guiding principles are based on the idea of freedom, security and loyalty contract.

[11] Turcu, I., *New Civil Code Law no. 287/2009 Book V. About obligations art. 1164-1649 Comments and explanations,* Ed. CH Beck, *Bucharest,* 2011, p 87.
[12] Turcu, I., *op.cit.,* 2011, p 91.
[13] One such case of termination of contract is required by law and the judicial termination regulated in art. 1271 par. 3 letter. b Civil Code in unpredictable.

6.1. Pursuant to art. 0:101 of ***the guiding principles of European contract law*** proposed additions *Principles of European Contract Law,* "everyone is free to contract and to choose their partner. The parties are free to determine the content of the contract and form rules that apply. Freedom of contract is exercised in compliance with mandatory rules ". Observed in connection with the above-cited provision that by free will agreement, the parties may determine including rules applicable to the contract form and the principle of mutual consent is not automatically apply the effect of contractual freedom. Limiting freedom of contract is given exclusively mandatory provisions of law and no longer use the concepts of "public order" and "morals" concepts containing variable and often difficult to say. Obligation to comply with mandatory rules can be found, as stated[14], and secondary Community law aims to protect the contract was in a state of discomfort or represent an ideal tool to ensure compliance with public policy.

Freedom of contract is the shorelines and the obligation to respect the rights and freedoms of others, in order to ensure integration contract as social fact, not only *vinculum juris,* the pre-existing law. Thus, according to art. 0:102: "Each may contract only for himself, unless stated otherwise. Contract may take effect only as long as prejudice or illegitimate change of third party rights. " Text quoted conclusion establishes a presumption in their own interest, that presumption can be rebutted only in cases of otherwise agreed. Thus, under the principle of relativity effects of the contract, this legal act can take effect only between the contracting parties can not harm and can not use other people *(res inter alios acta aliis neque nocere neque prodesse potest).* As a corollary, third parties are bound by the contract situation, you can rely on its effects, but can not require performance of contractual obligations.

Also as a result of the principle of freedom of contract, the parties are free to modify or terminate a contract. Thus, "by their mutual consent of the parties are free at any time to terminate a contract or to modify it. Unilateral revocation is effective only with regard to contracts of indefinite duration. "Modification or termination by mutual consent can occur at any time of the contract. Withdrawal can be a cause for termination of its effects only in the case of contracts for an indefinite period.

6.2. Contractual security or principle binding force of contract *(pacta sunt servanda)* assumed duties of the parties to carry out its obligations as stipulated in the contract, as required by its provisions and contractual law. Pursuant to art. 7:101 - 7:111 of the *Principles of European Contract,* the obligations arising from this legal act must be made at the place and date specified in the contract, the deadline - since the early whom enforcement is sought may refuse such execution, except for certain circumstances, such as, for example, affecting its interests unreasonable manner. Also, the creditor must comply with the obligation to accept performance if it is proposed by the other party. Right to require performance of the contract belongs to each of the Contracting Parties under Art. 0:202, which states that "each contracting party may ask for performance of its obligations as stipulated in the contract." However, if during the execution of the contract is a change in unpredictable circumstances, which would seriously undermine the usefulness of the contract for one of the parties, the binding force of the contract is mitigated by dissolution. Parties have an obligation to negotiate or adapt the contract to terminate

[14] See in this respect ULIESCU, Marilena, *Guiding Principles of European Contract Law,* The volume of *Romanian law in the context of European Union requirements,* presented at the Scientific Session of the Institute of Legal Research, 2009 Hamangiu Publishing House, Bucharest, 2009, p. 8.

execution where it has become excessively onerous for one party. Revision or termination of the contract because of unpredictable was recognized in order to restore balance affected contract due to circumstances beyond its control. To remove the binding force of the contract, changing circumstances must occur after the conclusion of the contract, could not be reasonably foreseen at the time of conclusion of the contract, and the party affected by such changes will not be assumed by contract obligation to bear risks.

Contract Renegotiation and adaptation take place, usually by agreement of the parties or by court decision. The court shall order the judgment which gives adapt the contract or termination effects, equitable distribution of losses and benefits of changing circumstances and the damage suffered by any party in the negotiation or refusal breaking bad faith negotiations by the other party.[15]

Pursuant to art. 0:204, "when the contract is interpreted or the validity or enforcement when it is threatened, the efficiency of contract should be preferred if the annihilation of harm interests of one of the contractors." Application of the *actus interpretandus est potius ut valeat quam ut pereat* or the principle of priority to dismantling its storage contract[16] is traditional Romanian law. It was adopted by the Civil Code of 1864 and maintained in the current code, as a rule of interpretation of the contract. Principle of the contract is governed art. 1268 par. 3 Civil Code, that "clauses shall be construed as meaning that the effects may occur and not that it would not produce any".

6.3. *Loyalty* or good faith *contract* is an obligation incumbent on both Contracting Parties from time to conclude contract negotiations, as shown in the above, and persist throughout its execution. Thus, "each party is bound to act according to the requirements of good faith in contract negotiations pending combination effects. The parties may not exclude or limit this duty. 'Good faith can be characterized as a "good behavior contract" is in this sense a rule of conduct, synonymous with loyalty.[17]

For the purposes covered by the *Guiding Principles of European contract* execution in good faith is a general obligation of the contract. According to art. 0:302, "parties may plead and contractual rights only with respect according to purpose." Therefore, the parties may invoke the rights and terms of the contract according to its specific purpose or cause.

Loyalty principle implies obligation of cooperation and consistency. In order to achieve all the effects of the contract, the parties are obliged to adopt a positive behavior and not limited to the absence of bad faith or the failure to adopt a conduct contrary to the contractual partner. In the spirit of the regulation contained in art. 0:303 of the *Principles*, the parties are required to cooperate if cooperation is necessary for performance of the contract.

The requirement of consistency requires each party a duty to adopt a linear behavior, which previously had not contrary behavior training contract. It is an obligation to refrain from doing anything likely to take advantage of the confidence gained from the counterparty that, relying on this behavior has created certain legitimate expectations. Text art. 0:304 provides that "a party can not act in contradiction with previous statements and conduct, upon which its contractual partner could legitimately base." Also, as opined, "consistency requires that if the party is obliged to meet certain diligence for his right to become chargeable, it can not invoke the right in if not necessary efforts to fulfill its obligations".[18]

[15] I n the same vein, see Turcu, I., *op.cit., 2009,* p 160.
[16] *Idem.*
[17] ULIESCU, M., *op.cit.,* 2009, p 9.
[18] Turcu, I., *op.cit., 2009,* p 163.

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SOME CONSIDERATIONS ON RIGHT TO LIFE ROMANIAN LAW JURISPRUDENCE OF ECHR

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Abstract: *The right to life is a fundamental right of the human being, the observance of which it depends the very existence of other rights, which is regulated in the constitutions of all democratic states in international and European documents. Constitution regulates this right in Chapter II, Article 22, paragraph (1), in which the established principles regarding human rights and fundamental freedoms. However, neither the Universal Declaration of Human Rights, as a fundamental document of international human rights law or the European Convention on Human Rights, as a European document devotes the word "life" a coherent and comprehensive definition and is not specific about when this right is recognized. Despite the fact that the case law is not clear on when the right to life acquires, the Strasbourg Court has interpreted each case taking into account the obligations of the states, of not causing death through deliberate actions and take measures to protect the lives of people. Therefore, on the birth of this law, we note that the European Court leaves this aspect to the discretion of the Contracting States by national legislation in the context of a modern world that is based on the moral principles of respect for life, yet there is controversy about how the death penalty is the fair punishment as a solution to punish criminals and the extent to which a criminal may claim the right to life.*

Keywords: *the right to life legal documents, the obligations of States, consistent practice*

Man with imprescriptible rights, is the first value of the society, and these rights have been asserted, proclaimed, enshrined and guaranteed by legal, institutional and material means so that the person is protected and defended from the harmful effects of wars and other acts of barbarism, of expressions of religious, philosophical and political intolerance[1].

Aristotle's concept that "man is a social being" places him in the situation of a human being not only with natural and biological needs, but social too, which can only be satisfied in a community. Therefore, sociability appears as a natural characteristic, intrinsic to the human being that determines moral commandments of life in society to which people should be conform to accept, generating eventually, some attitudes that differentiate individuals[2].

Therefore, human's need to live in the community led to a number of consequences on the individual's desire to protect its life and all that it implies: property, privacy, tranquility, points of view, physical and mental integrity, etc, and the violation of these values entailed certain obligations to repair or penalties. For this purpose the Law of the XII Boards represents a document with special significance, in which there were listed rights of citizens such as the right to property, the right to be free, the right to choose their leaders and even the right to happiness.

The idea that man is, by nature, a series of rights, but a consequence of being born human, comes therefore from ancient times. For example, Plato said that „all who are here present I consider you all as parents, relatives, and people by nature, if not by law (phusis nomos).

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[1] Vasile Val Popa, Liviu Vâtcă, *Human Rights*, All Beck Publishing, Bucharest, 2005, p. 4

[2] Cătălin Ion Ciora, *Universal Declaration of Human Rights and the Constitution of Romania*, Human Rights magazine, no. 3/2008, I.R.D.O. Bucharest, p. 6.

By nature, the fellow being is the father of the fellow being, but the tyrant law of humans opposes its contrast to nature"[3], seemingly to distinguish between rights acquired by law and those acquired as a result of the fact that we are born human beings.

Therefore, we can say that the human's need for freedom and progress was the base to the evolution of his rights and therefore must be analyzed from this perspective first, before being analyzed for political, social or economic perspectives.

Therefore, fundamental human rights constitute a prime concern to communities of all time. They should be understood as subjective rights of citizens, essential to life, liberty and their dignity essential to the free development of human rights established and guaranteed by the constitutions of states and law[4].

The right to life is an essential human right, the observance of which it depends the very existence of the other rights, which is regulated in the constitutions of all democratic states in international and European documents.

Romanian Constitution regulates this right in Chapter II, Article 22, paragraph (1) within which establishes the principles regarding human rights and fundamental freedoms.

In turn, criminal law and criminal procedure law, by regulations issued by the legislature, is to determine the acts and deeds that harm or endanger the person's life, all the appropriate measures to prevent and punish them organization and conduct of prosecution proceedings of the criminal trial, in order to protect the fundamental social value - the life of the individual.

Article 2 of the European Convention guarantees the right to life as follows: "The right to life shall be protected by law. No one shall be deprived of his life intentionally but only in the execution of a death sentence handed down by a court when the offense is punished with this punishment by law. "It is not considered a violation of this article if it results from the use of force when it is more than necessary: in defending a person against unlawful violence;

b) In order to enforce a legal arrest or to prevent the escape of a person in custody, in perfectly legal conditions;

c) On legal action in order to quell a riot or insurrection.

Together with Article 3, it enshrines one of the fundamental values of democratic societies that are part of the Council of Europe. Law of the European Court of Human Rights has stated that without the protection of this right, the exercise of any other rights or freedoms guaranteed by the European Convention would be illusory[5].

In turn, the International Covenant on Civil and Political Rights provides in Article 6 § 1 that "the right to life is an inherent human right."

Article 3 of the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948 by Resolution 217 A (III) provides that "every human being is entitled to life, liberty and to its security"[6].

However, neither the Universal Declaration of Human Rights, as a fundamental international document in the human right matter nor the European Convention on Human Rights, as a European document does not devote the word "life" a coherent and complete definition and does not specify about when this right is recognized.

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[3] Quote„Protagoras" (words are attributed to Hippias).

[4] Ioan Muraru, Simona Tănăsescu, Constitutional law and Public institutions, the 10th Edition, Lumina Lex Publishing, Bucharest, 2002, p. 154.

[5] http://www.apador.org/publicatii/manual-DO-proof.pdf

[6] "The main international human rights instruments to which Romania is a party", Volume I, "universal instruments" Romanian Institute for Human Rights, coordinator Irene Moroianu Zlatescu, Emil Marinache, Rodica Şerbănescu, Ion Oancea, 4th edition, revised and enlarged, Bucharest, 1999, page 8.

Regarding the moment when the right to life arises, there are even today various scientific theories that generate controversy. Thus, this aspect is fully clarified in countries where abortion is banned (countries such as Ireland, Poland and Malta), unless the pregnancy would endanger the mother's life, in these countries the right to life is protected from the date of conception, the embryo being considered, therefore, a person and is treated as one.

On the other hand, in countries such as Romania, France, Spain, etc, abortion is permitted by law. These disparities between countries have generated a series of retaliation from religious leaders who considered abortion a mortal sin and the representatives of states with liberal tradition, in the desire to decide which law takes precedence: the embryo's right to life by birth or a woman's right to intimate and family life.

In Romanian legislation, according to a conception, about the existence of the right to life can only be spoken of, from the moment the process of natural birth had ended, when the baby is expelled and begins its life outside the womb[7].. The argument that this concept is based is that of infanticide incrimination this because Article 177 Criminal C. incriminates killing newborn children immediately after birth by the mother which is in a state of disorder caused by birth. Therefore, only after completing the process of birth, the passive subject fulfills the conditions of being newly born, that of being a person[8].

The debates on this issue are stiff and less convincing or compelling arguments can be made both on the one side and on the other. The stakes, after all, is finding a balance between protecting the right to life, attributed to the conception product and the pregnant woman's right, to dispose as she wishes of one's body. The problem is easily solved in the event that the state decides not to recognize any rights to the fetus, leaving the full freedom of decision to the pregnant woman[9].

Therefore, neither the European level [10] nor international, there is no consensus regarding the moment when life is protected, each state being able to dispose of legislative measures to prohibit or accept abortion, and in relation to this, the right to life is shielded from the date of conception or birth.

However, according to the DEX, the concept "life" is understood as a synthesis of biological processes, physical, chemical, mechanical which characterize organisms or the time between one's birth and death, the series of events happening at this time[11].

From those analyzed, it is quite clear that the right to life of the person is acquired at birth and is lost through death. Moreover inheritance rights also arise at the date of the child's conception, with the condition that he is born alive, to breathe at least once, this being an additional argument in favor of the idea that the right to life is acquired at birth.

The same point of view is expressed in its jurisprudence by the European Court in Strasbourg[12] considering that states comply with their positive obligations arising from the respect to the right to life if they establish a legal system that allows at least a civil action in case of killing an unborn baby.

In another circumstance, the Court made clear the principle that the fetus has a right to life, but subordinated to the woman's right to abortion. However, there is a recommendation

[7] Tudorel Toader- Criminal law Special part, ed. All Beck, Bucharest, 2002, p. 38.
[8] Sergiu Bogdan- Criminal Law special part, Legal Universe Publishing House, Bucharest, 2009, p. 14
[9] http://asdcdo.org/blog/?p=131
[10] See VO v. France case in which the Court did not wish to clarify the status of the embryo, categorizing or does that "person" within the meaning of art. 2- http://jurisprudentacedo.com/Vo-contra-Franta-Dreptul-la-viata-Domeniul-de-aplicabilitate-Copil-nenascut.html
[11] http://dexonline.ro/definitie/via%C8%9B%C4%83
[12] See cause Christodoulou v Greece- http://jurisprudentacedo.com/Christodoulou-c.-Grecia-Copil-nenascut.-Incidenta-art.-2.-Obligatiile-statelor.html

of the Council of Europe, in the sense of recognizing the right to life of the unborn from conception-(European recommendation nr.874 from the 3 to 4 October 1979) [13].

As shown, any international legal document, regional or national that promotes and protects human rights, inserted since the first articles this right, which shows its fundamental importance, but also involving the obligation of states to show an active attitude to protect this right.

This obligation is manifested in many fields, so, for example in the field of the fight against terrorism, the state must, on the one hand, to punish the guilty and, on the other hand, to take the appropriate preventive measures of the general situation[14].

Also, states have an obligation not to cause death deliberately to take the necessary measures to protect the lives of its citizens, to develop an impartial and efficient judicial system to investigate the causes of violation of the right to life and punishing the guilty ones by carrying out effective investigations.

The importance of the right to life has been underlined by the European Court in numerous cases directly addressing the issue of applying Article 2, showing that states have a positive obligation, procedurally, to carry out effective investigation to identify and punish those that harm or threatens to affect human life.

As to the right to an effective investigation the ECHR has pronounced itself in the case of Baldovin against Romania. According to the case file, in July 2002, the applicant gave birth in a public hospital to a girl who she named Maria. At birth, the mother presented to the doctor on call, G.I., the indications of the gynecologist who cared for her during pregnancy, and also results of several scans performed, which showed that the fetus was in transverse position in the womb and that a caesarean was indispensable. Despite these recommendations, the doctor on call G.I., caused the applicant's natural birth. Maria died by suffocation on the day after birth. An autopsy was performed, but the applicant requested a re-survey, which was conducted on the 25th of July 2002 by the chief doctor of forensic services in Gorj. According to the report in this case, Maria's death was caused by asphyxia with the umbilical cord at the time of birth. The report stated that there was a direct causal link between the death of the newborn and how the birth took place as a failure to comply with the recommendation for caesarean section[15].

The Gorj Court reasoned, in the last final internal decision in 2004, the decision to exonerate doctor G.I. of all criminal liability by the fact that, by virtue of the legislative framework, there could not have been performed, after issuing of the National Institute of Legal Medicine „Mina Minovici", a new expertise or additional expertise that could serve as evidence in criminal proceedings.

Such an approach of the court of appeal, made possible as a result of national legislation in the field of forensic examination is fully contrary to the procedural obligation contained implicitly in the Article 2 of the Convention, which requires national authorities to take measures to ensure that they achieve evidence to provide a complete and accurate report of the facts and an objective analysis of clinical findings, especially the cause of death[16].

[13] Nasty Marian Vlădoiu, Constitutional protection of life, physical and mental integrity, Hamangiu Publishing House, Bucharest, 2007, p.14.
[14] Bianca Selejan-Gutan, European Protection of Human Rights, 4th Edition, C.H.Beck Publishing House, Bucharest, 2011, p. 87
[15] See Baldovin v. Romania (2011)- http://jurisprudentacedo.com/Baldovin-c.-Romaniei-Dreptul-la-viata.html
[16] http://jurisprudentacedo.com/Baldovin-c.-Romaniei-Dreptul-la-viata.html

As shown, states have by virtue of Article 2 of the European Convention, the obligation to organize and conduct effective internal investigations against those who, directly or indirectly, caused a breach of the right to life.

According to the jurisprudence of the ECHR, in the absence of effective investigations, disappearances may be considered a violation of the right to life[17] and direct responsibility of the states regarding violations of Article 2 of the Convention. In this regard, it is enlightening Case Tanis against Turkey, which shows how even the state that is meant to protect its citizens, has a decisive involvement in the disappearance of two of its citizens. Thus, in the context of the disappearance of persons, the fact that four years later it continues ignoring the fate of those who disappeared, and the lack of plausible explanations of the authorities on of what happened, leads the Court to establish a direct responsibility of the state in the disappearance of those people[18].

Therefore, states have a positive obligation to protect life and in virtue of this obligation, knowing that there is a real risk, the State would have to act to protect the lives of people on its territory. There are not, however, few cases of threats or aggression against the person notified to the local police by numerous complaints, but by non-involvement of authorities that have ultimately led to the death of the applicants.

Significant in this regard is the case Vladan, considered the most terrifying attack happened in Romania in the last 20 years, which might have been avoided if, after repeated complaints for threats made by the abuser's wife to the local police, the authorities would have involved[19].

Precisely for this reason, a deeper involvement of the competent authorities of the Romanian state is desired, where complaints concern the threats to life and integrity of the person.

Also at European level, the Court sanctioned the passive attitude of the authorities concerned Kontrova against Slovakia (2007), an attitude that led to the death of the applicant's children (they were killed by the applicant's husband, after repeated threats, despite the fact that the applicant did repeated complaints to the local police)[20].

The active duty of the State to take the necessary measures to effectively protect the right to life is reflected in public health. In this area, the state is required to have the necessary legislative measures that would require public and private hospitals to ensure appropriate conditions to protect human health and procedural obligations allowing the organization and functioning of an objective and impartial judicial system to determine the cause of death for people in care of and medical staff in case of medical negligence, to punish them.

Although the most serious consequences for human life and health, malpractice in our country is relatively difficult to prove, and material or moral damage never cover the loss.

In Romania, especially after joining the European Union, was obligatory the adoption of legislation that stipulates medical malpractice. The number of cases notified by College committees increased from year to year, yet the number of those found guilty is very small[21].

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[17] See Tanis and Others v. Turkey (2005)

[18] See Tanis and Others v. Turkey - http://jurisprudentacedo.com/Persoane-disparute-Responsabilitatea-statului-Tansi-contra-Turcia.html

[19] A se vedea cazul Vlădan- http://www.gandul.info/news/primul-cap-care-cade-in-cazul-vladan-seful-politiei-capitalei-a-fost-destituit-in-locul-lui-a-fost-numit-lucian-guran-9376647

[20] Bianca Selejan -Gutan, European Protection of Human Rights, 4th Edition, C.H.Beck Publishing House, Bucharest, 2011, p. 90

[21] Cristian Iorga, Panteleimon Manta, Cristina Puşcu-Legal aspects of medical malpractice in the journal analysis of the "Constantin Brancusi" University of Targu Jiu, Juridical Sciences Series, Issue 3/2010, p 171.

In this respect, for the first time in 2006, the European Court ruled in favor of a Romanian who died of a kidney cancer, because the Romanian authorities have not given for free, the specific medication in these cases. The Court found that the Romanian authorities in the case of Stephen Panaitescu had violated the right to life under Article 2 of the European Convention on Human Rights[22] by the fact that the State has failed to fulfill its obligation to provide free medication to patient needed.

But law and morality obliges anyone in the limits of knowledge and power to give the needed medical help, and the doctor especially can not shirk this duty citing for example that it is not specialized, because the legislature says in the imminent danger, lack of care would worsen the patient's condition, and the damage that lack of expertise could cause would be less than the harm caused by the lack of any help. Taking care of a sick person, the doctor contacts towards his patient, moral, professional and legal responsibilities, and any injury caused by the doctor's mistake is urging to be repaired[23].

Another aspect that deserves to be analyzed related to the right to life is that if over time this absolutely fundamental right appears to us as a sine qua non condition for the existence of the other rights, as enshrined in the documents that promoted and protected human rights, it is not uniformly regulated throughout the world today. In the XXI century there are still countries in the world that have abolished the death penalty, stipulating by international and regional documents that the death penalty can be imposed only for the most serious crimes and only in accordance with law.

Applied since ancient times, capital punishment is far from being abolished worldwide, especially as applied by states considered democratic as the U.S. (38 states). In 1990, capital punishment was applied in 92 countries and territories, including China, Iran, Pakistan, Iraq[24].

The death penalty was abolished for all crimes in Italy (1994) Germany (1987), New Zealand (1989), Andorra (1990), Angola (1992), Australia (1985), Austria (1968), Belgium (1996), Canada (1998), Croatia, Czech Republic, Ireland and Hungary (1990) Denmark (1978), Spain (1995), Finland (1972), France (1981), Monaco (1962), Moldova (1995), Namibia and Nepal (1990), Norway (1979), Poland (1997), Portugal (1976), UK (1998), Dominican Republic (1966), Sweden (1972) Switzerland (1992), Venezuela (1863), Romania (1989) [25].

Currently in the world, the death penalty exists in countries such as Afghanistan, Saudi Arabia, Algeria, Armenia, Bahamas, Bahrain, Bangladesh, Belize, Cameroon, Chile, China, North Korea, South Korea, Cuba, Egypt, UAE U.S., India, Indonesia, Ethiopia, Iraq, Iran, Jamaica, Japan, Liberia, Lebanon, Malaysia, Mongolia, Nigeria, Pakistan, Guatemala, Singapore, Thailand, and Tunisia[26].

At European level, Article 1 of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms prohibits the death penalty stating that "the death penalty is abolished. No one shall be condemned to such penalty or executed ", but the document signed at Strasbourg on 28th of April 1983, does not rule out this punishment of acts committed in time of war or imminent threat of war.

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[22] See Case Panaitescu against Romania - http://jurisprudentacedo.com/Romania-plateste-cu-20000-EUR-esecul-autoritatilor-de-a-proteja-viata-unui-bolnav-de-cancer.html

[23] http://jurisprudentacedo.com/Infractiune-Ucidere-din-Culpa.html

[24] Nicolae Purdă, Nicoleta Diaconu- Legal Protection of Human Rights, Second edition revised and enlarged, Legal Publishing House, Bucharest, 2011, p 186.

[25] Olivian Mastacan – Death sentence in the Romanian Law, Legal Universe Publishing, Bucharest, 2010, p. 177-179.

[26] Olivian Mastacan- Op. cit. p. 181-182.

The death penalty violates the most fundamental human right, namely the right to life. Nothing justifies this punishment, whether or not considered effective in combating crime. Such practice is ethically unacceptable; it is cruel, legally incorrect and too often can lead to killing of innocent people, in which case, compensation is not possible[27]. In these cases who is responsible for judicial errors that generate moral violations of life[28]?

Therefore, the death penalty may be decided by each state, as punishment for a crime, ordered after a fair trial. It is used most often to punish killings particularly serious, but unfortunately in some countries also applies to fraud, adultery or rape.

In the context of a modern world that is based on the moral principles of respect for life, there is still controversy about how the death penalty is fair for punishing criminals as a solution and whether a killer can claim the right to life.

Across Europe, the death penalty has been abolished in most states with the exception of Belarus, for this reason this country is not a member of the Council of Europe.

Conclusions

In 2010 Romania was the first among EU member states, by the number of trials registered with the European Court of Human Rights that have infringed Articles 2 and 3 of the Convention, and in 2011 the country was punished 13 times by the Strasbourg Court for judicial errors for the fact that investigators are physically assaulting people during investigations, they arrest them without legal basis, do not take into account complaints about threats to the person's life, which encourages bullies and eventually lead to the murder of the applicants.

As shown also in the law of the Court, the right to life is essential for the protection and promotion of the other rights enshrined in the European Convention and other legal documents.

Despite the fact that the case law is not clear on moment when it acquires the right to life, the Strasbourg Court has interpreted each case taking into account the obligations of states to not cause death by the intentional actions and take measures to protect the lives of people. Therefore, on the birth of this law, we note that the European Court leaves this to the discretion of the Contracting States by the national laws.

In contradiction to its fundamental importance, the right to life is defined in the domestic and international documents, but without the existence of the concern of lawyers are theorists and practitioners to define the word "life."

[27] http://europa.eu/rapid/press-release_IP-07-850_ro.htm

[28] Judges in the country with the most developed system of justice in the world - United States, condemned to death and ordered, ten years ago the execution of an American from Texas, despite the fact that the accused Claude Jones claimed at the time his arrest in 1989 to execution in 2000 that is not guilty of the murder for which he was given the death penalty. Claude Jones asked in 2000, the then governor of Texas - George W. Bush to order the postponement of the execution. George W. Bush, at the time involved in the fight to win the U.S. presidency, refused and sent Jones directly to lethal injection. 10 years later, in November 2010, a DNA test proved that Jones was not the perpetrator. Judges and prosecutors have acknowledged that Jones's execution was a capital mistake- http://www.luju.ro/international/non-eu/eroare-judiciara-imensa-in-sua-un-american-executat-acum-10-ani-pentru-omor-pe-semnatura-lui-george-w-bush-a-fost-gasit-nevinovat-cu-testul-adn?pdf

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THE LEGAL CONTEST AGAINST THE ENFORCEMENT IN THE REGULATION OF THE NEW CIVIL PROCEDURAL CODE

Nicolae-Horia ȚIȚ[*]

Abstract: *The article analyzes the regulation of the legal contest against the enforcement in the New Civil Procedural Code, namely the object of the contest, it's admissibility requirements, the competent court to solve it, the legal terms in which the contest can formulated, the procedure in front of the court, the ways of appeal against the solution of the first court and the effects of the contest. Also, the article identifies the time application issues regarding the new regulation and makes de lege ferenda proposals.*

Keywords: *enforcement, legal contest of the enforcement, suspension of the enforcement.*

1. Preliminary considerations

The New Code of Civil Procedure – NCCP regulates the contest against the enforcement of civil judgements in articles 711-719, which constitute Chapter VI of Title I – General provisions of Book V – About enforcement. The regulation refers to the object of the opposition (art. 9), the conditions of admissibility (article 712), the competent court (article 713), terms (article 714), formal conditions (article 191), the legal procedure (article 716), the juridical remedies (article 7), the suspension of the enforcement (article 718) and the effects of the opposition (article 719).

The regulation is generally uniform and well structured, but certain inaccuracies or inconsistencies are present, as we will show further on. By comparison with the legal framework of the Civil Procedure Code of 1865, we can appreciate that significant progress has been made as the majority of legislative solutions regarding the opposition upon enforcement is being kept and novelties, namely a more detailed regulation of certain institutions and the consecration of certain judicially solutions, have become object of legal texts.

The provisions of the New Code of Civil Procedure regarding the contest against the enforcement are applicable only if the opposition concerns a procedure started after the entry into force of the law. In this sense, Article 3, paragraph 1 of Law no. 76/2012 regarding the implementation of Law no. 134/2010 on the Code of Civil Procedure states that its provisions apply only to procedures initiated after its entry into force. However, this particular legal procedure should be regarded as part of the execution procedure, not as a separate legal proceeding, initiated by the introduction of such a claim. Therefore, the reference time for determining the applicable law shall be the date of the claim introduced to the enforcement body and not the date of the request for opposition to enforcement. This is, as a general rule, the date when the lender has formulated the request for enforcement to the enforcement body. Whenever the claim is brought to court after the entry into force of the new Code of Civil Procedure, but if it refers to a procedure initiated prior to the entry into force, the claim is governed, in all procedures, by the regulations of the previous Code of Civil Procedure. [1]

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[1] In this regard, Zidaru, Gheorghe Liviu, Briciu, Traian, *Observații privind unele dispoziții de drept tranzitoriu şi de punere în aplicare a NCCP*, available at http://www.juridice.ro/244313/observatii-privind-unele-dispozitii-de-drept-tranzitoriu-si-de-punere-in-aplicare-a-NCCP.html.

2. The object of the opposition to the enforcement

The provisions of Article 721 NCCP regulate the object of the enforcement. Paragraph 1 of this article provides that „against the enforcement, the rulings given by the judicial executor, as well as against any act of enforcement, any concerned or harmed person can formulated an opposition. One can also make opposition to the forced execution even when the judicial executor refuses to perform the enforcement itself or to fulfill an act of enforcement under the law."

Therefore, one may opposite upon the enforcement regarding all acts of the forced execution individually, as well as against the enforcement itself, as a whole. Also, the contest may be directed against the judicial executor's decisions, except those that are described by the law as definitive or against those on which the law provides a special type of appeal[2]. In this regard, the novelty of the new regulation is that it consecrates the possibility to contest the judicial executor's closings, situation which had not been regulated by the previous Code of Civil Procedure. The judicial executor's rulings that are, by law, final, can not be appealed as it is provided by article 714 paragraph 2 NCCP, according to which the legal term for introducing an opposition against a judicial executor's conclusion on enforcement is 5 days whenever the decision is not, by law, definitive. The legislator does not define the concept of the judicial executor final closing but, by analogy with article 634 NCCP, which determines the meaning of final judgments, we conclude that the legislator intended to designate those rulings of the judicial executor that can not be subject of an opposition to enforcement, in order to distinguish them from the decisions of the judicial executor that are subject to special types of appeal.

The possibility to challenge the enforcement of the judicial executor's decisions is conferred to those concerned, as a guarantee of the principle of legality in the enforcement phase. The appeal against the judicial executor's rulings should not be confused with the opposition against the judicial executor's refusal to perform the enforcement itself or an act of enforcement, according to the law. Nevertheless, the latter should not be confused with the complaint against the refusal to initiate the enforcement procedure provided by article 664 paragraph 2 NCCP. The opposition against the judicial executor's decisions refers to those acts occurred during the enforcement procedure, after the approval of the court, and it regards its unlawful nature. An appeal against the refusal to perform an enforcement or to perform any act aims all acts that have not been fulfilled by the judicial executor, including the situations when he did not emit the rulings provided by article 664 paragraph 1 NCCP, regarding the opening of the forced execution file or, where appropriate, the refusal to start the enforcement, the situation when the judicial executor does not formulate the demand of enforcement within the period provided by article 665 paragraph 1 NCCP. The complaint regulated by article 664 paragraph 2 NCCP deals exclusively

[2] Gavriş, Dumitru Marcel, *Contestația la executare*, în Gabriel Boroi (coord.), *Noul Cod de procedură civilă, comentariu pe articole*, Vol. II, Editura Hamangiu, Bucureşti, 2013, p. 199.

with the refusal of opening the execution file[3], subject of a special legal framework, different from that regarding the opposition against enforcement. Therefore, the complaint governed by article 664 paragraph 2 NCCP is subject of a non-contentious procedure, according to article 527 and the following of NCCP, while the contest against enforcement is part of a contentious procedure, according to article 716 paragraph 1 NCCP.

Also, neither the opposition upon the forced execution, as a common legal procedural path against the discharges of the judicial executor, nor the complaint under article 664 paragraph 2 NCCP, or the opposition against the executor's refusal to perform the enforcement itself or an act of enforcement, should be confused with the complaint under article 56 paragraph 2 of Law no. 188/2000 on judicial executors. This claim can be filled against the judicial executor's whenever he refuses to perform any of the obligations provided by article 4, paragraph 7, let. b)-i) of Law no. 188/2000 on judicial executors, except those regarding the enforcement of civil provisions from executional titles, as it is mentioned in article 7 let. a) of Law no. 188/2000 on judicial executors[4].

According to the article 711, paragraph 2 NCCP, if the procedure stated by article 443 NCCP has not been used, the opposition can be made whenever explanations regarding the meaning, scope or application of enforcement are needed. Although the text refers to article 443 NCCP, the two texts are rather different. Thus, article 711, paragraph 2 NCCP consecrates the so-called opposition to title, its object being represented by the elucidation of the title, whatever its legal nature. Through this procedure, both titles which are court's judgments as well as other types of titles that, by law, can be put into forced execution, can be clarified. Article 443 NCCP refers exclusively to the explanation of judgments, but this procedural path is open to interested parties whether such judgment is fit or not to be put into execution. Consequently, the reference made in article 443 NCCP is relevant only in those situations in which the title is actually a juridical judgment, as only in this particular case the elucidation of the title can be make also trough the procedure mentioned by article 443 NCCP.

According to article 711, paragraph (3) NCCP, after the enforcement has begun, any interested or harmed person may request, through the opposition upon execution, also the cancellation of the judgment regarding the enforcement's approval, if it was given although the legal exigencies had not been satisfied. The decision of admitting the enforcement is governed by article 665 NCCP, its effects being covered by paragraph 4 of the same legal text. Thus, the declaration of enforceability enables the creditor to ask the judicial executor that had requested approval to enforcement to employ, successively or simultaneously, all means of enforcement provided by law in order to achieve its rights, including the enforcement's expenses and it produces legal effects throughout the country. The decision of enforcement acceptance is not subject to any appeal, so the terms used by the legislator

[3] In our opinion, the wording used is likely to cause confusion, because it suggests the conclusion that if the decision regulated by article 664 paragraph 1 last thesis regards the refusal of opening the executing file, the enforcement dossier does not exist. We believe that in this situation a dossier of enforcement must be prepared according to the provisions of article 656 paragraph 1 let. b) NCCP, which state that all the decisions of the judicial executor must include the case number under the sanction of nullity, according to article 656 paragraph 2 NCCP. Therefore, even if the judicial executor refuses the opening of enforcement for non-compliance with the formal legal requirements for enforcement, according to article 663 NCCP, he is obliged to register the request and provide a record of enforcement, because, in case the court of enforcement admits the complaint provided by article 664 paragraph 2 NCCP, the judicial executor does not open an executional file, but he must notify directly the enforcement court according to article 665 paragraph 1 NCCP, in which case the 3 days term specified by the legal text will begin to run from the date of the final decision on the admission of the complaint.

[4] Oprina, Evelina, Gârbuleț, Ioan, *Tratat teoretic şi practic de executare silită, Volumul I. Teoria generală şi procedurile execuționale*, Universul Juridic Publishing, Bucureşti, 2013, p. 598.

must be understood in the sense that the decision will not be contested either with appeal or with extraordinary appeal or review of the judgment. Even if it is not expressly stated, the ruling of acceptance of the enforceability shall be served only to the enforcement judicial executor; following, he will communicate a copy to the debtor, according to article 666 NCCP. Against this decision, however, it can be formulated an opposition to execution, according to article 711, paragraph 3 NCCP, by any interested or harmed person. Relative to this provision, we appreciate that the creditor as well may contest against the approval of execution, whenever he might be prejudiced by it (for example, in the event that the court should indicate explicitly the means of enforcement, even though the creditor has not expressly requested a specific way of enforcement).

Article 711 paragraph 3 mentions that one may required through the opposition of enforcement the annulment of the decision of enforcement's only after the procedure has started. This appears to be superfluous because, according to article 622 paragraph 2 NCCP, the enforcement begins with the referral to the enforcement body. Therefore, the conclusion trough which the application of enforcement has been approved is pronounced by the Court, in all cases, after the start of the executional procedure, so that it is not possible to contest it before its start. Hence, *de lege ferenda*, we propose the removal of the phrase „after the start of enforcement" within the article 711 paragraph 3 NCCP.

Last but not least, article 711 paragraph 4 NCCP provides that within the opposition to enforcement, the division of common property, shares or joint property can be required[5]. Therefore, an impediment to enforcement can be eliminated, namely that of joint ownership on shares or joint property when only one of the co-owners is debtor. In such situations, the joint ownership is opposed as impediment during the enforcement; the creditor may request the sharing of goods, so the enforcement can proceed. The legal text confers the right to ask the division of property to any person concerned, so that the request can be made even by the co-owner or by one of its personal creditors.

3. Conditions for the exercise of the enforcement opposition

In the analysis of the conditions of the enforcement opposition, one must distinguish between the admissibility regarding the grounds (cause) of the contest against enforcement and the procedural conditions, both intrinsic and extrinsic.

Regarding the first matter, article 712 paragraphs 1 and 2 NCCP provides, in a similar manner to article 399 paragraph 4 of the previous Civil Procedural Code that if the enforcement is based on a judicial or arbitral judgment, the debtor will not be able to invoke in an opposition grounds of fact or of law which he could have opposed during the judgment at first instance or on appeal. Whenever the enforcement is not based on a judgment, the debtor can invoke in the opposition to enforcement reasons of fact or of law relating to the rights contained in the enforcement title, provided that the law does not stipulate a particular procedure regarding the dissolution of the title[6].

Opposition to enforcement cannot, therefore, be based on grounds relating to the substantive legal relationship, but only on the procedural legal relationship, as a general rule. As such, whenever the enforcement title is represented by a judicial decision, in the opposition one may not be invoked reasons of fact or of law related to subjective rights or aspects pertaining to

[5] Gavriş, Dumitru Marcel, *op. cit.*, p. 200
[6] Deleanu, Ion, Mitea, Valentin, Deleanu, Sergiu, *Noul Cod de procedură civilă, Comentarii pe articole*, Vol. II, Editura Universul Juridic, Bucureşti, p. 125.

court proceedings at the end of which the judgment was rendered because otherwise it would undermine its *res judicata*[7]. The law permits exceptionally the formulation of substantive defense with respect to the subjective right where the enforcement title is represented by another document of which the law recognized the quality of law enforcement, provided that regarding that document there is not provided a particular procedure of contesting or cancellation of the title (for instance, the complaint against the minutes finding and sanctioning of an offence).

As a novelty, the NCCP provides the express inadmissibility of the opposition upon the enforcement if the reasons that might be invoked in a contest could have been raised through an previous opposition[8]. Thus, article 712 paragraph 3 states that a party can not make another appeal for reasons that existed at the time of the first appeal. However, the complainant may amend the original application by adding new grounds of appeal if, in respect of the latter, the legal term for exercising the challenge to enforcement is not fulfilled[9]. The hypothesis of the legal text is that, in that same side, usually the debtor makes more appeals at successive enforcement by invoking different reasons. The NCCP specifically forbids such a procedural manifestation, only allowing the modification of the initial claim, within the legal term, so derogating from the general provisions of the article 204 paragraph 1 the NCCP, according to which the plaintiff, as a general rule, may amend its application until he is legally summoned for the first time in court. Therefore, in case of opposition to the enforcement, the legislator has provided a double prohibition: on one hand, the ban to formulate a new opposition on grounds that existed at the time of the first appeal; on the other hand, the ban to formulate new grounds within the same dispute, but after the expiry of the legal terms, even if the invocation of these new reasons would be dealt under the term provided by article 204 paragraph 1 NCCP, respectively the first hearing when the appellant is legally summoned in court.

The provisions of article 712 paragraph 4, according to which lenders that are not part of the enforcement procedure have the right to intervene in the enforcement carried out by other creditors, in order to participate in the procedure or in the distribution of the assets obtained from the debtor's, although are included in the article concerning the conditions for the admissibility of the contest against enforcement, which are unrelated to the matter, as they refer to the institution of intervention in the executional proceedings, covered up in detailed in Section 4 – The intervention of other creditors – in Chapter IV – The Conduct of enforcement – of Title I of Book V of the NCCP. Also, article 712 paragraph 5 NCCP does not regulate a matter of admissibility regarding the opposition to enforcement, but one aimed at another condition for the exercise of it, namely the active procedural capacity. Thus, this legal text provides that in the enforcement of movable or immovable or of forced surrender of real estate or movable goods, the contest against enforcement may be introduced by a third person, but only if it claims to be the owner or to have other real estate rights regarding that specific good. However, this is not a rule of admissibility of the complaint, but one that aims to regards the parties. Thus, this legal text provided that the opposition upon the execution of movable or immovable property or forced to surrender the immovable or movable, can be introduced by a third person, but only if it is claiming an ownership interest or another real estate right in respect of the property concerned. However, this is not a rule of admissibility of the opposition, but regarding the parties of the opposition.

[7] Leş, Ioan, *Noul Cod de procedură civilă, Comentariu pe articole*, Editura C.H. Beck, Bucureşti, p. 992 – 993.
[8] Gavriş, Dumitru Marcel, *op. cit.*, p. 203.
[9] Ursuța, Mircea, *Sinteza noutăților Codului de procedură civilă*, Universul Juridic Publishing, Bucureşti, 2013, p. 86.

In terms of procedural requirements relating to the exercise of the contest upon enforcement, we must distinguish between general requirements specific to the application, and specials conditions.

With regard to the first problem, article 715 paragraph 1 NCCP provides one rule according to which the objections shall be made in compliance with the requirements of form laid down for legal applications. Therefore, the opposition to enforcement is subject of the general provisions of article 194-197 NCCP regarding the intrinsic and extrinsic requirements of a claim in court.

In the category of special procedural conditions concerning the exercise of the opposition we must include those relating to the deadline for the exercise of the appeal. Related to this condition, article 714 NCCP provides as a general rule, a period of 15 days for the contest against the enforcement itself, regarding any act, term which shall run from the date on which the interested party first became aware of the act of enforcement. In case of contestation upon enforcement by garnishment, the term of appeal shall run from the date on which the applicant has received the communication or, as the case may be, a notice concerning the establishment of the garnishment. If the garnishment is founded upon periodic revenues, the period of opposition for the debtor begins no later than the date of the first of these revenues had been withheld by the garnishee. If the debtor contests the enforcement itself, the period shall run from the date on which it received the declaration of enforceability or the summons, in accordance with article 666 NCCP, either from the time when he became aware of the first act, whenever the debtor has not received neither the declaration of enforceability, nor the summons or if the enforcement shall be made without notice.

As pointed out above, the contest against the decisions of the judicial executor, whenever they are not final, by law, can be done within 5 days from the date of the notification. The opposition on clarifying the meaning, scope or application of the enforcement can be done anytime within the term for obtaining the enforcement.

In some cases, there are special legal terms for contesting upon the enforcement. For example, article 816 paragraph 3 NCCP provides a term of 10 days that runs from the communication of the decision of ordering the notation of the enforcement in the real estate register, for the third party purchaser of the mortgaged property to opposes to the sale of the good; Article 854 paragraph 1 NCCP provides a period of one month to exercise the enforcement appeal against the act of adjudication, time running from the date of provisional registration in the real estate register; article 875 paragraph 3 NCCP provides 5 days to oppose to the draft report of distribution of the proceeds from the sale of assets, term that runs from the date of the report in which were noted the objections to the draft of distribution, if they were maintained at the time fixed for the reconciliation.

4. Resolution of the opposition to the enforcement

As a general rule, the court having jurisdiction to hear the opposition upon the enforcement is the court of enforcement, according to article 713 paragraph 1 Civil Procedure Code. According to article 650 NCCP, the enforcing court is the court in whose jurisdiction is situated the office of the judicial executor that performs the enforcement, unless the law provides otherwise. To this rule there are exceptions, for example, in the

case of real estate, the court shall be that in which jurisdiction is located the immoveable good, pursuant to article 819 NCCP[10].

According to article 713 paragraph 2 NCCP, in case of judicial enforcement by garnishment, if the debtor's domicile or registered office is under the jurisdiction of another court of appeal than the court of enforcement, the opposition may be introduced to the court where the debtor has its domicile or registered office. This is a particular situation of territorial jurisdiction, so the plaintiff can choose between several courts alike, according to article 116 NCCP. Nevertheless, article 713 paragraph 2 NCCP provides an alternative territorial jurisdiction in case of forced pursuit of real estate, of enforcement of the fruits and revenues of the property, as well as in the case of forced teaching of real estate, if the immobile is in the constituency of another court of appeal than the enforcement court. In this situation, the opposition shall be introduced at the court where the immobile is situated. We appreciate that this rule can be applied only in the case of direct enforcement, respectively in the case of pursuing the fruits and revenues of the property, because in the case of enforcement of immovable goods, the enforcement court is, by way of derogation from the general rule, the court in whose constituency is situated the property, therefore a territorial jurisdiction cannot operate.

The opposition concerning the explanation of the meaning, scope or application of the enforcement title must be introduce to the court which pronounced the decision, according to article 712 paragraph 3 NCCP. If such title emanates from an organ without jurisdictional competencies, the jurisdiction lies with the court of enforcement.

The contest upon enforcement is subject to the rules of judgment in the first instance, these provisions being applied in this case according to article 716 paragraph 1 NCCP. As a consequence, there will be applied, regarding the opposition of enforcement, the provisions concerning the application of settlement proceedings, the written phase, the juridical research, debate, deliberation and pronouncement that the law provides. Article 715 paragraph 2 NCCP states that the complainant who resides or is located in another locality than that of the enforcement court has the ability to choose, even in his application, his residence or office in that locality, showing the person who shall receive all communications. We consider that such a special provision was not necessary as the legislator regulated this right for any party involved in the proceedings, according to article 158 NCCP. Also, we consider that the expressly mention of article 715 paragraph 3 NCCP according to which the meeting is mandatory, is not necessary, since this is the general rule laid down in article 208 paragraph 1 NCCP. We appreciate that the legislator should have specified the situations where the meeting is not mandatory, and not those where it is.

A number of special rules relating the judgment of the opposition upon enforcement are consecrated. Thus, according to article 716 paragraph 2 NCCP, the court will immediately ask the judicial executor to submit, within the time fixed, certified copies of the documents from the enforcement file which are contested, case in which the provisions of article 286 NCCP are applied, and will ask the party concerned to pay the expenses incurred by them. Also, according to article 716 paragraph 4 NCCP, at the request of the parties or whenever the court considers it necessary, the judge may request the judicial executor information and written explanations.

In order to solve the opposition, the parties will be cited in short term and the hearings will be characterized by emergency and priority. The judgment given on the claim may be contested only with appeal, except the judgments under article 711 paragraph 4 NCCP (when

[10] Oprina, Evelina, Gârbuleț, Ioan, *op. cit.*, p. 601.

it was decided upon the division of the joint property) and under article 714 paragraph 4 (when the opposition by which a third party claims that it is the owner or it has another real estate right over the good intended) that can be challenged under the general provisions. The decision to resolve the contest on the meaning, scope or application of enforcement is subject to the same remedies as the decision that is being executed. If the appellant required the court to clarify the meaning, scope or application of a title that is not of a jurisdictional body, the judgment resolving the complaint may be challenged only by appeal[11].

Regarding the solutions that the court may give upon the admission of the opposition on enforcement, according to article 719 paragraph 1 NCCP, the court, taking into consideration the object of the content, may cancel or terminate the enforcement itself or may cancel or clarify the title. Also, if in the contest against enforcement, the interested party has requested the division of the common property, the court will decide on distribution, according to the law. In the event the court rejects the appeal, the appellant can be obliged, if it is required, to compensation for damages caused by the delay in enforcement, and when the opposition had been exercised in bad faith, he will be obliged, by the court, to pay a fine of 1,000 to 7,000 Ron. If the court considers that the judicial executor refusal to receive and register the claim of enforcement or to take any other measure prescribed by law is unjustified, the court may compel the judicial executor, through the same judgment, to a fine of 1,000 to 7,000 Ron, and at the request of the interested party, the judicial executor can be obliged to pay compensation for the damages that he has caused[12].

5. Conclusions

The opposition upon enforcement is an important means of ensuring the principle of legality in the process of enforcement of civil judgments, providing the interested parties with procedural levers in order to invest the court with the analysis of various aspects mainly related to the enforcement. The regulation contained in the new Code of Civil Procedure has the role to harmonize the legislation with the needs identified in practice and to provide an appropriate framework to solve them. Through the application of these provisions, we consider that, in general, the new rules are a step forward from those contained in the previous Code of Civil Procedure, even if there are a number of legislative imperfections will, most likely, be corrected.

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[11] Leş, Ioan, *op. cit.*, p. 1003.
[12] Gavriş, Dumitru Marcel, *op. cit.*, p. 216.

THE SHIPPING CONTRACT IN THE LIGHT OF NEW REGULATIONS

Mihaela Miruna TUDORAŞCU

Abstract: *To ensure the smooth shipment of goods, businesses turn to professional intermediaries who are committed to seek the means of transport and to ensure their delivery to the recipient. For this reason businesses are concluding a contract with intermediaries, called shipping contract, for designed to facilitate the movement of goods between producers and consumers. By art. 2064 from New Civil Code, the shipping contract is a variety of a commission (fee) contract, by the shipper undertakes to conclude, in his own name and for the comitent, a contract of transport and other accessories operations.*

Keywords: *contract, shipping, commission, carrier, transport.*

Expedition of goods and their transport have been a concern of society since ancient times, determined by the distinct needs of people in different locations. Today, this has become a challenge for specialists, due to globalization and the desire to meet the needs of more customers in different regions and with different needs. Carrying freight transport involves sometimes difficult tasks, as exchange of goods, their repartition and the supply of large consumers, being generally to long distances, defining work of dispatch as a contributory factor for and for economic development.

Analyzing the transport of goods, we observe that we are dealing, legally speaking, with a wide juridical structure and in practical terms with a complex operation. For sure, tha main role, the center of these operations is the carriage of goods contract, but, precisely in order to optimize it, to ensure continuity of movement of goods, a new legal structure was born, with ancillary role, freight forwarder contract, in order to mediate the link between the customer and the carrier and to provide "legal cloak" for all these transport related operations.

Expedition of goods is not only a priority and necessary concept in a market economy, but also an important sector in law system, intersection of these two fields occasions to facilitate the existence of the entire society.

To ensure the smooth shipment of goods, businesses turn to professional intermediaries who are committed to seek the means of transport and to ensure their delivery to the recipient. For this reason businesses are concluding a contract with intermediaries, called shipping contract, for designed to facilitate the movement of goods between producers and consumers.

By art. 2064 from New Civil Code, *the shipping contract is a variety of a commission (fee) contract, by the shipper undertakes to conclude, in his own name and for the comitent, a contract of transport and other accessories operations.*

The shipping contract is a variety of fee contract, belonging to mandate without representation. This means that, in addition to the specific provisions of shipping contract are applicable the rules from the commercial area settled by the New Civil.

As a form of mandate without representation, carrier concludes the contract in its own name and on behalf of a comitent a transport agreement, in principle negotiable. So the carrier is, an intermediate between the supplier of goods and their carrier, most often encountered in practice as freight forwarder. So the shipping contract is a variety of a commission contract,

and a second mandate without representation – special mandate, the carrier being an intermediate in commercial activity, being sought for its professional services.

The carrier is the most important advisor for customer, owner of the goods, in transport. The shipping contract is materialized under the form of a service contract, that occurs in relation with the transport of goods, from a place of departure to a destination (special mandate).

If the carrier has the necessary means and realizes himself the cargo transport, he enjoys the incumbent to carrier rights and obligations, art. 2070 of the new Civil Code stating:"*dispatcher who takes the obligation to perform transport, with his own or someone else's means, generally or partculary, has the rights and the obligations of the dispatcher*."

Auxiliary operations required for carrier, summarizes activities such: advice for the client, loading and unloading cargo, performing for the client administrative formalities etc.

In the international literature, the shipping contract has several names: in French – *commission contract*, in English - *forwarding agent*, in Italian - *speditione*, in German - *speditionsvertrag*.

The shipping contract definition has changed beginning with the entry into force of the new Civil Code – The Law No. 71/2011, both in terms of terminology and the legislative framework. Today, it is governed by Articles 2064 - 2071 of the New Civil Code, providing a self-regulatory for the shipping contract, unlike the Commercial Code (repealed with the entry into force of Law no. 71/2011). Under the old law, art. 405-413 Commercial Code, there were no explicit reference for the shipping contract, the rules were those devoted to the commission contract, more than that, the shipping contract was considered an auxiliary element of the transport contract in which it was embedded.

Common standard contractual clauses in Romanian law are "The general conditions RSCU" developed by Romanian Shipping Companies Union (RSCU) regarding shipping houses. Certain commercial entities (like Romtrans and Navlomar) use a model contract, which is completed with the "General Conditions of Work", in fact cotractual clauses which leads the contracts concluded with this type of entities as being an adhesion contract. By Art.6 from "The general conditions RSCU": " In all cases when the shipping house is a member of RSCU, the clauses of shipping contract are completed with the clauses from the General Conditions, which are part from contract or order, even if an express statement to that effect is missing". Art. 9 form the same text provides that the legal relationship between the carrier and the client, arising from the concluded contract, are governed by Romanian law.

Romanian Shipping Companies Union - RSCU - is a professional organization, non-governmental, non-political, independent, based on democratic principles. RSCU aims to increase the role and efficiency of freight forwarding in internal and international traffic, freight related activities, and the commissioners of the customs - in the development of Romanian economy the on the principles of market economy, including the transport sector, combining modes in order to ensure a fast moving of goods, safe and efficient, from producer to consumer.

Standard contractual clauses are used internationally: "Standard commercial conditions regarding freight and forwarding agents" (Shipping and forwarding agents - S.F.A) şi " Terms of expeditionary" developed by the *International* Federation of Freight Forwarders Associations (IFFFA) from Berna, Romania being a member. Its main objectives include: promoting the interests of the profession of international expeditionary, improving the quality of expedition, encouraging cooperation between shipping houses, increasing the speed and efficiency of shipments.

Rules regarding the multimodal goods transportation we find in The Convention of Unite Nations for the international multimodal transport of goods, signed in Geneva on 2nd of May, 1980.

Regarding the combined transport of goods we have the rules in G.O. No. 88/1999, published in Official Bulletin No. 423 from 31st of August 1999, aproved by Law No. 401/2002, published in Official Bulletin No. 455 from 27th of June 2002.

The New Civil Code makes changes terminologically speaking, so the words as expeditionary, carrier, client are replaced, in the new Code, with expeditor, forwarder and the client. Although the Commercial Code was repealed, shipping contract items in their essence are the same, providing to the shipping contract a specific regulation.

A carrier-based statue in our country enjoys Romanian law enforcement - regardless of the nationality or the headquarters of the client in question - even if it failed to specify lex contractus by explicit stipulation.

The purpose of shipping contract is to intermediate the bond between the client and the carrier, and to assure the „legal coat" for all the transport adjacent operations.

Shipping contract has a consensual character and the simple willing of parties is enough. However, in case of dispute, contracting party wishing to assert their alleged rights will have difficulty in proving the existence of the contract. In commercial field, documentary evidence is required for proving the conclusion of contract.

In addition to the specific rules of shipping contract will be appilied the ones regarding the commission contract, bacause we have a variety of this kind of contrac, as we said before. By Art. 2044 al. 1 New Civil Code, the commission contract is concuded in written form, authentic or under private signature, and in al. 2 we find that, if by the law it is not precised, the written form is necessary just to prove the existence of the contract.

In old Commercial Code (Art. 405-412) was not established any formal requirements for the valid conclusion of contract.

Probative value of the written form is stipulated in conventional rules. Art. 1 al. 2 from Model Contract of Romtrans provides the written form, and in Art. 1 al. 4 from The general conditions RSCU we find that acceptance and order can be sent electronically, fax, telex or mail. For the electronic form of contract we have the the provisions of Law No. 365/2002 on electronic commerce.

If the contracting parties can demonstrate the existence of contract with the written document, for others is a *stricto sensu* legal fact, being any evidence admissible.

To be validly concluded, the shipping contract has to fullfil the general conditions of Art. 1179 New Civil Code, which took over provisions of Art. 948 The Old Civil Code. These conditions are: The capacity to conclude a contract; the consent; a determined and legal object; a legal and moral cause.

The duration of contract is set out in the contractual clauses and it is up to the parties to decide the time when the contract becomes effective. In common law mandate without representation may be concluded for a definite or indefinite duration. If the parties have not set a deadline, it takes effect, in the absence of contrary stipulation, on duration of 3 years (art.2015 New Civil Code).

Being a variety of the commission contract, for the shipping contract is appliable the legal rules of the commission contract regarding the cessation. Aceste dispoziții nu exclud ca încetarea contractului să intervină ca urmare a ivirii oricăreia dintre cauzele generale de încetare a contractelor, precum executarea de către expeditor a sarcinilor la care este angajat, expirarea termenului prevăzut în contract, realizarea condiției rezolutorii care

afectează contractul, apariția imposibilității fortuite de executare survenite (exemplu: pieirea foruită a mărfurilor încredințate expeditorului).

Revocation of shipment is stipulated in Art. 2065 New Civil Code to which, until the conclusion of the shipping contract, the client can cancel the shipping order, paying to the carrierthe costs and a compensation for the things that he made untill the communication of the shipping order.

The carrier can give up any time during the contract with the principal obligation of notification. Expeditorul poate pretinde o remunerație pentru actele juridice depuse înainte de renunțare comitentului și este obligat să-l despăgubească pe comitent pentru prejudiciile suferite prin efectul renunțării, cu excepția cazului în care continuarea efectuării activității de expediție i-ar fi cauzat expeditorului însuşi o pagubă însemnată, care nu putea fi prevăzută la data acceptării comenzii.

Death, incapacity or bankruptcy of one of the contracting parties arises from the *intuitu personae* shipping contract. In art. 2035 New Civil Code are precised the effects, in this situstions, regarding the valide mandate and the shipping contract. So, in case of death, incapacity or bankruptcy of one of the contracting parties, heirs or representatives are obliged to immediately inform the other party and are forced to continue to execute the mandate if its delay may jeopardize the interests of the principal or his heirs.

Shipping contracting parties are the client and the carrier.

The client, freight provider, is the one who wants his goods to be transported and who orders to the carrier to do that service. He shall instruct the carrier to choose the transport type proper for the goods, to identify the transporter and conclude with them a contract of carriage for transporting the goods.

The client is the person who may conclude himself a contract with the transporter if the carrier would not be in charge for that, as intermediate. So, the condition of full exercise capacity must be fullfil for the validity of the shipping contract. By the dispositions of chapter I point 2 from *The general conditions RSCU*, the client may be any juridical or individual person, owner of goods and who solicitate the transport of goods, including transport related operations. The client is the one who pays or secures the payment of the carriage and operations related to it.

The carrier is juridical or individual person who acts as an intermediate. Sometimes he is called comissionner-carrier or shipping house, and in the old regulation he was called expeditionary or the one who transport the goods, by Art. 413 Commercial Code.

The carrier is the determining factor of the optimal performance of the freight transport.

As the variety of the mandate without representation, the object of the shipping contract is treatment of commercial business, in professionally way by the carrier; in this category are the *actions and inactions of the Contracting Parties.* The legislature defines the contract, in general, in art. 1225 al. 1 New Civil Code: *the object of the contract is the legal operation, like sale, rent, loan and so on, settled by the parties, being revealed from the contract rights and obligations assembly.* So, the object of the shipping contract is the goods transport itself, with all the implication of this activity, and the the goods themselves.

The goods are not included in this category, they are the material object of the contract. They can be classified into: dangerous goods, with particular value, with great fragility, perishable or may present some features that require additional safety measures, different from the usual transport. The material object of the contract undergoes to some in which are engaged the contractual parties, forming and producing effects. Handling goods to their movement involves passing from the client to the carrier, and finally to the customer.

Regarding the contractual obligation object, legislature defines it as the services that the debtor has to execute (art. 1226 al. 1 New Civil Code), what means that for the shipping contract, the debtors are the client and the carrier, fact that comes from the mutually binding nature of the contract. In terms of the contribution of each Contracting Party, we distinguish between the client benefits and the carrier benefits.

In terms of the carrier benefit, the shipping contract has as object treatment by this of juridcal act with third parties, in his own name and on behalf of the client, acts that must be negotiated for the client and consists in: concluding of the shipping contract with the carrier, determining the suitable type of transportation according to the nature, quantity and distance that goods have to travel to the destination, ensure reaching to destination. These operations can be made by the carrier just between the lines settled by the client: minimum price set by the client, dead-line for reaching the goods etc., overcome these limitations remaining without effect because the client did not give a valid consent.

From the perspective of the client benefit, the object of the shipping contract is paying the commission that the client is is entitled to when submitting diligences for transporting goods, and refund of expenses that the carrier made during the transport of goods, and making also available for the carrier the goods which are to be moved to the destination. When remuneration is not determined by contract, this will be settled by the law, practice or by tha value of the made services (Art. 2010 al. 2 New Civil Code), shipping contract being a mandate for consideration.

The object of the shipping contract produces effects for both contracting parties. These effects involve rights and obligations belonging to the client and to the carrier, which will be further analyzed according to each subject contractually involved.

The bligations of the client arising from the shipping contract mutually binding nature, being reciprocal obligations to those imposed for the carrier. They fall into obligations to do and obligations to give.

First of all, the client is required to provide to the carrier the goods, so they can be transported to the fixed destination. This action means that the carrier will be in possession of goods, and for this fact, the client needs to be a producer of goods or to be an owner of goods which will be send to the distributors, or the client can be a simple instrument for ensuring the transport of goods.

For this purpose, by the dispositions of Point no. 3 from *the general condition of S.F.A*., the client must ensure that he is the owner of goods or to act as its authorized agent, just to avoid the risk of transporting stolen goods.

By art. 3 point 1 from the general conditions RSCU, the goods must be delivered, packaged, labeled, and able to withstand to transport operations and related to the destination. The shipping houses have no liability for damages arising from the absence, insufficiency, or the defectiveness of the pack, marking or/and labeling of goods, and from lack of adequate information regarding the nature or characteristics of particular goods. The customer bears the consequences resulting from these improper actions. (RSCU Standards, Chapter III Point 2 and 4).

Second, the client must give to the carrier the necessary documents, and also the specific instructions for each kind of goods for optimal transport. These documents may be certificates of origin of goods, guarantee certificates, deeds or rental of containers, Special documents for the transport of dangerous goods, customs documents, invoices etc.

The client must ensure in every cases, correctness and accuracy of data to the carrier (General condition of S.F.A.). Regarding the supply of goods in special conditions, the

client has to give precise information about the conditions to the shipping house, this information being subject to the agreement of the carrier.

Obligations to give assume liabilities to pay for the client who may be divided as follows: obligation to pay the remuneration due the carrier for the commercial service that he made, obligation to pay to the carrier the necessary and useful engaged by him on the occasion of transport of goods, fees that are called expenditure.

In this paper we have shown that, the shipping contract is an intermediate contract variety of a commission contract and of mandate without representation, receiving separate regulations in light of the new Civil Code.

We conclude with some suggestions of law on shipment of goods: the insurance of the goods by the carrier should be obligatory and not exceptionally, which would increase customer confidence in the shipping house and would reduce the risk posed to the client; specific rules regarding warranties of the carrier, incident to the ancient trade regulations, whereas these concepts are not specified in the new legislation, and commercial practice demonstrated the necessity to apply the repealed provisions.

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CRITICAL ISSUES FOR COLLECTIVE BARGAINING AND FREEDOM OF ASSOCIATION IN THE CURRENT LEGISLATION

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Abstract: *Legislative changes in 2011, namely Law no. 40/2011 on the amendment of the Labour Code and Law no. 62/2011 on social dialogue were likely to create an obstacle to collective bargaining and freedom of association. Criticism of these two acts demonstrate the need to amend the labor law.*

Keyword: *Labour Code, collective agreement, social dialogue, the liberty of bargaining, the legislative technique norms, Law. 62/2011 on social dialogue*

By passing, right from the beginning of the century, various normative deeds for employees protection, Romania was one of the vanguard countries in the history of labour law: *The Law on Cooperatives of Workers and Craftsmen (1909), The Law of Associations (1909),* taking into account that, on the worldwide level, the first laws which ascertained and brought under regulation the collective conventions were: The Austrian Law of 1910 on employing trading officers and The Swiss Code of Liabilities of 1911; in Germany such were passed in 1911 and in the USA in 1935[1].

In 1909 and 1920 the Parliament rejected a draft bill on the collective labour agreement but, in reality, such collective labour agreements had been concluded since 1909 at The Romanian Railway Company (Căile Ferate Române), the Oil Companies from Valea Prahovei (Întreprinderile Petroliere de pe Valea Prahovei), Bucharest Gas and Electricity Plant (Uzina de Gaz şi Electricitate Bucureşti) and Buhuşi Drapery (Postăvăria Buhuşi)[2].

The law on organizing the professional unions, which was passed in 1921, ascertained not only their legal personality, but the right of the workers to conclude labour „agreements" with the employers, bringing under regulation the right of the unions to file legal actions against the employer, in case of the latter's failure to observe these agreements. In 1929, *The Law on the Collective Labour Agreement*[3]*s* was passed, thoroughly bringing under regulation the collective bargaining.

The right of the unions to conclude collective labour agreements on behalf of the employees was exclusively granted to the professional unions, by *L*aw *no.52/1945*, thus, as of this moment, the collective labour agreement became the source of the labour law, bringing under regulation the most important aspects of the legal labour relationship (wages, types of vacations – holiday or on sick leave, labour conditions). Based on this law, collective labour agreements were concluded in December 1945 and April 1947 in all economic areas.

Although, even after the passing of the *Labour Code in 1950*, the institutional character as legal norm of the collective labour agreement was preserved, in Romania, due to the nationalization of industry and centralization of economy by eliminating the

[1] http://www.costelgilca.ro/legislatie/documente/1/

[2] http://denisapatrascu.wordpress.com/2011/02/21/contractul-colectiv-de-munca-la-nivel-national-o-piedica-temporara-pentru-guvern/

[3] http://www.costelgilca.ro/legislatie/documente/1/

mechanisms of the market economy, the role of the collective labour agreements started to be limited to the documents with a political value. This was caused by the political subordination of the existing unions, as well as by the social partner, the State as owner of the undertakings, thus resulting a fictitious social dialogue.

Even though, prior to 1990, the role of the collective agreement was reduced, even if it was brought under regulation by law and a lot of importance was paid to such, further to the enforcement of Law no.13/1991, this became a specific instrument of labour law. This summarized the role of the collective bargaining, that of the law of the parties, which role the Constitution granted according to the provisions of art.38.

The sole collective agreement at the national level is a three-party understanding, the Government, by the relevant ministries (education, health and culture) being a signatory party, together with the unions and the employers' associations.

Law no. 40/2011 which amended the Labour Code, together with Law no. 62/2011 on social dialogue entailed a series of normative changes likely to cause limitations to the freedom of association and the collective bargainings.

Further to the year 1989, the legislation on negotiating the collective labour agreements underwent three major stages:

- Law no. 13 of February 8, 1991 on the collective labour agreement,
- Law no. 130 of October 16, 1996 (republished according to art. II of Law no. 143 of July 24, 1997, published in the Official Gazette of Romania, Part I, no. 172 of July 28, 1997, giving the texts a new numbering) on the collective labour agreement,
- Law no. 62 of May 10, 2011 (republished according to art. 80 of Law no. 76/2012 on the enforcement of Law no. 134/2010 on the Civil Procedure Code, published in the Official Gazette of Romania, Part I, no. 365 of May 30, 2012, giving the texts a new numbering) on the social dialogue.

The doctrine outlined the opinion according to which, *de lege ferenda*, it is necessary to make at least three amendments, which are likely to prove the necessity of eliminating the obstacles in the way of social dialogue.

We agree to this point of view, according to which the regulations previous to the passing of Law no. 62/2011 should be used again:

1. The reintroduction of the sole collective labour agreement at the national level is necessary, as this has the following advantages: allows the existence of the social dialogue at the highest level (between the union and the employers' associations); creates a unitary legal regime for all the workers in the country; rectifies certain imperfections of the labour law; stimulates the conclusion of subsequent collective labour agreements. As resulting from the collective bargainings during the years previous to the legislative amendments, it follows the conclusion regarding their surprising nature; the aim was to bring under regulation, as thoroughly as possible, the social labour relationships, the rights and obligations of the two parties during the work process. Such an agreement, we dare say, from the point of view of its content, is an updated and adapted to present „labour code"[4].

The reason generally claimed by those in favour of abrogating this legal instrument was that it was only in Romania that such a collective labour agreement at the national level existed. But this type of convention also exists in Belgium, the Czech Republic, France,

[4] Alexandru Ţiclea, *Dissertation on Labour Law (Tratat de dreptul muncii)*, Universul Juridic Publishing House, Bucharest, 2010, page 269

Germany, Italy, Holland (at the land level, as well as at the federation level, by order of the Minister of Labour), Spain, and Turkey.

By abrogating the legal concept of collective labour agreement at the national level, the lawmaker disregarded the will of the social partners who, in 2011, further to the expiry of the sole collective agreement at the national level for 2007-2010, had negotiated a new collective contract at this level, whose registration was refused by the Ministry of Labour and Social Protection.

The special legal literature[5] and the practice of the various authorities of the Ministry of Labour, Family and Social Protection, when dealing with the content of the collective labour agreements and especially that of those concluded at the national level, considered that there are three categories of clauses within their content, namely:

- clauses regarding the personnel rights, in respect of which the legal provisions establish that these rights (and their amount) are determined by collective bargainings (wages[6], holidays[7], the working time shorter or longer than 8 hours per day[8]);
- clauses in connection to certain personnel rights (their amounts) in relation to which the normative deeds in the area of labour law do not include any regulations; for example, according to art. 78 para. (1) of both sole collective labour agreements at the national level, upon the termination of the of the labour agreement due to reasons which cannot be ascribed to the employee, the employers shall grant him a compensation of at least one monthly wages, apart from the due right up to date; the Labour Code does not mention such a compensation.
- clauses regarding the granting of certain personnel rights in amounts higher than those provided by the labour legislation in force. Thus, according to the sole collective labour agreement at the national level, the notice to be given in case of termination of the individual labour agreement from the initiative of the company is of 20 working days [art. 74 para. (2)], while, according to the Labour Code, the duration of this notice cannot be shorter than 15 days (art. 73 para. 1).

At the same time, according to the sole collective labour agreement at the national level for 2007-2010 (art. 40 para. 4), the minimum negotiated basic wages is higher (RON 440 in 2007) to that established by the Government Decision no. 1825/2006 (RON 390), and by the G.D. no.1193 of 09.12.2010, a minimum wages of RON 670 was established for 2011, while C.C.M.U.N. established an amount of RON 700 as of the moment of registration or publishing (which did not happen, due to the passing of Law no. 62/2011).

In respect of the clauses included, the last sole collective labour agreement at the national level, abrogated by Law no. 62/2011, also provided the necessity for including in the collective labour agreements at the company level of certain measures with a social character, among which: building, set-up and maintenance of nurseries and kindergartens for the employees' children, as well as canteens-buffets for the employees, building, set-up and maintenance of offices and social groups on the working premises, formation and improvement of professional training, including in the area of labour relationships [art. 96,

[5] Gheorghe Brehoi, Social Security Law – An Area of Law (Dreptul securității sociale-ramură de drept), The Law (Dreptul) no.7/1994 pages 8-11; Şerban Beligradeanu, Labour Legislation (Legislația muncii) 1992, with comments, vol. IV pages 107-108.
[6] Art.162 para. 1 of the Labour Code.
[7] Art. 145 para. 2 of the Labour Code.
[8] Art. 112 para. 1 of the Labour Code.

para. (1)]. The throw-back of the provisions with a social character is, unfortunately, characteristic to the labour law norms passed in 2011[9].

2. Collective labour agreements should be concluded at a business activity branch level and not at a business activity sector level, based on the fact that the regulation of the activity sectors and collective bargaining at this level[10] negatively impacted on the collective agreements' conclusion instead of incentivising it. The organizing level of unions and employers' associations, as social partners at this level, is rather remote, even inexistent. At a sector level it has been concluded until present on one collective agreement (in the medium education sector), which was not the case under the previous regulation of collective bargaining at the activity branch level. This limitation also impedes on the conclusion of collective agreement at units' groups level, where, currently, there are only seven such agreements in place.

3. From our point of view, the most severe infringement of the liberty of bargaining is constituted by the diminishment of the participants' number, from at least one third from the units' employees' number to at least half plus one – which is the condition of achieving unions representation at this level. The increase of the participants' number to at least half plus one from the unit's employees – condition for achieving unions representation at a base level[11] - renders almost impossible the existence of such representation, which if followed by the impossibility of concluding collective agreements at this level.

A case study, based on the new legislation, is that of S.C. Mechel S.A. Târgovişte. There were two unions in this company. These existed even before the changes in the social dialogue legislation, brought by Law no. 62/2011. After this law was passed and the collective agreement at a unit level expired, a new collective bargaining agreement could not be negotiated and concluded because none of the unions meets the employee's number condition imposed by the law for achieving the representation.

Notwithstanding this, as both unions and employer needed a regulation to govern the employment relationships, the negotiation of two collective labour conventions was decided. These two conventions were concluded based on article 153 of Law no. 62/2011, according to which, having in view the mutual recognition principle, „any union organization duly constituted may conclude with an employer or with an employers' association any type of written convention, agreement or understanding, which constitute the parties law and the provisions of which are applicable only to the members of the signatory organization".

It is, undoubtedly, a compromising solution. The labour collective convention which was concluded does not produces effects for all employees, being limited to those which are members of the signatory union and, since it is not registered with the Territorial Labour Inspectorate, not being opposable to third parties in the extraordinary situations provided for by special laws[12].

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[9] Nicolae Voiculescu, Short considerations regarding the evolution of regulation in the social dialogue domain, published in „Controversial aspects ragrding the interpretation and applicability of Labour Code and the Social Dialogue Law" *In Honorem prof. univ.dr. Ion Traian Ştefănescu,* ed. Universul Juridic, Bucureşti 2013, page 37

[10] Art. 128 of Law no. 62/2011 and Government Decision no. 1260/2011

[11] Art. 51 para. (1) lett. c) of Law no. 62/2011

[12] Law no. 200/2006 on the creation and use of the Fund for guaranteeing the payment of wage related receivables, published in the Official Gazette no.453/25.05.2006 conditions the granting of a compensation equal to three monthly wages, by reference to clauses existing in the collective labour agreement.

The doctrine created a standpoint[13] according to which „the enactment of Law no. 62/2011 of Social dialogue created the premises of the development of a strong union's structure, which to gather a percentage as high as possible of employees", aspect which was grounded on practical basis, following the idea that „Any practitioner which participated in a collective bargaining at an unit's level knows how difficult is a bargaining at a level unit, where more unions are involved and understands better the risks entailed by a negotiation whereon the employees are represented by more unions". The same author[14] is of the opinion that „There is a real risk that, pride and ambition affect bargaining, especially in the case of *minority* unions, these elements seriously affecting the manner in which employees representatives understand to fulfil their mandate."

Along with these three aspects, the freedom to negotiate, as well as the freedom to association was subject to legal transformations. Romania is one of the funding states of the International Labour Organization, therefore the implementation of the unions' freedom and of unions' law, as well of the right to organizations and collective bargaining through Conventions no. 87/1948, respectively no. 98/1949 of this organization created the international legal framework, to which national legislations should have aligned at the adhesion moment, these conventions being part of the minimal, initial legislation

Law no. 62/2011 brought a series of amendments to unions' legislation, by the repeal of Law no. 54/2003 on unions. Chapter II of the law on social dialogue does no longer contain a special provision like that of art. 22 para. (3) of the previous, repealed law, Unions Law no. 54/2003, whereby units where unions achieving representation were duly constituted were compelled to freely make available to unions premises for their functioning and to ensure the necessary refurbishment for these to perform the activities provided by the law. This aspect made the object of constitutional control, the Court acknowledging that the provision at stake creates such a limitation to the ownership right in order to guarantee the effectiveness of exercising citizens' right of free association in unions, provided by art. 40 para. (1) of the Constitution, as republished, by ensuring the conditions of good functioning of unions. This provision corresponds to the spirit of the European Social Charter, as revised, ratified by Romania through Law no. 74 of 3 May 1999, the article 5 of which provides that „in view of guaranteeing or promoting the liberty of employees or employers to constitute local, national or international organizations for the protection of their economic and social interests and to adhere to such organizations, the parties undertake that national legislation would not affect and is not to be applied in a manner which to affect such liberty."

In the context of invoking the exception of non compliance with the Constitution, when it was alleged that the legal provision, currently repealed, breaches the constitutional provisions contained by art. 44 para. (2), according to which „private property is equally guaranteed and protected by the law, irrespective of its holder." When rejecting the exception of non compliance with the Constitution [15], the Constitutional Court considered as ungrounded the allegation regarding the breach the constitutional provisions contained by art. 44 para. (2), because the legal obligation does not entail a difference in the legal treatment between state's private property and that of private economic agents. The wording refers to employing units, without

[13] http://www.costelgilca.ro/stiri/document/5002/scurte-consideratii-privitoare-la-scaderea-plafonului-de-membri-care-confera-sindicatelor-reprezentativitatea-la-nivel-de-unitate.html.
[14] Idem.
[15] Decision no. 50 of 12 February 2004 on the exception of non compliance with the Constitution of the provisions of art. 22 para. (3) of Unions' Law no. 54/2003 (Official Gazette, Part I, no. 168 of 26 February 2004).

making a difference between these. At the same time, the Court considered that, according to art. 44 para. (1) of the Constitution, which guarantees the ownership right and receivables against the state, „the contents and limits of these rights are established by law."

Another aspect clearly regulated by previous enactments refers to the object of collective bargaining. Through the conclusion of collective labour agreements, as opposed to the previous law, i.e., Law no. 130/1996, art. 3 para. (4) of which regulated the object of collective bargaining as covering, without limitation, but as a minimum condition of clauses which may be negotiated, at least wages, work duration, work schedule and work conditions, Law no. 62/2011 does no longer regulate the minimal bargaining conditions. As provided under art. 1 lett. a (iii) of this enactment, collective bargaining is considered as „the negotiation between the employer or the employers' organization and the unions, or the unions; organization and the employees' representatives, as the case may be, which seeks the regulation of labour or work relationships between the two parties". In this manner, if the employer or the employers' organization does not agree, material aspects of collective bargaining may be left aside the analysis, obviously in employees' disadvantage.

Moreover, the two enactments which modified labour law are criticisable also from a legislative technique point of view.

Thus, Law no. 24/2000 regulating the legislative technique norms establishes the rules for enactments' drafting. Among the established rules, which must be observed, the following are included:

- The respective project must be correlated with the provisions of the related enactments, as well as with European and international norms (art. 11);
- Regulations of the same level and having the same object are usually contained in a single enactment (art. 12);
- Within the enactment process, the establishing of two or more regulations in the same enactment must be avoided (art. 14).

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LEGALITY OF THE SOLUTIONS INCLUDED IN THE MEDIATION AGREEMENTS

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Abstract: *According to the Law no. 192/2006 regarding mediation and exercise of the mediator profession, as subsequently amended and supplemented, the mediation agreement can be subject to authentication by the notary public or by the court of law, as the case may be. Thus, a legality control is performed in the context of observing the mediation principles.*

Keywords: *mediation agreement, legality control.*

According to art. 58 para. (1) of Law no. 192/2006 regarding mediation and organization of the mediator profession, „when the parties in conflict have reached an agreement, a written agreement can be drafted, which will include all the clauses agreed upon by the latter and which has the value of a document under private signature.

At paragraph 2 of the same article, it is instituted the rule according to which „the agreement is drafted by the mediator, except for the situations in which the parties and the mediator agree otherwise" .

It results that the law regulates two possibilities, namely:

1) the mediation agreement is drafted by the mediator;

2) the mediation agreement shall be drafted by the parties.

In the situation in which the mediation agreement is drafted by the mediator, the latter has the legal obligation, according to art. 58 para. (4), to present it, under the sanction of the absolute nullity of the notary public or of the court of law, for the latter, based on the mediation agreement, to check the conditions of fund and form by the procedures provided by the law and to issue an authenticated document or a court decision, as the case may be, with the observance of the legal procedures, in any of the following situations:

- in the case in which the mediated conflict is aimed at the transfer of the property right regarding the real assets, as well as of other real rights, partitions and succession clauses (art. 58 para. (4) of Law no. 192/2006, as subsequently amended and supplemented);
- in the case in which by the mediation agreement it is constituted, amended or extinguished a real immovable right (art. 58 para. (4^1) of Law no. 192/2006, as subsequently amended and supplemented);
- in all the situations in which the law requires it, under the sanction of absolute nullity, the performance of the obligations of fund and form (art. 58 para. (58) of Law no. 192/2006, as subsequently amended and supplemented).

As we have mentioned, by exception, the mediation agreement pay not be drafted by the mediator, if the latter and the parties agree otherwise. In this situation, there is the issue of whether the obligation to present the agreement to the notary public or to the court of law, as the case may be, can any longer be retained in the responsibility of the mediator, considering that the text of art. 58 para. (4) refers to the „mediation agreement drafted by the mediator".

According to art. 59 para. (1) of Law no. 192/2006, as subsequently amended and supplemented, „the parties may ask the notary public to authenticate their agreement,

according to the law and with the observance of the legal procedures". Also, these „may appear before the court of law to ask, meeting the legal procedures, for a decision to certify their agreement" (art. 59 para. (2) of Law no. 192/2006, as subsequently amended and supplemented).

Taking into consideration that, in the previously mentioned situations and specifically provided, the law institutes for the mediator the legal obligation to present the mediation agreement to the notary public and the court of law and, taking into consideration the importance of the social relations regarding the legal circuit of the goods, we consider that the parties also have the obligation to ask the notary public to authenticate the mediation agreement or to present the mediation agreement to the court of law, in order for a court decision to be made.

In all the other situations, at the discretion of the parties, there is the possibility to address the notary public or the court of law, but they also have to take into consideration the dispositions of art. 46 para. (2) of Law no. 192/2006, as subsequently amended and supplemented, which institutes the sanction of absolute nullity in the cases which are contrary to the law and public order and the fact that the attributions of the mediator are limited to the information of the parties, assisting them and drafting the document, the role of the notary public, respectively of the court of law, being to check the compliance of the document concluded in written form with the applicable regulations and the public order.

Regarding the right of the parties to address to the notary public, or to the court of law, we consider that the manner to authenticate the document resulted from the parties agreement in the mediation procedure is reported to the stage of the litigation inferred from the mediation procedure. Thus, when there is no litigation on the dockets of the court of law, the performance of this control is the competency of the notary public, and if the file is already on the dockets of the court of law, we consider that the attribution to control the legality of the mediation agreement rests with the court of law. A different interpretation of the text of art. 59 of Law no. 192/2006, as subsequently amended and supplemented, would lead to the situation that the attribution of the authentication of the documents under private signature from the competency of the notary public (art. 12 sect. b of Law no. 36/1995 of notary publics and notary activities, republished) shall pass in the competency of the courts of law, which is against the current trend and need to relieve the courts of law.

Art. 78 para. (2) of Law no. 36/1995 of the notary publics and notary activities, republished establishes the fact that „the mediation agreements will be checked regarding the performance of the conditions of fund and form, the notary public being able to make corresponding amendments and supplementations, with the agreement of the parties". Thus, if the mediation agreement concluded by the parties is against the law or public order, it will be able to be changed by the notary public, with the consent of the signing parties, in order to authenticate it.

Referring to the appearance of the parties before the notary public, art. 78 para. (2) of Law no. 36/1995 of the notary publics and notary activities, republished establishes the fact that: „in order to authenticate a mediation agreement, the parties of the agreement shall be present in person or by legal representative or by a conventional representative based on an authenticated power of attorney, in order to sign before the notary public and the performance of all the conditions of fund and form provided by the law". The role of this legal disposition is to facilitate the resorting to the support of the notary public, although, apparently, the legal solution can be criticized, starting from the consideration that anyway the party has to appear before the notary public in order to issue the respective power of

attorney, thus they may appear also in order to ask the authentication. In real terms there is the possibility that the parties may not coordinate the program so as to be present on the same date before the notary public, which represents an argument within the meaning of the legal solution mentioned, in which case the party agent shall appear, delegated based on an authenticated power of attorney.

The procedure of authentication of the mediation agreement by the notary public is regulated by art. 90-101 of Law no. 36/995 of the notary publics and notary activities, republished.

Thus, the notary public will proceed to identify the parties, in one of the manners provided by art. 85, with the mention that the parties may appear before the notary public also by special agent. Then, these express their consent regarding the content of the mediation agreement subject to authentication and signs it. In the case of an impossibility to sign the document, the notary will record this in the authentication of the document.

According to art. 98 para. (2) of Law no. 36/1995 of the notary publics and notary activities, republished, „the original copy of the authenticated document, together with annexes which are an integral part of this document, shall be signed before the notary public by the parties or by their representatives, as the case may be, by those called to approve the documents drafted by the parties, by the assisting witnesses, when their presence is requested, and, as the case may be, by the one who drafted the document, according to the conditions of the hereby law".

Referring to the legal force of the document authenticated by the notary public, art. 98 para. (4) provides the fact that: „the parties will receive a duplicate of the original document. The duplicate of the notary document has the probative force provided by the law as the original document".

According to art. 100, the document authenticated by the notary public is the full proof, until the recording of the forged document, regarding the findings made in person by the notary public, respectively:

- the presence of the parties and of the other participants to the authentication procedure;
- the place and date of the document conclusion;
- exteriorization of the parties consent.

Also, for the valid authentication of the mediation agreement, the authentication of the document has to include:

- the expression „the hereby document is declared authenticated";
- the finding that the parties consent was given and that the document was signed by the persons who have this obligation;
- the mention referring to the impossibility of one of the parties who signed the respective agreement.

With motivation, the notary public may reject the request of the parties to proceed to the authentication of the mediation agreement. In this situation, the parties may address a complaint against the court of law in whose jurisdiction the notary public performs his/her activity, within 10 days from communicating the rejection document (art. 143 of Law no. 36/1995 of the notary publics and notary activities, republished).

In the situation in which the litigation is brought to justice, the parties may address to the court of law, who will take note of their agreement and will decide to issue an remittal decision.

According to art. 59 para. (2) of Law no. 192/2006, as subsequently amended and supplemented, „the competency belongs either to the court of law in the jurisdiction of which either party has its domicile or residence or, as the case may be, the registered office, or to the court of law in the jurisdiction of which is located the place where the mediation agreement was concluded". The legislator regulated an alternative competency, the parties having the right to choose which of the courts mentioned in the text of law will be addressed in order to authenticate their mediation agreement. The same article establishes below that: „the decision by which the court approved the parties agreement shall be issued in the council room and represents enforceable title according to the law".

The procedure of approving the parties agreement is regulated by art. 438-441 Civ. proc. code. Thus, „the parties may appear any time during the trial, even without having been summoned, in order to ask to be issued a decision certifying their transaction".

When the parties appear before the court on the very day of the term, the request to issue the decision regarding their agreement can be approved by a single judge. If they appear on another day than that established for the trial, the decision shall be made in the council room. The transaction of the parties will represent the decision disposition, and the decision will be able to be attacked only with appeal, at the hierarchically superior court.

In art. 61 para. (1) of Law no. 192/2006, as subsequently amended and supplemented, it is provided that fact that „the mediation can have as object the settlement in full or in part of the litigation". Thus, it is possible that, after initiating a trial, the parties may settle a part of their claims by mediation, agreement for which they will ask the court to give a partial decision, for the other aspects of their litigation the case being replaced on the dockets, according to the dispositions of art. 62 para. (3) of Law no. 192/2006, as subsequently amended and supplemented.

By issuing the decision by the expedient, the court vests the mediation agreement of the parties with the legal power of an enforceable deed (art. 63 para.(3) of Law 192/2006, as subsequently amended and supplemented). Before being certified by the court of law, the parties agreement has the value of a document given under private signature.

As we have already mentioned, in order to vest the mediation agreement with a superior legal power, the parties may address either to the notary public, for the authentication of the document, or to the court of law to certify their agreement, when the litigation is already on the dockets of the court.

From this rule, art. 64 para. (1) of Law no. 192/2006, as subsequently amended and supplemented provides the following exception: „The mediation agreements concluded by the parties, in the cases/conflicts having as object the exercise of the parent rights, the parents contribution to the support of the children and the establishment of the children domicile, takes the form of an expedient decision". Thus, in the case of these mediation agreements, the parties will address directly to the court of law, as they do not have the possibility to agree on these aspects by a mediation agreement authenticated by the notary public, but only as approved by the court of law.

According to art. 59^2 of Law no. 192/2006, as subsequently amended and supplemented, the request by which the court is asked to issue an expedient decision referring to the mediation agreement concluded by the parties is exempted from the judiciary stamp duty, „except for the cases in which the mediation agreement regards the transfer of the property right on a real asset, of other real rights, partitions and successor causes" (art. 59^1 of Law no. 192/2006, as subsequently amended and supplemented).

When the litigation is solved by mediation, and the court of law makes an expedient decision by which it takes note of the parties agreement, the already paid stamp duty shall be returned to the party, upon request, by virtue of art. 63 para. (2) of Law no. 192/2006, as subsequently amended and supplemented. By exception, the stamp duty is not returned in the cases in which the conflict settled by mediation is aimed at the „transfer of the property right and/or the constitution of another real right on a real asset" or „a succession cause for which the succession certificate was not issued" (art. 63 para. (2^1) of Law no. 192/2006, as subsequently amended and supplemented).

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REFLECTIONS UPON THE CRIME OF AFFRAY

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Abstract: *The author analyses the crime of affray according to the Penal Code in force as related to the new Penal Code.*

Keywords: *crime of affray, Penal Code in force, the new Penal Code, compared penal law.*

1. As it is known, the new Penal Code[1], with all the further completions and amendments, places among *the crimes against person* also the crime of affray in Chapter II regarding the *crimes against bodily integrity or health*, while in the current Penal Code the crime of affray is part of Chapter V, regarding *other crimes that harm certain relations regarding the social order*, being different thus also from the point of view of the legal object.

2. In the penal literature[2] the affray involves a violent and spontaneous fight between more people whose actions are intermingled so that it is difficult to identify the contribution of each person involved in the fight. As the penal liability is personal, the law-maker decide to incriminate the act of affray, *i.e*. the participation of a person to such activity, considering that the affray *per se*, regardless the contribution of each participant represents a serious offence that harms the social order and violates the rules of social life[3].

The incrimination of the affray through itself determines also a *new systematization* of the respective crime: the object of the protection being the relations regarding the social life, the place of this crime belongs among those referring to the relations of social order and not among those regarding the human person.

As concerns this aspect it should be thought if it is justified the solution of the new Penal Code to include this crime in the chapter concerning crimes against person.

3. According to certain authors[4] *the primary legal special object* of the crime of affray would consist of the relations regarding the fundamental attributes of the person, bodily integrity, health or even life, when during the affray it is committed a crime against person and the author is not known. This opinion is also supported by other authors[5].

In such a case, the harming of the bodily integrity or of the health or even the occurrence of death appears as a consequence of the crime of affray[6].

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[1] Law no. 286/2009 regarding the Penal Code, published in "Monitorul oficial al României" (The Official Journal of Romania), part I, no. 510 of 24 July 2009.

[2] Vintilă Dongoroz et al., *Explicații teoretice ale Codului penal român (Theoretical Explanations of the Romanian Penal Code)*, vol., IV, Romanian Academy Publishing House, Bucharest, 1972, p.676.

[3] Tudorel Toader, *Drept penal român, Partea specială (Romanian Penal Law. Special Part)*, sixth edition, revided and updated, Hamangiu Publishing House, 2012, p. 479.

[4] Vasile Dobrinoiu, Norel Neagu, *Drept penal. Partea specială. Teorie şi practică judiciară conform noului Cod penal (Penal Law. Special Part. Legal Theory and Practice according to the new Penal Code)*, Universul Juridic Publishing House, Bucharest, 2011, p. 65.

[5] Ovidiu Predescu, Angela Hărăştăşanu, *Drept penal. Partea Specială.,Examinare comparativă Codul penal - Noul Cod penal (Penal Law. Special Part. Comparative Examination of the Penal Code and of the New Penal Code),* Universul Juridic Publishing House, 2012, p.504.

[6] V. Dongoroz, S. Kahane et al., *op. cit.,* vol. IV, p. 677-678.

The secondary legal special object consists of the social relations regarding the social cohabitation, the preservation of order and public peace, of the social security necessary for the peaceful and harmonious cohabitation between citizens.

We have certain reserves on this solution of systematization.

It was not taken into account the fact that the crime of affray has as *primary legal special object* the relations of social order, harming the peaceful life of the citizens and the good agreement between the society members.

Only secondarily these acts harm the fundamental attributes of the person, such as the bodily integrity, health or even life[7]. In such a case the harming of the bodily integrity or of the health or even the occurrence of death appears as a consequence of the crime of affray.

Under this aspect the above modification of the content of the regulation of the above mentioned crimes does not seem justified to us.

4. *The material object* consists of the body of the people or of the goods affected by the violence acts. Also, according to para. 2), the crime has as material object the body of the person who, during the affray, suffered a bodily injury and according to para. 3), consist of the body of the person who was caused death, if the author is not known[8].

5. *The active subject* is represented by a plurality of authors, each of them being responsible as author for the participation to the affray[9]. The affray exists if two parties participate, each with at least two people, who exchange acts of violence, situation that generates clash between people, the actions being intermingled so that it is difficult to identify the actions of each person involved. When there is only the group of the accused, the victim who was caused death being alone, the offence belongs to the provisions regarding the criminal homicide[10].

6. Committing this crime is susceptible of *penal participation*, under the form of instigation or of complicity[11].

7. As concerns *the passive subject* of the crime of affray is the person or the people who suffered from the violent manifestations of the participants to the affray[12].

8. *The structure of the crime of affray,* i.e. its legal content, is made up of the *allowed situation* and the *constitutive content*.

Referring to *allowed situation* we notice that this does not exist in the case of this crime. Consequently, the legal content is represented by the constitutive content.

The constitutive content of the crime of affray, i.e. what the author should do to exist the incriminated offence, includes also an *objective* and a *subjective side.*

As regards the *objective side,* the crime of affray involves the existence, like in any other crime, of its component parts: *the material element, essential requirements*, *the immediate consequence* and the *causality relationship* between the material element and the immediate consequence.

The material element of the objective side is reached through the action of *participation to an affray between more people.* The participation to the affray exists also when, after the beginning of an affray, a person intervenes or accepts to be involved in the

[7] Tudorel Toader, *op. cit*, p. 478.
[8] Vintilă Dongoroz et al.., *op. cit*., vol. IV, p.677.
[9] *Ibidem*, p.678.
[10] I.C.C.J. (High Court of Cassation and Justice), penal section, decision no. 5991/2005, in *Buletinul jurisprudenței. Culegere de decizii pe anul 2005* (*Journal of Jurisprudence. Collection of decisions on 2005)*, C.H. Beck Publishing House, Bucharest, 2006, p. 930-931.
[11] Toader Tudorel, *op. cit*., p.675.
[12] Vasile Dobrinoiu, Norel Neagu, *op.cit*., p.66.

fight. Finally, there is also participation to the affray when a person caused or took part, at a certain time, in the violent conflict between the two adverse parties and, before the end of the affray, leaves the fight. In all the cases the participation to the affray involves the commitment of violent acts, i.e an active presence of the author in the crowd of people engaged in the conflict[13].

The essential requirements. The action of participation has to refer to an affray between more people. The law requires the fulfillment of the conditions of the affray, that is the existence of some adverse parties or groups clashed in the fight, so that the actions of the participants interfere and are difficult to be separated[14]. It results that, when the conditions of the affray are not fulfilled, the author taking side to one or more people in the fight against one opponent or detaching from the scuffle and fighting against one opponent, the offence does not represent the crime of affray, but, according to the case, another crime[15]. In this regard, in the legal practice was considered[16] that cannot be the case of an affray if two people attacked and hit another person, as an affray involves two opponent parties who exchange mutual acts of fighting, and in this case the victim was alone, being attacked by two aggressors and being hit by each of them.

In the case of the crime of affray are not applicable the provisions regarding the provocation because, even if the affray involves a mental disturbance, this differs qualitatively and as intensity from the state of disturbance specific to the provocation[17].

In order to complete the objective side it is necessary that the action or inaction through which it was reached the material element should have as an **immediate consequence** the harming of some of the attributes of the person, and of the rules of social order.

Between the material element of the crime of affray and the state of danger that constitutes the immediate consequence of the action or inaction through which the material element was reached, there must be a *causality relationship*[18].

Under the aspect of *the subjective side,* the crime of affray is committed on direct or indirect purpose.

For the existence of guilt it does not matter the *purpose* of the author or the *motive* which determined him. The motives can be different: hate, jealousy, vice, revenge, malvolence, avarice, etc., but they are irrelevant for the existence of the crime, yet they will be considered by the court in individualizing of the penal punishment according to art. 72 of the Penal Code (the author), respectively art. 76-106 (Chapter IV of the third title of the new Penal Code).

9. Committing the crime of affray, when it is done through an action, is susceptible of *preparatory act and attempt*. The penal law in force does not incriminate these *imperfect forms*. Also, the law-maker of the New Penal Code does not incriminate preparatory actions and the attempt, and they are not punished.

10. *The committment* of the crime is produced in the moment when the affray takes place, when many persons take part in a violent conflict, so that their action come together and are difficult to be delimited. In order that the crime exists, it is not important the

[13] Toader Tudorel, *op.cit*., p.675.
[14] Vintilă Dongoroz et.al.., *op. cit*., p.679.
[15] *Ibidem*, p.680.
[16] High Court, penal section, decizia no. 1088/1972, in R.R.D. no. 9/1972, p. 172.
[17] D. Clocotici, *Cu privire la aplicarea scuzei provocării şi a dispoziţiilor privind concursul de infracţiuni în cazul infracţiunilor de încăierare (As Regards the Application of the Excuse of Provocation and Provisions Concerning the Contest of Crimes in the Case of the Crimes of Affray)*, in R.R.D. no. 3/1979, p. 21.
[18] Vintilă Dongoroz et.al.., *op. cit*., p.680.

duration of the affray, but it will be taken into account when the judicial punishment is individualized.

11. *The crime modalities.* There are three aggravating normative modalities of the crime: According to para. 2), the crime is worse if during the affray *a serious bodily injury was caused to one or many persons and it is not known who produced it.*

The aggravating circumstance takes into account the fact that the array produced the bodily injury of one or more people, in compliance with the provisions of art. 194 of the Penal Code. The aggravating circumstance is applied only if it is not known which of the participants caused the result. It is of no interest if the victim is one of the participants to the array or a person that did not belong to it[19]. All the participants to the array are liable for the most serious offence caused, because, from an objective point of view, each of them committed the act of participation to the array, and from the subjective point of view either foresaw it but believed that this result would not be produced or did not foresee it, although it could have and should have been foreseen. The objective ground of the penal liability consists of the act of array to which they participated, and the subjective ground of their liability consists of the exceeded intention. If during the array only the deed stipulated in art. 193 of the Penal Code was produced, it will be applied the simple form in art. 198 para. 1) of the Penal Code, no matter if the author is or not known.

The aggravating circumstance exists regardless of the number of the people who suffer from a bodily injury; this circumstance will be taken into account at the individualization of the legal individualization of the punishment.

The sanction applicable to all the participants in the array consists of prison sentence from one to five years, with the exception of the victim, for whom the provisions of para.1) are applied.

According to para. 3) the first hypothesis, the crime is more serious *when through the deed committed in the conditions of para. 2) was caused the death of a person.*

The aggravating circumstance regards the fact that the array produced a more serious result, consisting of the death of a person, a result imputable on the basis of exceeded intention. In this case, the aggravating circumstance is also applied only if it is not known which of the participants caused the result.. For instance, was considered that the aggravating circumstance exists when the array led to the injuries of more people and the death of a person[20].

According to para. 3) the second hypothesis, the crime is more serious *when through the offence committed in the conditions of para. 2) was caused the death of two or more people.* The aggravating circumstance regards the fact that the array produced a more serious result, consisting of the death of two or more people, a result imputable on the basis of exceeded intention. In this case, the aggravating circumstance is also applied only if it is not known which of the participants caused it.

There are numerous *punishments* according to the concrete circumstances of the crime[21].

12. The crime of affray in the normative modalities in art.198 para.1 is *sanctioned* with prison sentence from 3 months and one year or with a fine. In the normative modalities in art.198 para.2 the sentence is prison from 1 year to 5 years.

[19] V. Dongoroz, et.al.., *op. cit.*, p. 681.
[20] C.A. Constanța, penal decision no. 117/1996, in *Dreptul* (The Law) no. 4/1997, p. 133-134.
[21] V. Dongoroz, et.al.., *op. cit.*, p. 682.

In art.198 alin.3 the sentence is prison from 6 to12 years, and if was caused the death of one or more people the special elements of the punishment are raised with a third.

13. According to para. 4), *it is not punished the person who was caught in the array against his will or who tried to separate the others.* Thus, the application of the punishment should not take place *when the participant was caught in the array against his will*. In this case, it is natural that the penal liability should not apply as, being caught in the middle of the array against his will, he did not have the intention to participate to it; and *when he tried to separate the others*. In this case it is natural that the participant should not be punished because his intention was not to participate to the array, but to separate other people.

In all the cases, the participant will not benefit from the special cause of non-punishment if, later, being caught in the array, he acts with the intention to participate to it and integrates in the exchange of violence[22]. The causes of non-punishment operates not only in the case of the simple array, but also in the other hypotheses stipulated in the text, with the exception of those who commit more serious offences and the authors are known.

14.As we have already shown, the new systematization of the crime of array in the new Penal Code represents a debatable initiative of the law-maker, such a legislative solution being proposed neither in the literature nor in the jurisprudence and cannot provide more protection to the social values discussed here, and to the social relations connected to these values.

De lege ferenda we propose that in the new Penal Code the crime of array should be placed against the crimes *that harm certain relations regarding the social order*, reproducing the solution of the penal law in force.

[22] V. Dongoroz, et.al., *op. cit.*, p. 684; Ilie Pascu, Mirela Gorunescu (*Penal Law. Special Part),* second edition. Hamangiu Publishing House, 2009, p.677.

CONSIDERATIONS REGARDING THE LEGAL SOLUTIONS THAT WOULD LEAD TO A BETTER MANAGEMENT AND USE OF THE INSTRUMENTS OF REGIONAL POLICY

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Abstract: *The improvement of the use of Structural Funds has been on the agenda of the European institutions since the very creation of these support instruments. Based on lessons learned from practice, professional opinions and perspectives of development, each multiannual programming has come with new measures and methods of accessing the funds for a simpler and better us by final beneficiaries and for targeting the ultimate objectives of the regional policy, those of the reduction of the disparities between the levels of development of the various regions and the overall harmonious development in the EU. Apart from the legal measures taken at European level, there are o series of legal measures that can be taken at national level. Although for Romania regionalization is seen as a panacea solution for increasing the absorption of EU funds, we believe that the implementation of a rapid process of regionalization behave a number of risks and can lead to results contrary to those expected.*

Keywords: *regional policy, Structural Funds, better management, regionalization*

1. Introduction

The improvement of the use of Structural Funds has been on the agenda of the European institutions since the very creation of these support instruments. Based on lessons learned from practice, professional opinions and perspectives of development, each multiannual programming has come with new measures and methods of accessing the funds for a simpler and better us by final beneficiaries and for targeting the ultimate objectives of the regional policy, those of the reduction of the disparities between the levels of development of the various regions and the overall harmonious development in the EU. Basically, each new enlargement of the EU has challenged the system and based on the new realities and needs of new Member States, new reforms of Structural Funds have been introduced (e.g. the European Single Act 1988; the Reform of Structural Funds 2000 – 2006)[1]. Globalisation, economic crisis and the digital economy have also pushed for reforms of the use of EU's financial instruments, mainly including the use of Structural Funds. From this point of view, we can qualify the regional policy as a changing and evolving policy.

There are several types of solutions that might be taken by responsible authorities and decision-makers that would lead to a better management of the Structural Funds. These solutions might be qualified as legal, administrative, financial and political. The main stakeholders are the European institutions, as well as the national authorities and even the regional bodies with decision-making powers in this field.

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[1] S.S., Nello, *The European Union: Economics, Policies and History*, 2nd edition, McGraw-Hill Education, Maidenhead, UK, 2009.

2. New rules on Structural Funds at European level

At European level, it depends on the Council of the EU and the European Parliament to adopt new rules on Structural Funds, as these institutions are the main decision-makers in terms of giving a legal status of the use and implementation of the Structural Funds, through the adoption of the regulations laying down the general rules and specific ones for each fund, regulations which are compulsory to each Member State and they do not need any specific national laws to transpose them.

From this perspective, there have been several proposals. Firstly, it's worth mentioning that starting with the new multiannual programming 2014-2020, the European Parliament and the Council of the EU will work in co-decision procedure to adopt the general rules on the use of Structural Funds. Until the Treaty of Lisbon, the adoption of the general rules was an exclusive right of the Council. Consequently, the role of the European Parliament in this field will increase.

Additionally, the substance of these regulations will have to change in order to clarify the role of each fund and by the establishment of common rules for the purpose to avoid in future the overlapping and inconsistency of funds, by harmonising their operating procedures.

Thirdly, the regulations would have to introduce instruments to coordinate the use of Structural Funds with other domains and financial instruments of the EU, such as the new research and development programme (Horizon 2020) and the European Agricultural Fund for Rural Development (EAFRD)[2]. Even if the rationale of the programme for research and development and of the Structural Funds are different, there are still possibilities to coordinate them on a complementary funding base by financing different sets of actions and related costs, in such a way that they could mutually reinforce their effects and help to achieve better and more sustainable results, as the regional dimension has been highly emphasized in both policy areas: research and cohesion alike. Therefore, the initiative of the European Commission to co-finance through Structural Funds some partnerships among universities, enterprises and research institutions has been saluted.

A new concept called *local development placed under community's responsibility* has been proposed by Graham Garvie (UK-ALDE)[3], member of the Council of Scottish border region, to be introduced within the new regulations. Considered to be one of the most innovative new tools of the future cohesion policy, the new concept has the full support of regions and cities, as it foresees measures for achievement of real synergies of implementation at local level of the Structural Funds, European Fund for Rural Development and the European Fund for Fisheries alike.

3. Legal measures that can be taken at national level

Apart from the legal measures taken at European level, there are o series of legal measures that can be taken at national level. The range of measures is so diverse, that it would be difficult to mention all of them therefore we would like to suggest just some of them.

[2] European Commission (2010) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe 2020 Flagship Initiative, Innovation Union* [online] ec.europa.eu/enterprise/policies/innovation/policy/innovation-union/communication/iu_en.pdf

[3] http://cor.europa.eu/en/regions/unitedkingdom/highlights/Pages/Local-Development-needs-to-be-key-pillar-in-new-EU-Cohesion-programmes.aspx

We strongly believe that more attributions should be transferred at local and regional level and it is necessary to create the legal environment for this step. The closer the decision-level it is, the easier and faster for beneficiaries to access and implement their projects. Most of the regional implementing bodies have already gained experience in this field and we consider they are ready to take over some attributions from the national level. We recommend this approach for larger countries only, as for smaller ones, this model might not work. On the contrary, for countries whose territory falls completely under NUTS 2 level, it is recommended a centralised approach, with the creation of a national regional strategy and of a centralized coordination of regional development strategies. In both cases, no matter what the administrative structure that is taken into consideration, there have to be a strong focus on strategic, long-term and sustainable development and as a consequence, such strategies should be adopted at national or regional level.

Of very high importance for a transparent and faster use of Structural Funds is the introduction on a large scale of electronic management systems for the selection, evaluation, monitoring of applications for Structural Funds and of the electronic signature[4]. The introduction of electronic management system might be considered as well as an administrative measure, but as long as it will not be enforced by national laws, its use will continue to be disparate.

The implementation of the e-signature at national level might help lowering the costs and simplifying the systems, if a rule of submitting all documents only electronically would be enforced. The two work flows of today, electronic and paper, present in some systems create additional complexity, duplicated work and bureaucracy.

A special accent should be put on the partnership principle in the use of Structural Funds, as one of the fundamental principles of the cohesion policy. More measures should be taken in order to enhance the use of the partnership principle: its introduction within the very first steps of the programming process and during all phases of implementation by allowing extended regional partnerships, regional networks and inter-community associations.

Basically, most of the legislative measures should target the simplification of rules and reduction of barriers in the use of Structural Funds. For some countries, such as Romania, considering its low absorption rate, having a strategy for improvement of administrative capacity and its implementation might be an ex-ante condition for the use of Structural Funds for the period 2014 – 2020. Without such a strategy and concrete measures until the end of 2016, the country risks its ability to use the European financing for a certain period. [5]

For example, some measures should be taken for improving the service delivery for applicants and beneficiaries using the on line real-time communication tools and well as introducing platforms of information exchange among different applicants on the web sites of the managing authorities or of the implementing bodies that are open to comments and discussions. A more use of web forms instead of portable document formats would make the application more interactive and user-friendly.

Additionally, the public procurements procedures might be significantly improved in order to allow a better and faster flow of payments to beneficiaries. Due to complicated and long-lasting procurement procedures, some beneficiaries gave up with their projects while others have encountered financial problems and activity blockages.

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[4] R. Glăvan, C. Mătuşescu, *The e-Cohesion Concept - the Introduction of an On-Line System for the Submission and Evaluation of Applications for the Access to E.U. Structural Funds,* ECEG 2012 Proceedings of the 12th European Conference on eGovernment, Barcelona, Spain PRINT version 2 Volume set, 2012.

[5] http://fonduri-structurale.ro/detaliu.aspx?eID=13010&t=Stiri

Last, but not the least, a set of measures might be taken in the field of financial intervention. Probably among the first steps to be taken is to allocate larger amounts of money for the cohesion policy, both by EU decision-makers over budget and national institutions. In order to make an impact at EU level, the regional policy has to benefit of sufficient funds to finance large projects, trans-regional and even trans-national ones. The allocation of higher amounts of funds for larger projects that are likely to impact at regional level with no competition for funds is more desirable than providing funds for 'everybody and everything'.

The next question that comes to mind is where we take the money from. Some experts expressed the opinion that the budget should reorient some funds from other EU policies, such as the C.A.P., to the cohesion policy.[6] Probably this will be one of the main topics on next multiannual budget's debate and negotiation between Member States.

Additionally, we consider that the State should involve financially more by increasing its interventions and that it should ease access to funds to different applicants by allowing more type of projects to benefit from pre-payments. Better management of reimbursements should also be performed in order to eliminate any financial blockages for beneficiaries of funds who have engaged fully and invested own money in financing projects and waiting for grants' returns for months or even years in some cases.

As a conclusion, all different type of measures targeting a positive change in the management of Structural Funds should consider to address especially the weak points of the cohesion policy that raise most of criticism: inefficiency, inadequate targeting, and insufficient impact.

4. Regionalization: panacea solution?

From the point of view of administrative organization, the cohesion policy has imposed a redefinition of paradigms and means of regional action, strengthening the regions and the decentralization of the State constituting the basic fundamentals of European political construction being considered the most appropriate way to deal with transformations that happen in the world-wide economic, social, cultural fields. Although the EU does not impose specific rules on how to manage its financial assistance instruments, establishing only principles to follow and report on how funds are being used, regional level being considered the optimal level to manage the European funds, because it would ensure better mainstreaming of specificity and level of economic development of the national territory.

Although, at least in words, decentralization policy and the reforms implemented in Romania in recent years have been influenced, in view of accessing EU funds, by the European model of territorial management, based on regional development to improve local access to improve local access to community programs, this approach seeming not to have full coverage in reality. Operational programmes in the area of regional development represents, at the moment, the only means for the implementation of national strategies and policies in the field of regional development. The regional level is not in the management of structural funds and cohesion ones only by the presence of Regional Development Agencies (unincorporated entities) and, possibly, intermediate bodies (decentralized entities, under state control).

[6] J. Bachler, C. Mendez, F. Wishlade, *Ideas for budget and policy reform: reviewing the debate on cohesion policy 2014+* , European Policies Research Centre, 2008.

To increase cohesion and reducing disparities between counties and regions, European funds in Romania did not have the expected impact; the data showing that, on the contrary, intra- and inter-regional disparities have increased, not decreased[7]. Thus, compared to 2004 regional disparities in Romania increased up to 36%, in comparative terms poor regions becoming poorer and the rich, mainly capital, richer, emphasizing also disparities within regions. Poor management of EU funds in general, combined with the lack of power of decision to the Regional Development Agencies in the management and planning and implementation problems threatens the realization of significant impact of EU funds on the economic development of Romanian regions.

Weak correlation between national strategic objectives, the Operational Programs and administrative means to achieve them is considered to be the origin of this. Basically, "there was no direct link between the development goals of the region, the funds necessary to carry them and the projects identified at the regional level."[8]

Is the regionalization the panacea solution for a better absorption and better tracking development goals? Does it bring the establishment of this administrative level an increase of the administrative capacity, the quality of governance, given the weak administrative capacity at local and regional level was often reported as a major factor for absorption or poor management of EU funds?[9] Obviously, a strong response requires an argument that exceeds the possibilities of approach in this paper, but we have reservations about such a panacea solution.

A European Commission study[10] ranks Romania last in the quality of regional governance, its performance depends, according to the study authors, a number of factors (including a strong regional media, independence, exerting pressure down up employment in the public sector at the expense of competitiveness based on patronage or personal contacts, less bureaucracy and more flexibility in decision making) little present regionally in Romania.

In our opinion, the positive developments that should bring the regionalization process are more about administrative efficiency and reducing regional disparities than the increase in the absorption of EU funds. This provided a process of regionalization well founded and developed in stages, the model of other European countries, not the looming rush to be done in Romania.

The summary of the public hearing conducted by the Advocacy Academy on regionalization says: "*This subject is complex and the decision requires an integrated strategy of political, economic, social, cultural and environmental, and sustained with the active involvement of all parties interested* ".[11] Also, a recent report by the Academic Society of Romania (SAR)[12] identifies a number of risks of a hasty and poorly substantiated

[7] See, *National Strategic Report (2012)*, p. 24 (available at http://www.fonduri-ue.ro/res/filepicker_users/cd25a597fd-62/Documente_Suport/Rapoarte_Strategice/09.01.2013/Draft_Raport_Strategi_National_2012.pdf) or POR *Annual Implementation Report(2011)*, June 2012, p. 5, (available at http://www.fonduri-ue. ro/res/filepicker_users/cd25a597fd-62/Documente_Suport/Rapoarte/1_Rapoarte_POR/30.07.2012/RAI_ POR_26_06_2012_FINAL.pdf).

[8] MDRT, *Assessment of the administrative capacity of regions in regional development*, p. 4, available at http://www.inforegio.ro/sites/default/files/Rezumat%2007%2012%202012%20ro.pdf

[9] James Scott, *De-coding New Regionalism: Shifting Socio-Political Contexts in Central Europe and Latin America*, Ashgate Publishing, 2009, p. 208.

[10] Lewis Dijkstra, *Quality of government in EU regions*, DG Regio, January 2011, available athttp://ec.europa.eu/regional_policy/newsroom/pdf/20110504_shortnote_governance.pdf

[11] The summary of *Regionalisation of Public Hearing ?Why?*, p. 36, available at http://advocacy.ro/sites/advocacy.ro/files/files/pagina-audiere/alte_documente/2012-12/ sinteza_audierii_publice_-_regio_11.12.2012.pdf#page=40&zoom=auto,0,791

[12] The Report *Regionalisation and EU funding: How not to do bad things until you do good ones*, available at http://sar.org.ro/wp-content/uploads/2013/03/RAPORT-SAR_FINAL.pdf

regionalization, including: the appearance of corruption at the regional level, and regional "feuds";, the accentuation of regional disparities and gaps between areas or between counties of the same region; increasing bureaucracy and mismanagement of the newly created structures; overlapping duties on certain technical areas, legal or financial, weak collaboration and cooperation in the political level, between the presidents of county councils and new leaders regional unit; emphasizing ethnic disputes.

The theory according to which the Regional Operational Program (ROP) will record better performance in the regions it is not shared by the business environment, an economic analysis conducted by the National Board for Small and Medium Sized Private Enterprises in Romania (CNIPMMR) offering skeptical conclusions on this objective.[13]

Compared to the strategies, priorities and lines of action established at European level for the next financial year in terms of regional policy (which have been identified, in general, above), we think that regionalization, in the sense that the issue is being debated today in Romania (the creation of regions, with legal status, headed by a regional council, with power of decision and implement better policies for regional development) is not a necessity. Considering that in Europe the emphasis is on consistency, on large projects, the regionalization leads to a reduction at national level without being certain that leads to an increased absorption of EU funds.

SAR Report as well as CNIPMMR study demonstrates that there is no clear and significant relationship between the extent of administrative decentralization and absorption of EU funds. In addition, in the current economic stagnation and increasing uncertainty in financial markets, financial decentralization (which must follow naturally functional decentralization) carries substantial risks: the abandonment of fiscal consolidation, increasing structural deficits, amplification gaps at regions and counties level, increased corruption. Finally, in terms of technical, administrative and territorial structure of current amendment scrolls consuming steps of time and resource (reauthorization of the EU to new regions, developing new regional strategy, training and management of European funds, attracting a new body of public institutions, etc..), which could induce a state of instability that could create more troubles than advantages.

Compared to alternative of decentralization-regionalization, two studies identified the need for *improvements in the quality of governance*, which subsequently may present a prerequisite for further "deeper" decentralization, proposing a series of precise solutions for better implementation of regional policy in Romania, solutions which we concur:

– keeping current regions and a fine tuning of the interaction mechanisms between and with the public institutions; decentralization new powers to the regions should take place gradually and taking into account the socio-economic potential;
– continuation of public administration reform started in 2002 especially in terms of improving government act at all levels of public administration; decentralization process should take place in relation to the capacity of local institutions, county and regional levels to take greater powers;

- improving the management of EU funds[14], both in terms of institutional structure[15] and in terms of human resources (system-centred performance reasons).

[13] To be seen the study *The impact of regionalization on the absorption of EU funds in Romania*, available at http://cnipmmr.files.wordpress.com/2013/04/impactul-regionalizarii-asupra-absorbtiei-fondurilor-europene.pdf

[14] Our adding, including the introduction of an electronic management which purposes is described in the first part of the study.

[15] According to the SAR Report, "*by creating a mechanism for control and early warning in the submission and evaluation of projects to prevent irregularities to block repayments*."

- increasing the functionality and performance of existing structures at the regional level[16] by:

a) "Strengthening the decision-making role of Regional Development Agencies by providing a legal status in terms of regional development policies";

b) "The Europeanization of Development Agencies – the active participation in international projects of the RDAs provided directly by the European Commission to work with the more developed areas of Europe and regions to develop strong partnerships with certain fields. "

As a cross-cutting objective, it is necessary to find a balance between the objective of increasing the absorption of EU funds and the prevention of aggravating disparities.

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[16] SAR Report, p.44.

PROBLEME ALE STATULUI DE DREPT ÎN ȚĂRILE POSTCOMUNISTE. STUDIU DE CAZ: ROMÂNIA ŞI UNGARIA

Claudia GILIA[1]

Abstract: *The former communist countries have fought and still fight an endless and active battle in order to appoint and implement democratic and European values, such as: rule of law, pluralism, respect for the human rights. Although the former communist countries, in the aftermath of 1989, have adopted fundamental laws that set them on the ground of democracy and rule of law, it's been already 20 years since then and still there are severe flaws of democratic principles and values that emerged in 2012. In our study, we insisted on two countries in Eastern Europe, both of them EU members, that is Romania and Hungary. We choose to study the problems in these two states because in Romania, in 2012, once the President has been suspended and the presidents of the two Chambers and the People's Advocate have been called off, everybody talked about a "takeover" and a severe violation of the rule of law principles. In Hungary, the 2012 and 2013 constitutional amendments have caused severe damages to some fundamental institutions of the rule of law, such as the Constitutional Court.These operating flaws of the two constitutional systems have been sharply criticized not only at internal level, but also by the European institutions. In our study we shall emphasize and analyze some of the problems the young democracies in Eastern Europe have to deal with.*

Keywords: *Constitution, rule of law, democracy, reform, democratic principles*

1. Constitutional crisis. Rule of law and constitutional reform in Romania

The process of democratization of the Romanian state began in 1990 has proved to be cumbersome and complex. Although since the time of drafting the Constitution, the Constituent Assembly members settled rule of law among the key attributes of the Romanian state, the consolidation was encountered over time difficulties. From multiple violations of the separation of powers, fundamental rights, to corruption, inflation legislative or Rule of law in Romania has been continually tested for resistance. For democracy in Romania, such as the 2003 constitutional events (constitutional revision), 2007 (suspension of the President and the rejection by the electorate a referendum for dismissal) to the 2012 (suspension of the President of Romania and the Constitutional Court to invalidate the referendum dismissal, dismissal of the two Presidents of the Chamber and the Ombudsman) have challenged the rule of law.

But if nothing shook the Romanian society more than the political events of the summer of 2012, which brought Romania to the brink of disaster with strong echoes constitutional and within the European Union.

Political forces in Romania are in either side of the barricade invoked the rule of law. If for some rule of law was in danger in Romania taking place even a "*coup*"[2] for

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[2] President Traian Basescu in the process of suspension from office warned promoters suspension - USL - "What do two weeks is nothing more than a strong bounce rule of law (...)". In the context of the suspension of President Traian Basescu in 2012, in a press release of the German Government stated: "*Chancellor* (Angela Merkel-sn) *considered as unacceptable that the basic principles of rule of law to be violated in a member country European Union* ".

others undertake all actions aimed at compliance with the Constitution and defend the Rule of law[3].

A number of documents of the European institutions have highlighted the problems faced by the rule of law in Romania, some even proposing solutions to remedy them.

Thus, European Commission For Democracy Through Law in the document *Opinio no. 685/2012* stipuled: "*Compliance with the rule of law cannot be restricted to the implementation of the explicit and formal provisions of the law and of the Constitution only. It also implies constitutional behaviour and practices, which facilitate the compliance with the formal rules by all the constitutional bodies and the mutual respect between them*".

In July 2012, the Romanian Government and Parliament adopted a series of measures in quick succession, which led to the removal from office of the Advocate of the People, the Presidents of both Houses of Parliament, a limitation of the competences of the Constitutional Court, changes on the conditions for a referendum on the suspension of the President of the Republic and the suspension of the President itself. The Venice Commission is of the opinion that "these measures, both individually and taken as a whole are problematic from the viewpoint of *constitutionality and the rule of law"*.

The events of the summer of December 20 have called into question a number of constitutional failure uncorrected affected and affects the existence of a state of law in Romania. The Venice Commission inventoried some of these problems and considered that "*the Romanian state institutions should engage in loyal co-operation between themselves*" and "*the constitutional and legislative reform is required to ensure that a similar situation should not arise again*".[4] Among the shortcomings of the rule of law are:

- *government emergency ordinances had been used frequently*. The problem probably lies in the fact that the Constitution itself provides incentives to have recourse to emergency ordinances because they remain in force unless the second (deciding) Chamber of Parliament explicitly rejects the corresponding approval bills submitted by the Government. In order to keep a government emergency ordinance in force, the governmental majority in Parliament only needs to delay a vote in the two Chambers of Parliament;[5]

- *the quorum required for the adoption of a referendum on the suspension of the President* was changed while a suspension was imminent. Such event driven changes of electoral legislation amount to a violation of the legal certainty6 and the principle of the stability of the referendum process[6]. The Venice Commission recommends not to have a participation quorum in case of a referendum and the debate in Romania on the validity of the electoral lists indeed shows the difficulties which can ensue from the introduction of such a quorum[7];

[3] For a very thorough analysis of the events of summer 2012 see: **Alexandru Radu, Daniel Buti**, *Statul sunt eu! O istorie analitică a crizei politice din iulie-august 2012*, „Monitorul Oficial" Publishing House, Bucharest, 2012.

[4] Article 88 and 89 - European Commission For Democracy Through Law - *Opinio no. 685/2012* - http://www.venice.coe.int/webforms/documents/CDL-AD(2012)026-e.aspx

[5] No less than *140 government emergency ordinances* had been adopted in *2011*, *95* in *2012* and *43* in the first 6 months of 2013.

[6] See : CDL-AD(2011)003rev Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), para. 41.2 (http://www.venice.coe.int/webforms/documents/CDL-AD(2011)003rev-e.aspx); CDL-AD(2002)023rev Code of Good Practice in electoral Matters: Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), section II.2.b. The principle of electoral stability has been taken up by the European Court of Human Rights in the case Ekoglasnost v. Bulgaria (application no. 30386/05), paras. 70 seq. (http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx)

[7] Article 48 - European Commission For Democracy Through Law - *Opinio no. 685/2012*.

- *Pressure against the Judiciary.* The independence and neutrality of the Constitutional Court is at risk when other state institutions or their members attack it publicly. Such attacks are in contradiction with the Court's position as the guarantor of the supremacy of the Constitution and they are also problematic from the point of view of the constitutionally guaranteed independence and irremovability of the judges of the Court. Another aspect of the necessary respect for the Constitutional Court is the execution of its judgements. Not only the rule of law but also the European Constitutional Heritage require the respect and effective implementation of decisions of constitutional courts;

- *Malfunctions in the relations between the main authorities of the State Parliament, President and Government,* etc.

The Venice Commission considers: "*the respect for a Constitution cannot be limited to the literal execution of its operational provisions. The very nature of a Constitution is that, in addition to guaranteeing human rights, it provides a framework for the state institutions, sets out their powers and their obligations. The purpose of these provisions is to enable a smooth functioning of the institutions based on their loyal co-operation. The Head of State, Parliament, Government, the Judiciary, all serve the common purpose of furthering the interests of the country as a whole, not the narrow interests of a single institution or the political party having nominated the office holder*"[8].

As a result of numerous failures observed from 2003 to the present, and especially with the events of 2012 on how state institutions respect the principle of check and balances, democratic values necessary to achieve constitutional reform to put Romania on a new constitutional foundation. It is important that politicians understand that this constitutional reform, followed of course by other legislative changes should consider removing future situations that would lead the country to bankruptcy rule of law and constitutional provisions must give new Romanian citizens ensure that the Romanian state is a democratic state of law, the specified values in art now. 1 paragraph. (3) of the Constitution are fully respected.

2. Rule of law in danger in Hungary?

Hungary, a former communist bloc country had to turn to fight for the implementation of a genuine rule of law. Hungary 1949 constitution substantially amended in 1990.

European Union member since 2004, Hungary has always been a loyal member of the European construction. The European financial crisis has led Hungary to take a series of measures that did not like to European Institutions[9]. These measures include constitutional amendments in 2012 and 2013, it was considered as not being in accordance with the rule of law or European values.

The Hungarian Parliament adopted the fourth amendment to the Fundamental Law on 11 March 2013[10]. The Amendment was promulgated on 25 March 2013 and has entered into force on 1 April. The adoption of the Amendment was made necessary by the decision of the Constitutional Court of December 2012[11] in which *the Constitutional Court annulled a part of the Transitional Provisions of the Fundamental Law for technical reasons.*

[8] Article 87 - European Commission For Democracy Through Law - *Opinio no. 685/2012.*
[9] Hungary is the most indebted of the Eastern European countries, with a debt of 80% of GDP.
[10] To amend the Constitution 265 MPs voted "FOR" 11 "against" and 33 abstained.
[11] Decision No. 45/2012 (XII. 29)

Among m he amendments to the Constitution by FIDESZ, the ruling party led by Viktor Orban as:

- The right to freedom of speech may not be exercised with the aim of violating the human dignity of other people. The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Members of such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity as determined by law.

- By virtue of an Act of Parliament, *financial support of higher education studies may be bound to participation for a definite period in employment or to exercising for a definite period of entrepreneurial activities*, regulated by Hungarian law;

- In order to reduce election campaign costs and create equal opportunities for the parties, the Amendment establishes *new rules with respect to political advertisings.* The Amendment *prohibits the publication of paid political advertisings both in public service and commercial media* (including radio and television channels). This general prohibition extends to both the electoral campaign period and the period outside the campaign. However, the Amendment ensures the possibility for the publication of political advertisings free of charge through broadcasting services on equal basis;

- Hungary shall protect the institution of *marriage as the union of a man and a woman established by voluntary decision*, and the family as the basis of the nation's survival. Family ties shall be based on marriage or the relationship between parents and children;

- The Constitutional Court shall review any piece of legislation for conformity with the Fundamental Law at the proposal of the Government, one-fourth of the Members of Parliament, the *President of the Curia, the Supreme Prosecutor* or the Commissioner for Fundamental Rights;

- Hungary's Constitutional Court can no longer reject constitutional amendments on matters of substance, only on procedural grounds;

- the Amendment creates *the opportunity for the State to provide a special church status for organisations engaged in religious activities*. Parliament may recognise churches that satisfy the conditions determined in the relevant cardinal law. Based on the new Article VII(4) of the Fundamental Law, these criteria are a sustained period of operation, social support and suitability for cooperation in the interest of the attainment of communal goals, etc.

Critics believe that the new Constitution is discriminatory and undemocratic and violate fundamental freedoms and the rule of law. References to God in Christianity, the traditional family values have caused concern in European chancelleries and the Hungarian population mobilized and protested against constitutional changes promoted by Viktor Orban and Fidesz.

The EU expressed concern about the bill. European Commission President Jose Manuel Barroso and Council of Europe Secretary General Thorbjorn Jagland said: "*These amendments raise concerns with respect to the principle of the rule of law, EU law and Council of Europe standards*". Also, the State Department spokeswoman Victoria Nuland said in a statement: "*They could threaten the principles of institutional independence and checks and balances that are the hallmark of democratic governance*."[12] President Barroso asks the Hungarian authorities to engage in a political dialogue with the European Parliament which will adopt in June a political resolution on "*the situation of Fundamental Rights in Hungary: standards and practices*". "*Some of that legislation may*

[12] For details: http://www.washingtontimes.com/news/2013/mar/8/us-joins-eu-warning-hungary-over-rights/

indeed by in violation of European laws and European principles," European Commission President Jose Manuel Barroso said in Copenhagen. "So we will *use all our power to make sure that Hungary complies with the principles and values and the rules of the European Union, and I am confident that we will achieve that,"* he added[13].

The ALDE group's concerns over the compatibility of the controversial laws recently adopted in Hungary with common European values of freedom and democracy: "*PM Orban might defend his government's right to decide but freedom also means respect for fundamental rights, like the right to a fair trail. A right that according to the Venice Commission is not sufficiently guaranteed in Hungary. The Government can try to play with the EU institutions but today's report from the Council of Europe is extra proof that the Hungarian Government is taking away rights and freedoms from its citizens as we have consistently claimed*"[14], said ALDE Leader Guy Verhofstadt, commenting on the Venice commission's opinion on the legal status and remuneration of judges and on the organisation and administration of courts. "*A political party that imposes new cardinal laws that do not guarantee 'the right to freedom of thought' or the right to freedom of 'conviction' cannot seriously speak of foreigners' dictatorship over Hungarian independence and freedom. It is hypocritical*," said Renate Weber (PNL, Romania) ALDE coordinator in the Civil liberties committee (LIBE) by commenting the Venice Commission's opinion on the right of freedom of conscience and religion and the legal status of churches, denominations and religious communities.

Some of the strongest criticism of the amendments came from Laszlo Solyom, who served as Hungary's president between 2005 and 2010. Mr. Solyom, a respected jurist, claimed that the ruling Fidesz Party led by Viktor Orban, the prime minister, had used the constitution to "meet daily political goals". He called on the current president, Janos Ader, himself a former Fidesz MP, to throw out the constitutional amendments[15].

The Parliament voted on March 11th to amend the constitution, ignoring pleas for delay from the European Commission, the Council of Europe and America's State Department.

On April 17, the European Parliament hosted a plenary debate on Hungary, during which Reding said the European Commission (EC) is analyzing Hungary's constitutional amendments and will deliver an opinion by mid-June.

After the adoption of amendments to the Constitution of Hungary and considering that they harm the European values and the rule of law, the foreign ministers of Germany, Netherlands, Finland and Denmark in a letter to Barroso asked the commission to help „*create a culture of respect for the rule of law*". "*A new and more effective mechanism to safeguard fundamental values in member states is needed*" – they wrote.

Despite these warnings and stances from their European leaders or position of the European institutions, we found that Hungary had not suffered any economic or other sanctions from the EU and constitutional amendments are in force. Unlike Hungary, Romania, during the events of summer 2012, EU officials and even those of the U.S. took positions more trenchant and veiled threats to cut EU funds have led leaders in Bucharest to take a series of measures that were not pleasing to Romanian citizens. We mention here only

[13] For details: http://news.monstersandcritics.com/europe/news/article_1685194.php/Barroso-We-will-make-sure-Hungary-complies-with-EU-laws

[14] See:http://www.alde.eu/press/press-and-release-news/press-release/article/eu-must-act-on-venice-commissions-condemnation-of-hungary-on-fundamental-rights-38030/

[15] "*Viktor's justice. The Hungarian government defies Europe over constitutional change",* The Economist, March 16th 2013 (http://www.economist.com/news/europe/21573589-hungarian-government-defies-europe-over-constitutional-change-viktors-justice).

the amendment of Law no. 3/2001 on the organization of the referendum that established the turnout quorum of 50% +1 of no. persons registered in the electoral rolls for the referendum for dismissal of the President to be validated by the Constitutional Court, although it was known that the percentage of referendums that took place was always below 50%.

Conclusions

Young democracies of Eastern Europe, facing the financial crisis Europe, have to face and deep political crisis which must find constitutional solutions to ensure member political and social stability and peace needed by citizens of both countries.

If Romania is desired by future constitutional reform to solve the problems facing the Romanian constitutional system in Hungary, the problem is just the application of new constitutional provisions introduced in the Basic Law in 2013.

The rule of law for the two states remain an elusive ideal, but that is constantly invoked to justify the adoption of a measure or the other. Keep the wisdom and maturity of politicians to respect the basic principles and democratic values and the rule of law, and the citizens of both countries to change their mentality, to participate in community life and to react when fundamental rights have been violated.

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DELAYNG FOR THE APPLEAL

Nicoleta ENACHE*

Abstract: *The National Education Law regulates the status of teachers in secondary education, complementing its rules with the general rules from the Labor Code. Although the activities of this category of personnel is made as a rule under an employment contract, the legislature has customized some of the features of work by teachers, but his efforts were not cross any criticism.*

Keywords: *school education, teachers, rights, obligations*

The right to a fair trial does not have a single dimension, but reflect a complex law, which involves a series of requirements that national legislature, but also those who are called upon to apply the law, including its recipients must comply.

Inspired by the regulation of the European Convention on Human Rights entitled the right to a fair trial principle governed by the New Code of Civil Procedure reflecting the national legislature conferred by rules established by the Convention and the European Court of Human Rights, developed in the application text.

Convention governing the right to a fair trial, settled in public within a reasonable time by an independent and impartial tribunal established by law, the obligation of a public pronouncement of the judgment.

Internal rules governing all art. 6 but the NCPC, this fundamental rule, states that everyone has the right to a fair trial of his case within optimal and predictable by an independent, impartial and established by law, meaning the court is obliged to order all steps permitted by law to conduct a prompt judgment.

Right to a fair trial but is based on the fundamental principles of the right to defense. The right to defense as the core, is covered in the New Code of Civil Procedure, in article 13, which is exercised in compliance with the conditions provided by law, without conflicting with other procedural guarantees: time optimal and predictable.

The question that naturally arises is which is the preferred term? The right to proceedings within a optimal and predictable is an obligation assumed by the State and imposed judicial power, which is beyond the regulation of art. 6 of the Convention and Article 21 of the Constitution, which speak a reasonable time.

This choice was motivated by the academic literature that in the Council of Europe, the European Commission for the Efficiency of Justice, was established since June 2004 as a reasonable deadline is the limit that separates its breaches of the non-infringement and are not may be considered sufficient if the result is achieved by setting a target for the legal system judging each case a suitable time and predictable.

Optimal period is the time limit to ensure the best efficiency and corresponding judgment the best interests pursued by the party requesting a right turning. Will be examined on a case to case, depending on the object of the proceedings and the procedure chosen by the parties.

Optimal character limit should not and can not be determined according to the interests defendant outside the civil trial, which, of course, have an interest pa possible to extend the process.

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Optimal character limit should be corroborated with celerity requirement imposed by the second sentence of para. 1AL 6 of the Convention and of art. 241 of the New Code of Civil Procedure.

It is therefore mandatory to ensure a quick judgments, but to give the best efficiency of the judiciary both in terms of its duration, but also in terms of respecting rights of the parties in the state to meet the best interests pursued The party requesting a right turning. Therefore, the preferred term, besides the need to ensure more rapid progress of the trial, must not affect the guarantees of the parties, including the defendant, such as the right to defense, contradictory, equality, orality, etc.

Term predictable is that term which is known by the parties involved in the lawsuit. The legislature has regulated in art. 238 in the New Code of Civil Procedure is the procedure to estimate the duration of the research process.

Under this procedure, the judge, having heard the parties and taking into account the specifics of the case, estimate the process, which will be recorded in the end. NCPC provision, which tends to ensure timeliness in the civil complaint is related to the delay in the process that the law available to any party, and the prosecutor involved in the trial.

These individuals may invoke violations of the proceedings within optimal and predictable legal measures and request that this case be removed. The law regulates the cases in which recourse to this procedure as a lack of circumstantial court referral could cause such challenges and assumptions that do not fit into the idea of delaying the case.

Thus, the appeal is possible if: the law sets a deadline of a procedure or motivation to pronounce a judgment which was accomplished without result, the court set a deadline by which a trial participant had to meet a procedural and this term has been fulfilled without the court to take, to one who has not fulfilled the obligation, the measures provided for by law or a competent person who is not a party to the court was obliged to communicate in a certain time, writing or other data or information resulting from its records which were required to resolve the process, and this term has been fulfilled without being taken to court who has not fulfilled the obligation, the measures provided by the law court has disregarded the obligation to settle the case within the optimum and foreseeable failure measures established by law or by the failure of the office when required by law, a necessary pleading her case, although the time elapsed since its last pleading would have sufficed for making or performance of the measure.

Although it seems that the last hypothesis is indefinite, failing to specify the preferred term and predictable, it is reported that, according to the NCPC, the court is able to estimate the research process (Article 238 NCPC).

Thus, at the first hearing at which the parties are legally summoned, the judge hearing the parties, estimate the time required for the research process, taking into account the circumstances of the case, so that it can be solved optimally within a foreseeable period was recorded Finally, and on his return judge may, under the same conditions contradictory.

In determining the estimated duration of the research process, the court must be reported and concrete opportunities to hear the case, the court determined the cargo role, the possibility of granting time on any day of the material available in the organization hearings in camera.

Infringement of the court to hear the case within a reasonable time shall entitle the parties to make use of the provisions of art. 522-526 New Code of Civil Procedure, by making an appeal on delaying.

A new legal institution is to delay the appeal process, which is a procedural nature which is incidental and bet on the possibility for any party to a lawsuit, and the prosecutor involved in the trial, to plead violations of the proceedings in a optimal term and predictable legal measures to require that this case be removed.

To be eligible for delayed appeal process conditions must be met prior intorducerii this application and legal prerequisites to be admitted.

The three conditions necessary for the formulation of disputes related delaying first three moments: the incident procedural must be put in question by a person who is a party to the litigation fund, or by the prosecutor when they participate in the trial. Per a contrario, an appeal filed by a third party, even if it justifies an interest in the process (but still not be parties) will be rejected as filed by a person without proceedings.

Secondly, in case the appeal is made in writing, it will be submitted to the court hearing the substantive dispute. Registration appeal to higher court or another court draws the consequence dismiss it as being the material competence of that court. Third, they must plea raised by the appellant as having the effect of delaying the process to subsist when formulating appeal. If the measures or acts alleged were fulfilled before or after the introduction of the appeal, the application will be rejected as unfounded or as superfluous.

Regarding, when placing such an appeal, in terms of temporal correlation can be born and a debate around whether or not an appeal within the formulation. On the one hand, although the articles devoted to this institution does not provide an explicit deadline, it can be argued that it is implicitly inferred from the legislation the grounds for appeal. Thus, under the sanction procedure of finding exercise in bad faith, it can be argued that the incident procedural delay effect should be unapologetic as soon as the applicant was aware of it or not later than the first hearing following this incident.

Otherwise, the presumption arises that there may be interference with her right of settling the case within a optimal and predictable, each with their own expectations litigants. The appeal shall be in writing and filed with the court hearing the trial in relation to claiming the delay judgment. An appeal can be made verbally at the hearing, in which case it will be noted, along with the reasons given by hand, of the session. The appeal does not suspend the case.

Text legally prescribe any time limit for the issue appeared to delay the process by which it can be challenged.

The appeal shall be settled by the tribunal hearing the proceedings immediately or within maximum 5 days without summoning the parties. Of course we wonder to what extent we can achieve the goal of the rule while the appeal is heard by the same judges who allegedly delayed by not taking legal proceedings within a reasonable time. We believe that it was fair that this appeal should be submitted directly to the court or the superior court judge at least that it be resolved by a panel of judges other than to whom the complaint was raised on the model provided by Article . 186 para. 3 and art. 195 para. 56 of the New Code of Civil

Procedure, in order to avoid any suspicion of bias. It considers the complaint to be justified, the panel of judges issue an order not subject to appeal, which shall immediately take the necessary measures to eliminate the situation that caused the delay in the proceedings. In this case, the complainant will be communicated for information, a copy of the conclusion.

In the absence of express provision to the deadline to motivate this conclusion because the term refers to the settlement five days, which includes motivation and communication, we can conclude only that the applicable general term motivation provided by art. 420 para. 5 Code of Civil Procedure, ie 30 days from delivery, although in our opinion the legislature

should provide an emergency within 10 days from delivery, the conclusion to be drawn up and the party appeal.

It considers the complaint as unfounded, the panel of judges will reject the settlement. Against this conclusion the appellant may appeal within three days of communication. The complaint filed with the court that issued the conclusion, which will forward it immediately to the settlement, the superior court.

The court shall resolve the complaint within 10 days of receipt of the file, a panel of three judges. Judgment is made without summoning the parties, by a judgment which is not subject to appeal, which must be substantiated within 5 days of delivery. If the court finds the complaint justified, shall order that the court hearing process to meet the pleading or to take the necessary legal measures, showing that they are and establishing, where appropriate, a deadline for their achievement. In all cases, the court will not hear claims could give guidance and will not offer absolution on matters of fact or law to anticipate how the settlement of the case or which affect the liberty to judge decide the case according to law , of the solution to be in process.

When the appeal or complaint was made in bad faith, the author may be required to pay court fines from 2,000 lei to 500 lei, and, at the request of the interested party to pay compensation for damages caused by the introduction of appeal or complaint. Bad faith arising from the unfounded nature of the complaint or appeal, and in any other circumstances which justified its finding that the exercise was done for a purpose other than that for which the law recognizes.

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SUBIECTELE PLĂȚII. ANALIZĂ COMPARATIVĂ ÎNTRE REGLEMENTAREA DIN VECHIUL COD CIVIL (1864) ŞI CEA DIN NOUL COD CIVIL

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Abstract: *The payment represents a means of voluntary enforcing of pecuniary obligations and can be made both by the debtor or other person, and may be accepted, in principle, by the creditor, its representative (agent), or the person authorized by the law or justice. However, both the old regulation and new civil code provides for the possibility of receiving a payment from a legal obligation report and by other people who act as third parties in relation to the legal relationship. In such a case, the judicial practice in general and arbitration practice in particular have expressed consistently in that the receipt of a payment by a person who did not receive a special mandate in this sense, does not have a discharging character for the debtor.*

Keywords: *Payment, payment subjects, creditor, debtor, solvens, accipiens*

I. General overview on payment

The legal obligation relationship gives the creditor the right to claim its debtor the execution exactly and in time to benefit from it, under the sanction of the coercive power of the State. In turn, the debtor, executing the obligation assumed for the benefit of its creditor or the person specially indicated by it, is liberated of the debt, closing in this way the legal obligation relationship with the creditor.

As known, the enforcement of the obligations may be made on two paths which are directly or in kind and indirectly or through cash equivalent[1].

In principle, the enforcement of the obligations is done in most cases directly, by means of payment.

Therefore, payment means the voluntary enforcement, in kind, of the obligation assumed. In common language payment is the voluntary enforcement of a pecuniary obligation meaning the submission of a sum of money to the creditor. In legal terms, the payment covers a much wider range of benefits of the debtor, such as the transmission or provision of a right, the conclusion of a contract, execution of a work, the provision of a service, rendition of a good, of documents etc.[2]

According to classical theory payment, assuming a manifestation of the will of the debtor to perform the obligation to which it was indebted is regarded as a legal act of conventional nature that is involved, in principle, between the payer and the person whose payment is made.

In the literature were shaped various opinions according to which the payment is considered a unilateral legal act of the debtor[3], theory criticized by an author[4] who founds

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[1] L. Pop, *Civil right Treaty. Obligations. [Tratat de drept civil. Obligațiile.]* Ist Vol. General legal status [Vol. I Regimul juridic general], CH Beck Publishing, Bucharest 2006, p. 444;

[2] Ibidem, p. 446;

[3] Fr.Terre, Ph. Simler, Yv. Lequette, *Civil right. Obligations [Droit civil. Les obligations]*, Dalloz, Paris, 1999, p. 1223;

[4] N. Cataluna, *Legal nature of payment [La nature juridique du paiement]*, Libraire generale de droit et de Jurisprudence, Paris, 1961;

his opinion on the distinction between payment as means of execution of obligations and payment as means of extinguishing obligations.

As far as we are concerned we agree with the doctrine which holds that the payment is always a legal act, as the debtor of the obligation shall acts always, voluntarily and with the intention to extinguish a legal obligation report.

We mention that the payment considered from the perspective of the debtor, of the one who makes a payment, always appears as a legal act, for which validity must be met conditions of the civil law relating to capacity and consent and from the point of view of the sample, this is similar to other legal acts.

Seen from the perspective of the creditor, for valid payment is not required, in principle, its consent. However, there are situations where the creditor participates effectively in making the payment, if it receives from its debtor let's say a payment title, which it introduces to payment. However, such a legal report is only apparently bilateral, because in reality we do not find ourselves in the presence of two unilateral manifestations of will[5].

In conclusion, we may state that payment is without question a legal act, regardless of what perspective is seen, and the will of the parties of such legal obligation report is not absolutely free or indifferent to perform a valid payment for any of the parts of the legal report[6].

With the unprecedented growth of the information technology and simultaneously with the appearance of modern payment methods, the role of the legal will of legal relationship parties to payment diminishes[7].

Therefore, payment as means of voluntary extinction of an obligation, involves either its execution voluntarily by the debtor, called *solvens*, or by a volunteer codebtor to the creditor or the recipient of the payment indicated by the creditor, called *accipiens*, either by providing a service, a work etc., or through the remittance of an amount of money[8].

In this work we shall focus upon the last means of payment mentioned above, namely to convey an amount of money in the execution of the legal obligation relationship.

Moreover, the approach of enforcement and willingly of payment in a contract of international trade shall be analyzed from both from the perspective of the situation in which the contracting parties have chosen as law applicable to the contract between them to be the Romanian law, or in the absence of such a clause, by virtue of the principle of *lex fori*, the Romanian legislation is also applicable to a such legal relationship.

Although our scientific approach takes into account legal relationships that take birth, modify and extinguish in international trade law, it should be noted that payment, according to the date of conclusion of international trade agreements – whether for short, medium or long-term agreements – is subject to the rules of commercial law to be completed with those of civil law, if such contracts were concluded until September 30, 2011, and only civil law rules that have been concluded after the date of October 1, 2011, the date of entry into force of the new civil code of Romania, legislation meant to be a modern regulation, destined for the unification of Romanian private law.

As a general rule, payment, being a means for voluntary execution of obligations can be made both by the debtor or other person, and may be accepted, in principle, by the creditor its representative (agent), or the person authorized by the law or justice.

[5] L. Pop, op. cit., p. 448;
[6] Ph. Malaurie, L.Aynes, Ph. Stoffel-Munck – *Class of civil right. Obligations [Cours de droit civile. Les obligations]*, Cujans, Paris 1999-2000, p. 561;
[7] Ibidem, op. cit., p. 562;
[8] Răzvan Vartolomei, *The legal regime of cross-border payments in the EU [Regimul juridic al plăților transfrontaliere în cadrul UE]*, Universul Juridic Publishing, Bucharest 2008, p. 23;

In the doctrine[9] was stated that payment may come both from the debtor (solvens) and from a solidary codebtor, a guarantor, a fidejussor or from any other person interested in the debt extinguishment, and the subsequent liquidation between the payer and the contractual debtor to be made according to the preexisting relationships between them.

Although both the old rules and the new civil code provides for the possibility of receiving a payment from a legal obligation report also by other people who act as third parties in relation to the legal relationship, however, in the arbitration practice was held that the payment made to a person without Power of Attorney is not recognized and does not discharge all liability[10].

As such, we consider that it is appropriate that in the present work to refer to some aspects concerning the regulation of payment both in the old and in new legislation.

II. Who can make the payment

In accordance with the provisions of Article 1093 of the old civil code, payment can be made valid by the debtor personally or through its representative. In the situation where two or more persons have the same quality of solvens in the same legal report, each of them can make valid payment to extinguish the debt. In the same context are the provisions of Article 1093 paragraph 1 Civil Code, according to which *"the obligation can be paid by any person interested, such as a coobligated or fidejussor"*.

Also, according to paragraph 2 of the same Article 1093, payment can be made valid also by an uninterested third party such as a donor that makes a liberality or a representative or a gerent under business management[11].

Text of law to which we referred in the previous paragraph expressly provides that the person (third party) not interested which makes its own payment cannot be subrogated to the creditor paid without the consent of the payee. However, no matter how uninterested the third party is working in the execution of payment, meaning either the debtor or on its own, we cannot talk about a payment whose effect is to extinguish the legal obligation relationship but only about replacing the initial legal obligation relationship with a new one.

Concluding we can say that, in principle, Article 1093 of the old civil code provides that payment can be made by any person, *except* the obligations to make *intuitu personae*, when payment can only be made by the debtor (Article 1094 of the old civil code) or where parties of the legal obligation relationship expressly agreed that payment can be made valid and exclusively by the debtor.

If obligations to surrender an amount of money or to forward or to constitute a real right so as a payment to be valid, Article 1095 of the old civil code provides that the solvens must satisfy two conditions, namely to be the owner of the property making the object of payment and to have the capacity to perform legal acts. However, paragraph 2 of the same Article 1095 provides an exception to the rule in paragraph 1 in the sense that if the obligations to give money or other consumable goods, the payment is valid even if the solvens was not the owner thereof and did not have the capacity to dispose of it if the accipiens received and consumed it in good faith. In such a situation, the good faith the

[9] O. Căpățână, B. tefănescu, *International trade law treaty [Tratat de drept al comerțului internațional]*, vol II., RSR Academy Publishing, Bucharest 1987, p. 50;

[10] Sergiu Deleanu, *International trade agreement [Contractul de comerț internațional]*, Lumina Lex Publishing, Bucharest 1996, p. 197; CAB Decision no 12 of 28.04.1971 in „CAB Repertoir" 1982 p. 28;

[11] L. Pop, op. cit., p. 449;

exception refers to assumes that accipiens does not know at the time of receipt of payment that the debtor was not the owner of the goods and does not have the ability to alienate[12].

With regard to the provisions of the new civil code concerning the persons who may make a valid payment, Article 1472 regulates that *"Payment may be made by any person, even if it is a third party in relation to that obligation"*.

Therefore, in principle, the current regulations do not differ from the old one, in relation to persons who may make a valid payment arising from a legal obligation report, except the situation where the debtor made clear to the creditor that it does not agree with the payment to be made on his behalf or for themselves by a third party (Article 1474 par. 1 new civil code).

However, the final sentence of paragraph 1 of Article 1474 provides an exception to the rule established, namely, the obligation to refuse the payment made by a third party shall subsist only as long as the refusal does not harm the creditor. *Per a contrario*, that means whenever a possible refusal of the debtor of recognizing the validity of a payment made by a third party it would be prejudicial for the creditor, the latter may receive the payment.

Furthermore, paragraph 2 of the Article 1474 in the New Civil Code stipulates that *„the creditor may not refuse payment made by a third party, unless the nature of the obligation or the convention between the parties requires that the obligation to be performed only by the debtor"*.

From the analysis of this law it follows that, in principle, a creditor cannot refuse the payment made by a third party *under the conditions in which it was not notified to do so by its debtor,* unless *the obligation* has *intuitu personae* character or the parties expressly agreed that the payment shall be made exclusively by the debtor.

In order to have an overview of how a third party in respect to a legal obligation relationship can make a valid payment in legal terms, in paragraph 2 of Article 1474 in the New Civil Code, should be read in conjunction with paragraph 3 of the same article.

Thus, from the corroborate interpretation of these texts of law it results that the payment made by a third party is discharging the debtor only if it made on the account of the latter with the intent to extinguish the debt to the creditor. Hence it follows that the payment made by a third party against a legal obligation relationship must meet two cumulative conditions, a positive one, that is to be submitted on behalf of the debtor and a negative one, not to be made from error.

Even though in terms of regulatory quality the new legislation represents a regression to the old regulation in general, with respect to a third party who can make a valid payment, although it is not specified who this might be, it may be inferred that there cannot only be one person who has interest to pay for the debtor. From this perspective, it appears that a third party who would have interest to pay for the debtor, with the intention to extinguish its legal obligation relationship, it can only be a guarantor of the debtor, a business guarantor of his, or a buyer of a mortgaged property or simply a person who wishes to make a liberality to the debtor.

From the analysis of Article1474 in the New Civil Code it follows that the payment made by a third party in relation to the legal obligation relationship, if it was made in the name of the debtor and for it confer to the third party the possibility of subrogate in the creditor's rights. Otherwise, the third party cannot be subrogated in the creditor's rights unless with the consent of the latter.

[12] Idem, p. 452;

The payment made by the third party in the name and on behalf of the debtor is discharging to the latter, which is this way convicted in relation to the creditor but gets bound in relation to the third party payer, except where the third party has made a liberality[13].

In other words, as long as the payment made by the third party in the name and on behalf of the debtor is conditional upon the consent of the creditor, has a discharging effect for the debtor to the creditor from the legal obligation relationship[14].

Therefore, the debtor is validly discharged of the debt if its extinction was made through payment by a third party in relation to the legal obligation relationship, but on behalf and at the expense of the debtor[15]. As far as we are concerned, we appreciate that the new regulation although desired to be modern – and in relation with the declarations of decision-makers made at the date of enforcement of the New Civil Code – would have been edictated with the purpose to limit conflict situations to be prosecuted to justice, in reality has contrary effects.

We support it because, as one can easily observe, the rules contained in Article 1474 paragraph 1 open the way for differences between parties of the legal obligation relationship in the sense that the debtor altogether objective can let the creditor know that does not recognize a payment that may be made in his name for itself by a third party, payment that would result in an excessive debt in relation to the initial flow rate, but the creditor may discard the request of the debtor and to accept payment from the third party, citing a possible injury he would suffer by not accepting the payment made by that third party.

The reasoning remains valid even if paragraph 3 of Article 1474 in the New Civil Code provides that the payment made by a third party on behalf of the debtor closes off that legal obligation relation, but the third party cannot be subrogated in the creditor's paid rights only in the cases and under the conditions prescribed by law[16], since, as I pointed out, if the payment is made on behalf of the debtor and with intent to extinguish the legal report, the third party payer is subrogated in creditor's rights, except where the third party makes a liberality.

As regards the payment made by an incapable, Article 1473 in the New Civil Code provides that it may not be required to be refunded on the grounds of incapacity at the time of payment date. Basically, the text of law is somewhat similar to that of Article 1095 paragraph 2 in the Old Civil Code. In the absence of clear provisions which specify to what payment obligations the rule is applicable, we appreciate that also in this situation contained in the current regulation, the payment cannot be repeated in the case of payment obligations, either of an amount of money or a rendition of a quantity of generic goods, with the condition however that the accipiens may have been in good faith.

Although the current regulation does not contain details about the purpose of the payment made by an incapable, we appreciate, however, that the editors of the New Civil Code by the provisions contained in Article 1473 had in mind, on the one hand, all payments that have as object a sum of money or things that is consumed by use, and on the other hand, the fact that the accipiens may have been in good faith at the date of the receipt of payment and may not have known that the solvens was incapable, and was no property of the owner, because otherwise we appreciate that the repetition may be required.

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[13] Ion Turcu, Selling in the New Civil Code *(Vânzarea în noul cod civil)*, C.H. Beck Publishing, Bucharest 2011, p. 415;
[14] Cass. III civ., 16 mai 1972, în L. Leveneur, Code civil 2010, ed. Litec, 2009, p. 789;
[15] Cass. I civ., December 8, 1976, in L. Leveneur, op. cit. p. 761;
[16] Article 1593 of the New Civil Code provided that whoever pays instead of the debtor may be subrogated to the rights of the creditor, without being able to acquire more rights than it has. Article 1594 of the New Civil Code held that contractual subrogation consented by the creditor is made without the debtor's consent, and Article 1595 of the same law provided that the debtor's consented subrogation can be done without the consent of the creditor only in the absence of contrary stipulation.

III. Who can receive the payment

In accordance with Article 1096-1098 in the Old Civil Code, *"payment shall be made to the creditor or its representative or to one who is authorized by law or justice to receive in is name"*. The analysis of the text shows that the person for whom the payment is made is the creditor from the legal obligation relationship or his representatives, whether they are legal, conventional or judiciary.

The law states that in order to receive a payment accipiens is conditioned by legal capability, meaning it has to have full legal capacity. Hence, in principle, a payment made incapable of to a creditor would not free the debtor (solvents). However Article 1098 of the Old Civil Code provides that the debtor will not be required to pay again, to the extent that will prove that the first payment profited to the creditor unable to receive it.

Please note that the payment is valid and liberates the debtor also in other situations expressly provided by law, such as those regulated by Article 1096 paragraph 2 of the Old Civil Code (legal, judicial or conventional representatives) or in the situation referred to in Article 1097 of the Old Civil Code, namely: a) when *accipiens creditor ratifies payment* made by solvens to someone who did not have the right to receive it. Ratification may be express or tacit. Tacit ratification results from the conduct of accipiens creditor who gives up to the avoidance of payment made by solvens to the third party[17]. We are in the presence of such ratification when the creditor asks the third party to submit the amount received as payment from the debtor or when the debtor has made a partial payment to the third party and the creditor asks the debtor the rest of the benefit due, which was not executed[18]; b) when *payment made to a person not entitled* to receive it, *was beneficial* to the *creditor*. We are in such a situation when the debtor makes the payment required by the creditor to its creditor thereof. However, such payment is valid only to the extent to which it extinguishes the full debt to the creditor. Otherwise the payment remains valid only to the extent to which it extinguished that debt off its creditor and for the rest of the payment is void. The rationale for which this payment is recognized as valid is that if the creditor is allowed to request a new payment from the debtor he would unjustly enrich[19]; c) *payment was made to a apparent creditor* (Article 1097 of the Old Civil Code). However, for the incidence of these provisions of this Article shall be fulfilled two conditions namely solvens or the one who makes the payment to be in good faith and accipiens or the one who receives the payment, that the apparent creditor, to be the owner of the claim that solvens pays at the time of payment.

In addition to the two conditions necessary for the payment of an apparent creditor, for the payment to be legally valid it must be real and effective, meaning to be truly made to the end of legal settlement of obligations.

In conclusion we can say that the payment made by solvens to an apparent creditor in the possession of the claim, liberates the debtor, resulting in extinction of the legal obligations. At first sight you might think that in case where the solvens made a payment to an apparent creditor, the true creditor remains injured. In fact, the latter can sue the apparent creditor in order to get the payment he received from the debtor.

As far as the persons who may receive a valid payment are concerned, with the result of the legal settlement of obligations, the New Civil Code in Article 1475 states that

[17] C. Hamangiu, N. Georgean, Annotated Civil Code [*Codul civil adnotat*], vol. III, ed. Socec & Co SAR, Bucharest, p. 55;
[18] C. Hamangiu, N. Georgean, op. cit., p. 55;
[19] L. Pop, op.cit., p. 454;

"Payment shall be made to the creditor, to the legal or conventional representative, to the person indicated by it or to the person authorized by the court to receive".

The analysis of this text of law shows that the new regulation does not differ from the old in terms of who can receive a valid payment, namely the creditor or its representatives. Furthermore, the New Civil Code sets like the old regulation that in case a payment is made to a creditor (accipiens) incapable to receive liberates the solvens only to the extent to which the accipiens takes advantage of (Article 1476 of the New Civil Code).

Regulatory novelty – refers to the person or persons who may receive payment in a legal obligation relation, other than the creditor or its representatives – was introduced by Article 1477 of the New Civil Code according to which *"Payment made to a person other than those referred to in Article 1475 is however valid if a) is ratified by the creditor; b) the one who received the payment becomes the holder of the claim later; c) was made to the one who claimed the payment on the basis of a liberatory receipt signed by the creditor",* for that paragraph 2 of the same article to provide that *"Payment made under conditions other than those referred to in paragraph (1) extinguishes the obligation only to the extent that the creditor to takes advantage of"*. The analysis of the text of law shows that outside the situation provided by the old regulations where payment of obligations was valid under certain conditions, even if made to a person appearing as a third party to the legal obligation relationship, the new regulation refers to two new situations in which such payment is valid and thus liberating.

In the first case, namely that provided by Article 1477, paragraph 1, letter b) of the New Civil Code, for such payment to be valid and to liberate the debtor it must after accipiens receives payment from a solvens, that the third party receiving the undue payment to acquire the claim from the real creditor (accipiens) through one of the ways provided by law.

As far as we are concerned, we think that although at first sight the solution of the regulator about the regulation of this situation seems logical, however, the provision is likely to give rise to contentious situations given that it does not specify also the period in which the third party recipient of a payment must acquire the claim under which it received an undue payment for the payment to be legally valid, that is liberating[20].

In these circumstances we believe that the regulator should have indicated a certain period[21] until the third party recipient of the undue payment should become holder of the claim, for such payment made under the conditions of Article 1477 paragraph 1 letter b) of the New Civil Code to be presumed as liberating for the debtor. With regard to the second provision with character of novelty regulated by Article 1477 paragraph 1, letter c), that the payment *"was made to the person who claimed the payment based on a liberatory receipt signed by the creditor"*, we believe that in principle is clear and not ambiguous, but at the same time we admit that is likely to lead to contentious situations that will load the role of the courts or arbitral tribunals[22].

[20] We consider that this provision might have the desired effect in a society where contractual and financial and economic discipline is the watchword, which must be associated with a rigorously statutory establishment of companies, especially in terms of the share capital of companies, which should be comparable to that practiced in democratic countries. We believe that raising the threshold value of capital for all existing companies and also for those that would be established, at the level of 25,000 euros, equivalent in lei *at the date of establishment* for *general partnerships, limited partnerships and limited liability companies* and 50,000 euros, equivalent in lei *at the date of establishment* for those *limited by shares and equity*, it is not likely to restrict public access to this type of economic activity, as long as there are regulations on commercial activities as authorized individual, family or individual business that does not contain the condition of capital.

[21] Specifying a *fixed term* until a claim can be acquired for the payment not to appear as undue, is likely to not affect pecuniary interests of any person *to a* generic formulation as *"a reasonable time"*, interpreted by each person interested in their advantage;

[22] The liberating receipt emanating from the creditor, even authentic, may be contested by the real creditor, which in the support of its point of view has the right to invoke either vitiating consent slip on the issue in question, even its total or partial infringement.

As per the second paragraph of Article 1477 of the New Civil Code, it basically repeats in another form the provisions of Article 1096 paragraph 2 of the Old Civil Code.

It can be seen that in the new regulation (the New Civil Code), the payment made to an apparent creditor is governed by an article separate from the payment made to a third party. Specifically payment made to an apparent creditor is subject to the provisions of Article 1478 of the New Civil Code according to which *"Good faith payment made to an apparent creditor is valid even if later it is determined that it was not the true creditor"* and paragraph 2 states that *"The apparent creditor must return to the true creditor the payment received, according to the regulations established for repayment of benefits"*.

The regulation itself does not differ from that of Article 1097 of the Old Civil Code, which is why we conclude that the new regulations provided by Article 1478 for the payment made to an apparent creditor to be liberating must cumulatively satisfy two conditions, namely *the good faith of the person making the payment* (solvens) at the time of it, and the person who receives the payment (apparent creditor) *to have the possession of claim* at the date of payment receipt.

Like the Old Civil Code in Article 1099, the current Civil Code in Article 1479 regulates the situation where the debtor (solvens) made a payment when was given temporary interdiction imposed by the freezing measures by its creditors (accipiens). In such a situation creditors who have obtained the unavailability of patrimonial property of the debtor are entitled to ask again payment made with the debtor's disregard of preservation measures and the latter is recognized and is given the right of recourse against the receipt of the payment made with disregard of preservation measures.

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