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CONTROL OF CONSTITUTIONALITY OF LAWS IN ROMANIA – CONTRIBUTIONS TO JURISDUDENCE

Marius ANDREESCU[*]
Claudia ANDREESCU[**]

Abstract: *To the Romanian system of law, jurisprudence does not have the quality of a formal source of law. Nevertheless, a legal reality, viewed from a historical perspective, has demonstrated the essential role of judicial practice in interpreting and enforcing the law, in constructing argumentative practices, in clarifying the will of the legislator, and in discovering the less obvious meanings of legal norms and, last but not least, in unifying thought and legal practice. Therefore, jurisprudence, along with doctrine, is an important component of the Romanian system of law. Based on these considerations, we intend to highlight some aspects of constitutional jurisprudence in this paper. We underline its contribution to the constitutional review of laws in Romania. Under the Constitution of 1866, which did not regulate institutionally such a control, the courts have assumed this competence by interpreting the law and by way of jurisprudence. Important aspects of the Constitutional Court jurisprudence and of the courts in the development of constitutional review in our country are presented and analysed. We support the idea that jurisprudence currently plays an important part in the interpretation of constitutional norms, including with regard to deepening the constitutional review forms.*

Keywords: *The emergence of constitutional review in Romania, jurisprudential reasoning, the interpretation of the Constitution by case-law, the role of jurisprudence in the calibration and development of constitutional review.*

1. Brief considerations about the case-law's role in the constitutional review's appearance

Constitutional supremacy would remain just a theoretical matter if not for proper guarantees. Indisputably, constitutional justice and its particular form, constitutional review is the main guarantee of Constitution's supremacy, as is expressly stipulated by the Basic law of Romania.

Teacher Ion Deleanu believed: "*Constitutional justice may be deemed, alongside many other things, a paradigm of this century*"[1]. The emergence and evolution of constitutional justice is determined by several factors to which the doctrine refers; of these, we mention: man, as a citizen, becomes a cardinal axiological benchmark of civil and political society, and the fundamental rights and freedoms are no longer just a theoretical speech, but a normative reality as well; democracy is reconsidered, within the meaning that minority's protection becomes a key requirement of the rule of law

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[1] I. Deleanu, *Justiția constituțională*, Lumina Lex Publishing House, Bucharest, 1995, p.5.

and, at the same time, a counterweight to the principle of majority ”parliamentary sovereignty” is submitted to the primacy of law and especially to the Constitution; as a consequence, the law is no longer an infallible act of Parliament, but conditional upon the Constitution’s norms and values; last, but not least, reconsideration of the role and place of constitutions, within the meaning of qualifying them, especially as: “fundamental establishments of the governed, not of the governing people, as a dynamic act, as a continues shaping and as an act of society”[2].

Evaluation of the constitutionality of the laws is the constitutional justice’s main form and it is the basis for democracy, guaranteeing a democratic government is to be accomplished, complying with the Constitutional and law supremacy.

George Alexianu thinks legality is an attribute of modern state. The idea of lawfulness in the author’s conception is formulated as follows: all state bodies operate based on a rule of law decided by the lawmaker, which needs to be complied with.

When referring to the Constitutional supremacy, the same author claimed with full justification and in relation to today’s realities: “When modern state organizes its new look, the first idea with which it is preoccupied is to crack down the administrative abuse; hence the intervention of constitutions and jurisdictionally, the establishment of an examination of legality. Once this abuse established, another one arises, much more serious, that of Parliament. Constitution’s supremacy is then invented and various systems to guarantee it. The idea of legality thus acquires a strong strengthening leverage”[3].

Historically, the judicial review of constitutionality established in the U.S.A. in the beginning of the 19th century holds particular importance, although the Constitution does not regulate procedural rules.

The Supreme Court ruled on the case of *Marbury v. Madison* for the first time in a case of this nature, declaring the Federal Constitution as a supreme law of the state and removing an act of Congress contrary to the Federal Constitution. The Court’s decision is drawn-up by Judge John Marshall and is the basis on which the American case-law is founded in the matter of constitutional review.The rationale that the American judge employed was as follows: the judge should enforce and construe laws. Constitution is the supreme law of a state which should be enforced with priority towards any other law. As Constitution is a law, it shall be construed and enforced by the judge, including to a particular case being the subject matter referred for trial. If the law is not compliant with the constitutional rules, the latter shall be enforced given the Constitution’s supreme character.

The second period commences in 1883 with a famous decision made by the Supreme Court of Massachusetts in the Wiegman dispute. The powers of the judges increase with regard to constitutionality. The Supreme Court nowadays does not just limit itself to checking a law from the point of view of complying with the constitutional competency of the lawmaker or in terms of compliance with procedures. As of that time until now, justice has begun, in the matter of constitutional review, examining the law from the point of view of opportunity, celerity and its social and economic justification. Thus, judicial power examines, via constitutional review

[2] For more information, see Ion Deleanu, *op. cit.*, pp. 5,6.
[3] G. Alexianu, *Drept constituțional*, Ed. Casei Şcoalelor, Bucharest, 1930, p. 71.

procedure, the Parliament's whole activity and removes all the measures deemed as contrary to the legal order in a State. This way, justice is a guarantor of the Constitution's supremacy and compliance with the principle of separation of powers in a State, "for mutual review and supervision of powers refer to the existence of a state".

The European template of constitutional justice is characterized from an institutional point of view in constitutional courts or district courts. During the inter-war period, this template was noticed in: Austria (1920), Czechoslovakia (1979), Spain (1931) and Ireland (1938).After World War Two, constitutional courts and district courts were founded in most European States: Italy (1948), Germany (1949), Turkey (1961), Portugal (1976), Spain (1978) etc. Among the Eastern- European countries to have this constitutional justice template, we mention: Romania, Poland, Hungary, Czech Republic, Croatia, Macedonia, Russia, Ukraine, Lithuania etc.

In our country, constitutional review has evolved, being marked by the national particularities and successive application of the two templates presented above.

The Constitution from 1866 did not regulate the constitutional review. However, the provisions of Art. 9 of the Constitution may be mentioned, according to which the Lord "punishes and promulgates the laws" and that He "can refuse its punishment". Consequently, the head of State could refuse to promulgate a law if they believed it to be unconstitutional. Obviously, this wasn't exactly an evaluation of the constitutionality of the laws, but it is a precursor means to such a check. During the period in which the Constitution of 1866 was in force, the head of State never resorted to such a procedure.

The constitutional review made by a court of law, not by a specialized institution, different from the judicial power, was accepted on the European continent as well. The constitutional history mentions a Romanian priority in this case. Thus, during the period 1911/1912, first Ilfov County Court, then the High Court of Cassation and Justice extended their powers to check the constitutional compliance of laws in the dispute known as "the tramway matter" from Bucharest.

What is interesting is that the rationale employed by Ilfov County Court and by the High Court of Cassation and Justice in arguing the possibility to achieve, using a pretorian way, constitutional review. Essentially, the considerations were the following: 1) the Court did not assume competency ex officio to rule on the constitutionality of a law and to cancel it, since such procedure would have constituted a mixture of the judicial power in the law making powers' duties. Consequently, the court undertook this competency, since it had been referred to check the constitutionality of a law; 2) based on the duties given, judicial power's main mission is to construe and enforce all the laws, either ordinary or constitutional. If an invoked law contravenes the Constitution, the court may not refuse to settle the matter; 3) There is no provision in the Constitution of 1866 by which to expressly prohibit the judicial power's right to check whether a law is compliant or not with the Constitution. The provisions of Art. 77 of the Constitution are invoked; according to them, a judge, as per the oath taken, is under the obligation to enforce the laws and the country's Constitution; 4) Unlike ordinary laws, the Constitution is permanent and it can only be revised as an exceptional measure. As it is the supreme force law, Constitution is imposed by its authority on everybody and this is why the judge is obligated to enforce

it with priority, including in the hypothesis where the law based on which the dispute is settled is contrary to the Constitution[4].

Decisions ruled by Ilfov County Court and by the High Court of Cassation and Justice have been well received by the specialists of that time. Here is a brief comment: "*This decision was a great satisfaction to all the people of law. It is a big step in the advancement of this country toward progress, for it enshrines the principle that this country's Constitution, its foundation, the palladium of our rights and freedoms, and no one should disobey them. We are proud our justice is showing even to the justice in the Western countries what is the true path to progress in the matter of public law*"[5].

2. Contemporary aspects of constitutional case- law. Case-law of the courts

The regulatory activity of law elaboration should continue by the activity of enforcing the rules; in order to enforce them, the first logical operation to carry out is to construe them.

Both the Constitution, and the law come as an assembly of legal rules, but these rules are expressed under the form of a legislative text. This is why it is not the legislative texts that constitute an object of interpretation, but the legal texts or the one of the Constitution. A legal text may comprise several legal rules. By way of interpretation, a constitutional rule can be deduced from a constitutional text. The Constitution text is drawn-up into general terms, which influences the determination degree of the constitutional rules. The constitutional rules are identified and determined via interpretation.

What also needs to be underlined is that a Constitution may comprise certain principles that are not clearly expressed *expresis verbis*, but they can be deduced by systematically interpreting other rules.

Within the meaning of the above, the speciality literature stated: "The determination degree of constitutional rules using the basic law text may justify the need for interpretation. The Rules in the Constitution are very suited for a progress of their course, because the text is par excellence imprecise, formulated into general terms. Constitution's formal superiority, its rigidity prevent its review under very short time-spans and then the interpretation remains the only way to adopt the normative content, usually older, to the social reality which is permanently changing. As the meaning of constitutional rules is by their very nature of outmost generality, its precise determination depends on the interpreter's will"[6].

The scientific justification of the interpretation arises from the need to ensure the effectiveness of the rules comprised both by the Constitution, and by the laws via institutions mainly carrying out the activity of interpreting the rules provided by the author.

These institutions are first the courts of law, and the constitutional ones.

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[4] See „Curierul Judiciar", Nr. 32, of 29 April 1912, pp..373-376.
[5] N.D.Comşa, *Notes from* „Curierul Judiciar", Nr.32, of 29 April 1912, p. 378.
[6] I. Muraru, M. Constantinescu, E.S. Tănăsescu, M. Enache, Gh. Iancu, *Interpretarea Constituției. Doctrină şi practică*, Lumina Lex Publishing House, Bucharest, 2002, p. 67.

Checking compliance of a normative act with constitutional rules, institution which represents the constitutional review is not a formal comparison or mechanical juxtaposition of the two categories of rules, but a complex work relying on the interpretation techniques and procedures both of the law, and the Constitution.

Consequently, the need to construe the Constitution is a condition of applying it and securing its primacy. The constitutional review is essentially an activity of construing the Constitution, and the law. There need to be independent public authorities competent to construe the Constitution and to examine in this manner compliance of the law with the Constitution. These authorities are the Courts and the Constitutional Courts within the European template of constitutional justice.

In exercising its duties, the Constitutional Court regulates a work of interpreting the law and the Constitution. The constitutional court cannot amend, complete or repeal a law.

In its former drafting, before the Constitution's review, Law no. 47/1992 prohibited the Constitutional Court to construe those normative acts making the subject matter of the constitutional review. Naturally, the current regulation has removed this ban, since the activity of checking compliance of the normative regulations with the provisions of the Constitution the constitutional judge carries out is essentially a work of enforcing the law relying on the interpretation of the legal rules.

The Constitutional Court participates in the fulfilment of the legislative function in the State, but not as a positive lawmaker, but as a negative lawmaker, whose purpose is to remove the "unconstitutionality venom" from a normative act. This is why the Court, by its duties, is not subrogated to the Parliament's activity, since the amendment, completion or repealing of a law is an exclusive attribute of the Parliament.

The Constitutional Court's constructive interpretation by case- law of the Basic Law also arises from this institution's role to "support the good operation of public powers in the constitutional reports of separation, balance and mutual control". The principle of separation and balance of powers in the State is still, despite all the critiques some authors expressed, the fundament of democratic exercise of state power and the main constitutional guarantee of avoiding excess or abuse of power from any of the State's authorities.

The relationships between State's authorities are complex in nature, but they must also secure their proper operation, by complying with the principle of Constitution's legality and supremacy. To carry out this desideratum, it is very important that a state balance is maintained between all its forms and variants, including as social balance.

The separation and balance of powers no longer concerns just the classical powers (legislative, executive and judicial). Other powers are added to these, rendering new dimensions to this classical principle. The relationships between the participants in the state and social life can also cause conflicts which need to be settled in order to preserve the balance of powers. Some constitutions refer to disputes of public law (Constitution of Germany- Art. 93), to conflicts of jurisdiction between the State and autonomous communities or conflicts of duties between the State's powers, between the State and regions and between regions (Constitution of Italy – Art. 314).

Romania's Constitution speaks of judicial conflicts of constitutional nature between the public authorities [Art. 146 sub-par. c)] and regulates the mediation function between State powers that the President exercises.

The Constitutional Court is an important guarantor of the separation and balance of the State's powers, since it settles legal conflicts of constitutional nature between public authorities and by the duties it has in the matter of control of constitutionality prior to laws and checking constitutionality of regulations of chambers, it intervenes in ensuring balance between the parliamentary majority and minority, effectively ensuring the opposition's right to express itself.

The Constitutional Court is a guarantor that the fundamental freedoms and rights are complied with. This fundamental part the constitutional court plays in the rule of law is accomplished by interpreting Constitution's case-law and of the laws. As a general rule, there are three key guarantees from a constitutional point of view on the rights and freedoms of citizens established by the Constitution: a) Constitutional supremacy; b) Constitution's rigid character; c) citizens 'access to the constitutional review and to the control of legality for the acts subordinated to law.

In Romania, the procedure of the exception of unconstitutionality ensures citizens 'indirect access to the constitutional justice.

Judicial review is an important way to guarantee the Basic Law's supremacy, since the courts, by the nature of their duties, they construe and enforce the law, which also implies the obligation to analyse compliance of the legal acts subjected to judicial review with the Constitution's rules. Consequently, the courts have competency in the matter of constitutional justice. We are taking into consideration not only the general obligation of the judge to comply with and enforce the Constitution rules or the duties conferred by law to refer the constitutional court by an exception of unconstitutionality, but particularly the possibility to censure a legal act in terms of constitutionality.

Recent case-law and doctrine in the matter look into the competency of the courts to check some legal acts in terms of compliance with the constitutional rules. An unconstitutional legal act is an act issued with misuse of power.

The unconstitutionality of a legal act may be ascertained by a court if the following conditions are cumulatively met:

1. the court exercises its duties within the limits of the competency set out by law;
2. the legal act may be individual or normative; it may be binding or elective;
3. not to have to the case the exclusive jurisdiction of the Constitutional Court to rule over the constitutionality of a legal act;
4. settlement of the case should depend on the legal act being criticized for its unconstitutionality;
5. there is a pertinent, sufficient and reasonable motivation of the court on the legal act's unconstitutionality.

If these conditions are cumulatively met, the boundaries of the courts 'duties are not exceeded, but on the contrary, the principle of the Constitutional primacy applies and effectiveness is given to the judge's role of applying and interpreting the law correctly. Such a solution is justified in relation to the judge's role in the rule of law as well: to construe and enforce the law.

Fulfilment of this constitutional mission, particularly important and difficult at the same time, requires the judge to enforce the law by complying with the principle of Constitutional primacy; consequently, to evaluate the constitutionality of legal acts forming the object of the dispute referred for trial or which apply to the settlement of the case. Enforcement of the legal acts is made by the judge taking account of their legal force, by complying with the principle of Constitutional primacy. In this regard, the provisions of Art. 4 par. (1) of Law no. 303/2004 also need to be mentioned, which force the magistrates to ensure the supremacy of law through their entire activity.

Another problem is that of knowing what are the solutions that the courts can rule, by complying with the conditions shown above, where they find the unconstitutionality of a legal act. There can be two situations: In a *first hypothesis,* the courts can be directly vested with checking the legality of a legal act, as is the case of the courts of administrative disputes. In this case, the courts can find by making a decision, the absolute nullity of legal acts, on grounds of unconstitutionality. *The other situation* takes into consideration the hypothesis in which the courts are not vested directly with checking the legal act criticised for unconstitutionality, but that legal act applies for settling the case referred for trial. In this case, the courts can no longer order the cancellation of the unconstitutional legal act; however, they shall no longer enforce it to settle the case.

3. Matters related to the Constitutional Court's case-law. On the material competence

Our constitutional court's case-law brings its contribution to the constitutional review in Romania by several aspects. We would like to analyse some relevant decisions in this matter next.

The Constitutional court has construed the notion of "law" in order to determine the scope of competency of the constitutional review on normative acts. The case-law has mentioned that the term of "law" provided under Art. 146 sub-par. b) of the Constitution is not widely used consisting of all normative acts, but only in its strict meaning, of law, by which the normative act is understood, adopted by the Parliament and promulgated by the President of Romania. At the same time, this scope also includes ordinances which are normative acts adopted by the Government based on a legislative delegation. "The concept of law arises from the combination of the formal criterion to the material one, since the content of law is determined by the importance paid by the lawmaker to the regulated aspects…settlement of the exception of unconstitutionality concerning other normative acts is not of the Constitutional Court's competency, as these acts are controlled in terms of legality by the administrative disputes courts" [7]. This decision of the Constitutional Court is important, particularly because it follows that the courts, particularly the administrative disputes ones, in relation to the legal rules of competency, may check the legality of a normative act, including in terms of its constitutionality.

[7] Decision no. 435 of 13 September 2005, published in the Official Journal no. 924 of 17 October 2005.

The Court has determined that its role is to set out that the provisions of law criticised are constitutional and, at the same time, if the interpretation given to them abides by the Constitution's requirements, as such that, to the extent the legal text criticised may be conferred a constitutional interpretation, the Court shall find the legal provision's constitutionality in this interpretation and shall exclude any other possible interpretations from this application[8]. This solution of our constitutional court is important because it identifies, from a constitutional point of view, the so-called interpretative decisions of the Court, by which the legal text criticised for unconstitutionality is not removed, but interpreted within the meaning of the constitutional rules to produce legal effects.

The Constitutional Court has constantly, in its case- law, decided that it does not have the competency to control facts materialized into actions or inactions, but only the "extrinsic and intrinsic conformity of the normative act adopted with the Constitution"[9] in connection with the scope of the Constitutional Court's competency to exercise constitutional review *a priori* on the laws, especially if the constitutionality check is required by a normative act amending a law whereby it was decided by the case-law that "In accordance with Art. 146 sub-par. a) of the Constitution, the a priori constitutional review s exercised by the Constitutional Court only on the laws before they are promulgated, not on the provisions of laws in force. Irrespective of the connections that can be made between the amending text and the amended text, the Constitutional Court, on grounds of Art. 146 sub-par. a) of the Constitution, cannot make a ruling within the a priori control over the law-amending text to be submitted to promulgation and it cannot expand constitutional review over the amended text from a law in force"[10].

Decision no. 799 of 17 June 2011 made by the Constitutional Court is important, because it established competency of this court of ruling over the constitutionality of the review law, adopted by the parliament before being subjected to referendum. In this regard, it decided that: "The review law adopted by the Parliament needs to be submitted to referendum, under the conditions of Art. 151 par. 3 of the Basic Law to be examined by the Constitutional Court to find out, on the one hand, whether the Court's decision on the law draft or proposal for review of the Constitution was respected or not and, on the other hand, whether the changes and completions made to the draft or proposal for review in the procedure for parliamentary debate and adoption complies with the constitutional provisions concerning the review." [11] .

More decisions have been ruled by our constitutional court in connection with the determination of its competency of ruling on the constitutionality of decisions made by the Parliament. In this regard, we refer to an important matter arising from the case-law in connection with the scope of constitutional review in this matter. In this regard, the Constitutional Court has constantly ruled that only decisions made by the Parliament

[8] Decision no. 223 of 13 March 2012, published in the Official Journal no.256 of 18 April 2012; Decision no. 448 of 29 October 2013, published in the Official Journal no .5 of 7 January 2014.
[9] Decision no. 1237 of 6 October 2010, published in the Official Journal no.785 of 24 November 2010.
[10] Decision no. 498 of 8 June 2006, published in the Official Journal no.554 of 27 June 2006.
[11] Decision no. 799 of 17 June 2011 on the law draft concerning the review of Romania's constitution published in the Official Journal no.440 of 23 June 2011.

can be subjected to the constitutional review, adopted after this competency has been conferred by the lawmaker, affecting constitutional values, rules and principles or, as applicable, the organization and operation of authorities and institutions with a constitutional rank.[12].

At the same time, the Constitutional Court stated that the task of controlling the decisions made by the Parliament "is an expression of the Rule of Law's requirements and a guarantee of the fundamental rights and freedoms… lack of jurisdiction control is equal to a transformation of the parliamentary majority into judges of own acts"[13] In the same regard, it was claimed that accepting the contrary thesis, leading to the exclusion of the exercise of constitutional review of the decisions made by the Parliament, made by violating the express provisions of the law, would lead to the placement of the supreme representative body of the people- the Parliament- above the law and accepting the idea that it is precisely the authority which legitimately adopts the laws constitutionally may breach them without any sort of punishment.[14]

One of the most important problems to have made the object of analysis by the Constitutional Court refers to the competency of this court of ruling on the conformity of a normative act with a legal act of the European Union institutions. In this regard, the case-law has constantly stated that the constitutional court has no competency to carry out a conformity control between a directive and the national normative act whereby it is transposed. A potential non-conformity of the national act to the European one does not implicitly draw the unconstitutionality of the national act of transposition. The competency of conferring greater protection in the national law towards the legal instruments of the European Union devolves on the lawmaker.[15]

In connection with the constitutionality check of the decisions ruled by the High Court of Cassation and Justice in settling appeals in the interest of the law, the Constitutional Court has ruled in its case-law that according to the legal rules in force, it has not such competency[16]). However, if, by a decision ruled in an appeal for the interest of the law, a legal text is given a certain interpretation, it cannot exclude the competency of the Constitutional Court of analysing the respective text, in the interpretation given by the court of last instance. "From the perspective of relating to the Constitution's provisions, the Constitutional Court checks the constitutionality of the applicable legal texts, in the interpretation enshrined in the interest of the law. Admitting a contrary thesis contravenes to reason of existence itself of the Constitutional Court, which would deny its constitutional role, accepting that a legal text is applied under the limits which would collide with the Basic Law[17]."

[12] Decision no. 53 of 25 January 2011, published in the Official Journal no.90 of 3 February 2011. See also : Decision no. 54 of 25 January 2011, published in the Official Journal no.90 of 3 February 2011; Decision no. 307 of 28 March 2012 , published in M.Of.no.293 of 4 May 2012; Decision no. 783 of 26 September 2012, published the Official Journal no.684 of 3 October 2012.
[13] Decision no. 727 of 9 July 2012, published in the Official Journal no.477 of 12 July 2012; Decision no. 80 of 16 February 2014, published the Official Journal no. 246 of 7 April 2014.
[14] Decision no. 251 of 30 April 2014, published in the Official Journal 376 of 21 May 2014).
[15] Decision no. 415 of 7 April 2011, published the Official Journal no.471 of 5 July 2011.
[16] Decision no. 778 of 16 June 2011, published the Official Journal no.668 of 20 September 2011.
[17] Decision no. 854 of 23 June 2011, published the Official Journal no.672 of 21 September 2011.

The case-law has established that the constitutional disputes court may rule in connection with the constitutionality of a repealing rule, seeing as, on the one hand, the presumption of constitutionality of the law is a relative presumption and, on the other hand, the provisions of Law no. 24/2000 lay down that it is impossible to reinstate the initial normative act by repealing of an prior repealing act.[18]

With regard to the competency of the Constitutional Court of settling legal disputes of constitutional nature, several relevant decisions have been ruled.

A first aspect is the definition given by the Constitutional Court to the legal dispute of constitutional nature: "The legal conflict of constitutional nature implies specific acts or actions whereby one or more authorities assign themselves powers, duties or competencies which, according to the Constitution, belong to other public authorities or the omission of public authorities, consisting in the declination of their jurisdiction or refusal to carry out certain acts falling within their obligations". Consequently, according to the court's case-law, legal disputes of constitutional nature are not limited to just disputes of positive or negative jurisdiction, which could create institutional blockages, but aim at any conflicting legal situations whose occurrence reside directly in the Constitution's text.[19].

The case- law has set out that political parties, public persons of public law are not in the category of public authorities that are susceptible of being parties involved in a legal dispute of constitutional nature which, according to the provisions of Art. 8 par. 2 of the Basic Law, contributes to the definition and expressing of the public will of the citizens. Hence, it is the Constitutional Court's opinion that political parties are not public authorities. Also, parliamentary groups as well are not public authorities, but structures of the chambers of Parliament. "A potential conflict between a political party or a parliamentary group and a public authority does not fall within the category of conflicts that can be settled under the jurisdiction of the Constitutional Court, as per Art. 146 sub-par. a) of the Constitution".[20]

By the same decision, the Constitutional Court ruled that opinions, judgments of value or allegations of a public dignity mandate holder- as is the President of Romania, or the leader of a public authority- concerning other public authorities cannot, by themselves, constitute legal disputes between public authorities, because they cannot trigger institutional blockages, if not followed by actions or inactions which may prevent these public authorities from carrying out their constitutional tasks.

4. Some conclusions

In our opinion, the Constitutional Court's role as a guarantor of the Basic Law should be enhanced by new duties aiming at limiting the excess of power of the State's authorities. We do not agree to what the specialty literature states, i.e. that a potential improvement of constitutional justice could be achieved by reducing the constitutional

[18] Decision no. 20 of 2 February 2000, published the Official Journal no.72 of 18 February 2000.
[19] Decision no. 901 of 17 June 2009, published the Official Journal no. 503 of 21 July 2009.
[20] Decision no. 53 of 28 January 2005, published the Official Journal no. 144 of 17 February 2005.

disputes court's duties[21]. It is true that the Constitutional Court ruled some questionable decisions in terms of abiding by the limits of exercising the duties incumbent upon it under the Constitution, by undertaking the positive lawmaker role.[22]. Reduction of the duties of the constitutional court for this reason is not a solution as legal basis. Surely, reducing the duties of a state authority leads to the removal of the risk of faultily exercising such duties. This is not how the activity of a state authority is improved in a rule of law, but by searching for legal solutions of carry out the duties which turn out to be necessary to the state and social system under better conditions.

Proportionality is a fundamental principle of the law explicitly enshrined by constitutional, legislative regulations and international legal tools.

In a future review of the basic law, it would be useful to add another paragraph at Art. 1 of the Constitution, foreseeing that "*The exercise of State power should be proportional and non-discriminating"*. This new constitutional regulation would become a genuine constitutional obligation for all State authorities, and they would exercise their duties as such that the measures adopted would register within the limits of the discretionary power recognized by law. At the same time, the possibility is created for the Constitutional Court to penalize the abuse of power in the Parliament and Government's activities, via the constitutional review of laws and ordinances, using the principle of proportionality as a criterion.

Among the Constitutional Court's duties can be included the one of ruling on the constitutionality of those administrative acts exempted from the legality control of the administrative disputes court. This category of administrative acts, to which Art. 126 par. 6 of the Constitution refers, along with the provisions of Law no. 544/2004 of administrative-disputes are particularly important to the whole social and state system. Consequently, constitutionality review is necessary since, in lack thereof, discretionary power of the issuing administrative authority is limitless and it may lead to the excessive narrowing of the exercise of the fundamental rights and freedoms or to the breach of important constitutional values. Our constitutional court should, for the same arguments, be able to review the President's decrees instituting the proceedings of referendum, in terms of their constitutionality.

The High Court of Cassation of Justice has the competency to adopt decisions in the appeal procedure for the interest of the law, which are binding for courts. If there is no legality or constitutionality control, practice has demonstrated that the court of last resort has, in numerous situations, exceeded its duty of construing the law and, by such decisions, has amended or completed normative acts, acting like a genuine lawmaker, thus violating the principle of separation of powers in the State[23]. We believe that, under these circumstances, the Constitutional Court must be given the competency to rule on the constitutionality of the decisions made by the High Court of Cassation and

[21] G. Vrabie ,*Natura juridică a curților constituționale şi locul lor în sistemul autorităților publice*, în Revista de Drept Public,nr.1/2010 p. 33.

[22] As an eample, we refer here to the Decision no. 356/2007, published the Official Journal no. 322 of 14 May 2007 and to the Decision no. 98/2008 published the Official Journal no. 140 of 22 February 2008.

[23] For more information, see Andreescu Marius, *Constituționalitatea recursului în interesul legii şi ale deciziilor pronunțate*, în Curierul Judiciar nr. 1/2011, pp. 32-36.

Justice adopted in the appeal proceedings for the interest of the law, in order to avoid the abuse of power from the court of last instance.

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Decision of the Constitutional Court no. 251 of April 30, 2014, published in the M.Of. no.376 of May 21, 2014. *Decision of the Constitutional Court no. 1237 of 6 October 2010*, published in the M.Of. no.785 of November 24, 2010;
Decision of the Constitutional Court, no. 356/2007, published in the M .Of. no..322 of May 14, 2007.

MARRIAGE IN THE ROMANIAN PRIVATE INTERNATIONAL LAW

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Abstract: *The 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.*

The study aims to answer the following questions:

1. How do we primary qualification of the notion of "marriage" in Romanian private international law?

2. What is the law applicable to the substantive conditions necessary for the marriage to be concluded in accordance with the provisions of the Romanian Civil Code?

3. What law governs the formalities of marriage in Romanian private international law?

4. What law governs the nullity of marriage and the effects of this nullity under the provisions of the Romanian Civil Code?

Keywords: *Romanian civil code, Romanian private international law, primary qualification of the notion of "marriage", law applicable to the substantive conditions necessary for the marriage, law governs the formalities of marriage, law governs the nullity of marriage.*

I. What do we mean by the notion of classification in Romanian private international law?

1. *The notion of classification and the types of classification*[1]

Application of private international law is impossible without deciphering the meaning of the legal rules specific to this branch or without classifying the test cases on categories. This dual mental operation that the judge has to do is called **classification**[2].

The **notion** of classification is defined by authors differently. According to a first opinion the classification is defined *as the operation performed by an authority that is required to solve a conflict, when asked to find the conflict category of the situation, in order to decide what rule should be applied*[3]. According to another opinion, the

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[1] N., C., Aniței. *The law applicable to matrimonial agreement. Romanian private international law*, Editura Lambert Germania, 2013, pp1-60.

[2] N., C., Dariescu. *Raporturile patrimoniale dintre soți în dreptul internațional privat (Patrimonial Relations between Spouses in Private International Law),* C. H. Beck Publishing House, Bucharest pp. 1-45.

[3] M., V., Jakotă. *Drept internațional privat (Private International Law),* vol. I, Chemarea Foundation Publishing House, Iași, 1997, p. 210; O., Ungureanu. C. Jugastru. A. Circa. *Manual de drept internațional privat (Private International Law),* Hamangiu Publishing House, Bucurestii, 2008, p. 86. .

classification *establishes the meaning of the notions of legal rules on the subject of regulation and the law applicable to the legal relationship.* In a reverse operation, through classification, they determine the legal category to which a fact situation belongs and indicate the competent law[4]. According to a last opinion, classification is defined in two ways: starting from the conflict of laws towards the facts (legal relationship) or vice versa. Thus:

a. the classification *is the logical-judicial operation of determining the exact full meaning of legal terms expressing the content and relations of the conflict of laws, in order to see whether a legal relationship (a state of facts) is included (or not) among these terms*;

b. the classification is *the interpretation of a legal relationship (of a specific fact situation) in order to see the to which conflict of laws, in terms of content and relationship, it belongs*[5].

In foreign literature classification is defined differently. Thus, according to a first view[6], classification is defined as *the legal operation performed to include a specific legal situation in the contents of a conflict of laws.* This operation gives rise to a conflict between the contents of the conflict of laws belonging to the same legal system, and to a classification conflict when another system of law, which relates to the facts, places it within the content of a conflict of laws different from that chosen by the legal system of the forum. According to another point of view[7], the classification means defining the terms used by the rules of private international law: *nationality (citizenship), domicile, residence, capacity, family rights, inheritance rights, etc*. ..

In conclusion, the notion of **classification** can be seen from two perspectives:

1. *on one hand it explains the meaning of concepts used by the conflict of laws in terms of content and relationships*;

2. *on the other hand, it represents the operation of determining the conflict of laws applicable to the specific legal situation by including the situation in the content of one of the conflicting laws of the forum.*

Classification is important for private international law because on the one hand, depending on the way a relationship is classified, a fact, a situation, a relation eventually depends on the solution of the conflict of laws, and on the other hand, the settlement of the conflict of classifications is prior to resolving the conflict of laws. For example, a French couple who live in Romania and who have acquired movable and immovable property here, die without heirs. The question: to whom such property will be assigned and by which title? arises. Will their assets become the property of the State whose citizens they are or of the State in which the heritage assets are? We should classify the state's right in relation to the vacant property. If we think that the state's right on the vacant property is a right of inheritance, then such property will be

[4] O., Ungureanu. C. Jugastru. A. Circa. *Manual de drept internațional privat (Private International Law),* Hamangiu Publishing House, Bucurestii, 2008, p. 87.

[5] D., Al., Sitaru. *Drept internațional privat* – Tratat *(Private International Law- Treaty)*, Lumina Lex Publishing House, Bucharest, 2001, p.73 – 74.

[6] B., Audit. *Droit international privé,* 2e édition, Economica Publishing House, Paris, 1997, p. 170.

[7] H., Valladão. *Développement et intégration du droit international priv é, notamment dans le rapports de famille (Cours de droit international privé) dans Recuiel des Cours L'Academie de droit international* de la Haye, vol. 133, 1971/II, p.488.

assigned to the State whose citizens the deceased people were (in this case the assets become the French state property). If the property goods become part of the state patrimony as waifs, *res nullius*, they must be assigned with this title to the state on whose territory they are (the assets will be assigned to the Romanian state).

In private international law classification is of **two kinds**[8]:

1. primary classification, by which the law applicable to the relationship with an extraneity nature is established, is qualified according to *lex fori*. So, after the primary classification, the general bilateral conflict of laws is turned into a unilateral particular rule, in which the relationship makes reference to the law of a particular state.

2. *secondary classification* subsequent to primary qualification, performed after the primary classification, is a matter of domestic law. So, it is given by *lex causae*. Performing the secondary classification in the above case means analyzing the conditions of validity of the consent to marriage by the French Civil Code rules.

2. The law based on which the classification is performed

In private international a highly debated problem **is the law based on which the classification is performed**[9]. In principle, classification is performed based on *lex fori*, but there are opinions that support the classification according to *lex causae*.

Classification under the law of the forum – *lex fori* – is supported by most authors who base their opinion on the following arguments[10]:

1. the conflicts of laws are part of the law of the court system, namely they are national standards. The court applies its own system of conflict of laws in principle. So, the court will qualify based on *lex fori*, using the principle "the interpretation belongs to the one that elaborated the rule" (*ejus est interpretari, cujus condere*);

2. classification is a problem prior to solving the conflict, and the operation can be performed only after the law of the forum.

However, there are some circumstances in which the classification cannot be performed according to the law of the forum. **Exceptions** allowed refer to[11]:

1. *the autonomy of the will* according to which parties are free to choose by agreement the law applicable to the contract and the classifications indicated in question;

2. *secondary classification* is performed according to the law designated to be applied to the legal relationship;

3. *immovable property*- governed by the law of the place where property is located namely by *lex rei sitae* and classification will be given by this law;

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[8] O., Ungureanu. C. Jugastru. A. Circa. *Manual de drept internațional privat (Private International Law),* Hamangiu Publishing House, Bucurestii, 2008, pp. 88-90.

[9] N. C., Dariescu. *Calificarea noțiunii de relații patrimoniale dintre soți. Izvorul acestor relații, (Classification of the notion of property relations between spouses. The source of this relationship*), Journal of Legal Studies, no. 1-2/2007, Venus, Iaşi Publishing House, p. 57-65.

[10] O., Ungureanu. C. Jugastru. A. Circa. *Manual de drept internațional privat (Private International Law),* Hamangiu Publishing House, Bucurestii, 2008, p.89.

[11] O., Ungureanu. C. Jugastru. A. Circa. *Manual de drept internațional privat (Private International Law),* Hamangiu Publishing House, Bucurestii, 2008, p 90.

4. *referral* – the operation by which the forum rules make reference to the foreign law, whose rules whose conflict of laws refer back to the court law or forward the law of another state. As such, the admission by *lex fori* of the referral involves considering the classification given by the foreign law;

5. *legal institutions unknown* to the law of the forum (for example, German law allows children born out of wedlock to claim some money from the alleged father);

6. *citizenship* – individual's belonging to a certain state – a rule that will be considered only when the person has only one nationality;

7. *autonomous qualification* – the requirements specific to the relations with an extraneity nature, and in particular the promotion of international economic relations may require certain classifications distinct from the laws that are in conflict, so as to avoid difficulties and for the harmonization of solutions, sometimes the concepts included in an international convention are described in the text of agreement.

Classification by the cause law – *lex causae* – is supported by a number of specialists[12]. Cause law is the foreign law competent to be applied to a legal relationship or to one of its elements. The arguments used by specialists are:

1. the normal competent foreign law cannot be applied regardless of its own classification;

2. the protection of the rights arising under the rule of foreign law is ensured by its correct application.

Regarding the law after which secondary classification is performed, being a matter of intern law, the majority of private international law doctrine indicates *lex causae*, namely the law that has the closest connection with the facts. Thus, the authority informed through a report on private international law regarding the patrimonial effects of marriage finds with the help of its own conflict of laws that a foreign law is applicable. The notions of: *marriage and patrimonial effects of marriage* will gain new meanings, in agreement with the foreign legal system.

The rules of private international law are regulated in the new Civil Code, Book VII entitled "Provisions of Private International Law", Chapter II is called "The Family".

Regarding the **Romanian private international law**, the primary classification is performed by *Romanian law*, *the law of the forum* for any Romanian public authority. Thus, according to art.2558 of the new Civil Code "When the determination of the applicable law depends on the classification that has to be given to an institution of law or to a legal relationship, we should consider the legal classification established by the Romanian law (Article 1). In case of referral, the classification is made by the foreign law that made reference to the Romanian law (Article 2). The movable or immovable nature of property is determined according to the law of the place where it is, or where appropriate, where it is located (paragraph 3). If the Romanian law does not know a foreign legal institution or knows it under a different name or with a different content, they can consider the legal classification performed by the foreign law (paragraph 4). However, when the parties themselves determine the meaning of concepts in a legal

[12] Y., Loussouarn. P., Bourel. Précis de *Droit international privé,* Editions Dalloz, Paris, 1996, p. 201-203.

act, the classification of these notions will be made respecting the parties' wishes" (paragraph 5). Two observations must be made: first, that the term "institution of law" must be interpreted *lato sensu*, including legal terms as well, and the second that the exceptions in paragraphs 2,3,4,5, are strictly interpretative. So, according to art 2558 paragraph 1 of the new Civil Code, the primary classification is always performed based on the Romanian law, namely in accordance with the terms used by the Romanian legal system. Also, the classification of an issue as procedural or substantive is made by the Romanian law.

II. Primary qualification of the notion of marriage[13]

1. The notion of marriage in Romanian family law

According to art. 2558 paragraph 1 of Civil Code, primary qualification is always made according to the Romanian law, namely in accordance with the terms used by the Romanian legal system. So, to clarify the meaning of the conflict of laws from art. 2585-2587 in the Civil Code it is necessary to perfrom the primary qualification of the notion of marriage in Romanian law.

According to paragraph (1) of art.259 of the Civil Code, marriage is the consensual union between a man and a woman concluded under the law. The term 'union' from the definition suggests the double legal sense of "marriage", that of legal act and legal status. It is noted that the new regulation rejects the idea of marriage between persons of the same sex.

The purpose of marriage, according to paragraph (2) of the article thereof, is to "establish a family." The legislator's perspective on marriage remains faithful to the Christian tradition and the conception behind the Napoleon Civil Code, in the context of the twenty-first century, marriage can be a means to unite the destinies of two people, without requiring them to necessarily give birth to offspring.

From the legal definition of marriage the following characters result[14]:

• marriage is *a union between a man and a woman* (a union that is based on the consent of those who get married);

• marriage is *freely consented* – express the free consent of those who are married;

• marriage is *monogamous* – a characteristic naturally arising from the foundation of marriage, namely from the mutual affection of the spouses;

• *marriage is concluded under the conditions required by law* (namely it is concluded only in a certain place, before a state authority, in a day set beforehand and in the effective and concomitant presence of both future spouses, with the possibility for the public to assist);

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[13] N., C., Aniței. *The law applicable to matrimonial agreement. Romanian private international law*, Editura Lambert Germania, 2013, pp1-60.

[14] N.C. Anitei. *Dreptul familiei (Family Law),* Hamangiu Publishing House, Bucharest, 2012, pp. 30-31; I.P. Filipescu, A.I. Filipescu*, Tratat de dreptul familiei (Family Law Treaty*), 7th edition, All Beck Publishing House, Bucharest, 2002, p. 14-15.

• *marriage has a civil character* (its conclusion and registration are the exclusive responsibility of the state authority);

• *marriage is concluded for life* (basically the marriage bond is designed to last between spouses throughout their lifetime);

• *marriage is based on full equality of rights between men and women* (equality that relates both to the conditions under which marriage is concluded and to the relations between spouses or between them and their children);

• *marriage is concluded* in order to establish a family.

The criteria mentioned above helps the Romanian legislator to establish whether a psychological and a social relationship between two people is or is not a marriage. These criteria are part of the Romanian private international law public order because they are deeply rooted moral convictions, included among the fundamental prejudices related to the three essential elements of human destiny: birth, marriage and death. The roots of the marriage features, deeply rooted in the Romanian mentality, are highlighted, acknowledged and proclaimed both by the Romanian Orthodox Church[15] and by the Romanian Catholic Church[16] and by the Protestants. In conclusion, for Christians, marriage is the freely consented union between a man and a woman established to ensure the welfare of spouses, and to give birth and bring up children in the spirit of the Gospel (namely to promote the welfare of children).

2. The scope of the notion of marriage in Romanian private international law

In order to perform the primary classification of the notion of **marriage** in Romanian private international law[17] we have to start from the meaning that this notion plays in the Romanian law, specifically in *family law*.

According to art.259 paragraph 1 of the new Civil Code "Marriage is the union freely consented between a man and a woman, contracted under the law."

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.

[15] Pr. D. Belu, Pr. I. Tudoran, I. Iorgu, *Catehismul creştinului drept credincios (The Catechism of the Christian Believer)*, The Romanian Orthodox Archdiocese from Iasi Publishing House, Iaşi, 1957, p. 49-50.

[16] I. Gramunt, *The definition of marriage in the Code of Canon Law*, article found on Internet at the following address: http://www.catholic.netz RCC/Periodicals/Homiletic/06-96/2/2html.

[17] N., C., Dariescu. *Raporturile patrimoniale dintre soții străini având aceeaşi cetățenie şi cu domiciliul în România (Economic Relations between Foreign Spouses of the Same Nationality and residing in Romania),* Lumen Publishing House), Iaşi, 2006, p. 21-28.

3. The notion of marriage in different legal systems[18]

Marriage is defined in French law as a union between two persons of different gender, contracted with the observance of all legal solemnities. Marriage is regulated in the French Civil Code titles V-IX. Marriage is such a **union**, even if it was not followed by its consumption or cohabitation. However, it is considered that for the existence of a valid marriage under French law, the following three conditions must be fulfilled:

– the parties who conclude the marriage have to be alive and to be of a different gender;

– the parties should be able to give their consent freely and effectively consent to become husband and wife;

– expressing consent, that *union* has to be solemnly celebrated[19].

Under Spanish law[20], marriage is defined as the civil status act which gives rise to personal and patrimonial obligations between spouses. This act is the legal basis of the family and a determinant element of the filiation regime.

In the tradition of *English joint law*[21], marriage is a contract based on the private and voluntary understanding between a man and a woman to become husband and wife respectively. Currently, the English case law regards marriage as an association that gives rise to fixed and equal shares of the spouses on the property of the family (namely on the property earned by each spouse) [22]. In the UK, the source of the legal regulation of marriage is the Marriage Law of 1949.

The legal definition of *marriage* (which is regarded as a contract) in the American system is taken from the customary English law. American family law generally responds to social requirements that future spouses have to meet:

– spouses must have the full capacity to assume financial responsibilities in order to prevent the state from subsequently offer material support for the maintenance of women and children;

– spouses should be encouraged to conclude a marriage for the purpose of procreation of viable beings and the limitation of sexual activities within the boundaries of marital relationships[23].

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[18] N. C. Dariescu. *Raporturile patrimoniale dintre soti in dreptul international privat roman (Patrimonial Relations between Spouses in Romanian Private International Law)*, C.H. Beck Publishing House, Bucharest, 2008, pp. 18-20.

[19] I. Chelaru, *Căsătoria şi Divorţul. Aspecte juridice civile, religioase şi de drept comparat (Marriage and Divorce. Civil, religious, and comparative law issues),* Acteon Publishing House, Iaşi, 2003, p. 478.

[20] J. C. Fernández Rozas, S. Sánchez Lorenzo, *Derecho internacional privado, segunda edición,* Ed. Civitas, Madrid, 2001, p. 451.

[21] Notions about marriage in English law found at the web address: http://www.law.cornell.edu/wex/index.php/Mariage#mariage:_an_overview.

[22] L. Collins *ş.a.*, *Dicey and Morris on the Conflict of Laws, thirteenth* edition, vol. I, Ed. Sweet & Maxwell, London, 2000, p. 1067.

[23] I. Chelaru, *Căsătoria şi Divorţul. Aspecte juridice civile, religioase şi de drept comparat (Marriage and Divorce. Civil, Religious and Comparative Law Legal Aspects),*, op. cit., p. 466.

The Family Code of the Russian Federation[24] of December 29, 1995 in Article 1 paragraph 3 and article 12 paragraph 1 (together with the Federal Act on Civil Status Documents[25], Article 24-30) defines marriage as the union between a man and a woman.

In the Italian doctrine, civil and religious marriage is "a bet or a lottery" for two people who put the being into the game and assets of each one along a life-long game[26].

Since 1960, in most countries, marriage law has undergone ample changes. The new regulations have been adopted, for example by France, England, Germany, Russia, etc.

Marriage[27] can be concluded in civil or religious form. So, there are states where:

– legal effects can only produce marriages in *civil form* (such as in Germany, France, Switzerland, Japan, Romania, etc.);

– legal effects may produce both marriages *in civil form* and marriages concluded *in religious form* (such as in Denmark, Spain, Italy, some provinces in Canada, some US states);

– legal effects can only produce the marriages concluded *in religious for*m (such as in Israel, Iraq, Iran, some provinces in Canada, some US states).

In conclusion, marriage can be concluded only in accordance with the substantive and legal conditions established by law and which are regulated differently by each state. However, we can see that there are a number of *common substantive and form conditions*:

– *marriage is a union between a man and a woman* – a union based on the consent of those who marry, and once concluded, it is governed by the legal rules that have become applicable by such consent (Russia, Louisiana, Romania, Italy, etc.);

– the parties *must be major* to be able to get married. The legal age to get married in most states is 18 years old, but there are exceptions. Thus, for example, the legal age to get married in France is 18 for men and 15 for women; in England the legal age to be able to marry is 16 for both men and women. In all states there are exceptions to the majority rule as the legal age one has to have in order to be able to get married. This can be reduced for good reasons;

– *marriage is freely consented* – expression of free consent of those who marry is guaranteed by legal provisions that allow the marriage to be concluded based on mutual affection of future spouses (France, England, USA, Romania, Italy, etc.);

– *marriage is concluded with the purpose of establishing a family*. Establishing family relationships is the content of marriage, the necessary and determinant cause of it (France, England, USA, Romania, Italy, etc.).

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[24]The Family Code of the Russian Federation can be found at the following address: http://www.gay.ru/english/communty/law/review00.htm.

[25] I. Chelaru, *Căsătoria şi Divorţul. Aspecte juridice civile, religioase şi de drept comparat (Marriage and Divorce. Civil, Religious and Comparative Law Legal Aspects),*, op. cit., p. 448.

[26] A. Galizia Danovi, M.S. Sacchi, *Matrimonio & Patrimonio*, Ed. Etas RCLibris, Milano, 2003, p. 9.

[27] V. Cebotari, *Dreptul familiei* (*Family Law*) Tipografia Academiei de Ştiinţe a Republicii Moldova, Chişinău, 2004, p. 30-34.

4. The notion of "polygamy"

Polygamy[28] is a marriage relationship in which a man (a woman) has at the same time several wives (husbands).

Polygamy[29] is of three kinds:

· Polygyny – where a male person marries several women;

· Polyandry – in which a female person marries several men;

· Group marriage – where more people of the same gender marry more people of the opposite sex.

In case of Mormons women are the ones who choose their husbands, being inspired in their choice by God. Men must remain virgin and be missionaries until they are chosen by future wives. Apprenticeship is mandatory for males and lasts for 2 years. During this time, young people are not allowed to flirt and must stay an arm's length away from girls. [30]

Polygyny is allowed in case of Muslims. The rules set by the Qur'an provide: "Take as wives those women whom you like, two, three or four, but if you fear you will not be just, then take only one." (Qura'an 4: 3). At present, polygyny is an exception and we find it in the following situations: either the man is an old man with outdated concepts and with other examples of such marriages in the family, or he is extremely rich and is able to financially support two or more wives without the slightest difference, for otherwise he would commit a sin. From an Islamic point of view, the husband has the duty to announce the first wife of his decision so that she decides whether to accept or seek for divorce.[31] [4] According to Islamic law, men have the right to have up to four wives at the same time.

Polygyny is widespread throughout the African continent, being a common practice especially in Kenya, Nigeria, South Africa and Sudan, but in Asia there are also countries which allow this: Philippine, India, Iran and Pakistan.

The Central Party in Sweden, one of the four parties proposed the legalization of polygamy. The idea provoked indignation and the proposal was withdrawn.

Canada appealed to the UN refugee agency to stop sending those refugees who practice polygamy to Canada.[32]

Britain does not recognize polygamy. However, a Muslim wife married to a polygamist in the country of origin, coming as a "refugee" with children in England, will be able to claim benefits as single mother (although she is married and the marriage is recognized by Islam) while the original pair, the polygamist man the first wife, will continue to receive benefits as a monogamous husband and wife. In this

[28] https://ro.wikipedia.org/wiki/Poligamie(consultat la data de 5 iunie 2019).
[29] https://ro.wikipedia.org/wiki/Poligamie(consultat la data de 5 iunie 2019).
[30] https://adevarul.ro/life-style/stil-de-viata/casatoria-lamormoni-poligamia-regulile-controversate-comunitatii-religioase-1_54d4df61448e03c0fd572b80/index.html (consultat la data de 5 iunie 2019).
[31] https://writertime.wordpress.com/2013/06/18/poligamia-in-tarile-arabe/(consultat la data de 5 iunie 2019).
[32] https://www.activenews.ro/externe/The-Economist-Problema-Canadei-cu-poligamia-sau-cum-feminismul-si-multiculturalismul-fac-o-combinatie-ciudata-150190 (consultat la data de 5 iunie 2019).

context, the polygamist man collects all the benefits from the wives "single mothers" because the Muslim woman is not entitled to opinion.

5. What transformation did the notion of marriage face in the last century?

The definition of the concept of marriage in the last century at the international and European level has undergone spectacular transformations[33] since same-sex marriages are regulated in different states that are either EU Member States, non-EU Member States and different states on other continents.

Of the 28 EU Member States 22 states legalized *free unions and homosexual marriages*. Thirteen of the 28 EU states allow marriage and nine others have accepted the civil partnership.

The Netherlands became the first country in the world to legalize same-sex marriage in 2001, followed by Belgium, Spain, Norway, Sweden, Portugal, Iceland, Denmark, France, Great Britain, Luxembourg, Ireland, Finland, Malta, Croatia and Germany.

In more than twenty states, majority European, they discuss the recognition of this status, legally acquired in a state that accepts homosexual marriage, in states the internal legal order of which prohibits such unions.

Bulgaria, Latvia, Lithuania, Poland, Slovakia and Romania are the countries of the European Union that do not allow either same-sex marriage or civil partnerships.

The first European country to ban same-sex marriage is Bulgaria in 1991. Lithuania, Belarus and Moldova, Ukraine, Poland, Latvia and Serbia, Montenegro, Hungary, Croatia and Slovakia followed as states that have defined marriage by constitution as a union between a man and a woman.

Some of the states that have *legalized free unions and homosexual marriages* also admit the adoption of a child by these couples.

Last year in *Obergefell vs. Hodges*, the US Supreme Court ruled that the American Constitution guarantees to the same-sex people the right to marry in similar conditions to opposite sex people and that states cannot reserve the right to marry only for heterosexual couples[34].

This year by the decision of the Court of Justice of the European Union *in case C-673/16, Relu Adrian Coman and others.* vs. *the General Inspectorate for Immigration and the Ministry of Home Affairs as immediate implementing rule* Romania is obliged to recognize, within the meaning of the provisions of Union law on the freedom of residence of Union citizens and members of their families, the right to stay in the territory of our country for the spouse of the same sex, being justified by the fact that the *term 'spouse' of Article 2 (2) (a) of Directive 2004/38, in conjunction with Articles 7, 9, 21 and 45 of the Charter, includes the same-sex spouse from a state which is not a*

[33] C Hageanu reference 3 "*We refer here to the levelling the treatment of legitimate and natural children, establishment of the principle of equal rights for spouses, the liberalization of divorce, legalization of free unions and homosexual marriages*" p.149.
[34] https://www.juridice.ro/419428/despre-casatoria-si-adoptia-pentru-homosexuali.html

member of the Union, of a European citizen with whom the citizen has been legally married under the law of a Member State other than the host State?

The Court has stated that while Member States are free to authorize or not to authorize homosexual marriage, they cannot impede the freedom of residence of a citizen of the Union by refusing to grant its same sex spouse who is a non-EU country national a derived right of residence on their territory.

Moreover, the legal effects of the judgment of the CJEU[35] *in case C-673/16, Relu Adrian Coman and others. c The General Inspectorate for Immigration and the Ministry of Home Affairs on June 5, 2018* apply to both EU Member States that do not have legal provisions on homosexual couples and EU Member States that have materialized civil partnerships through legal regulations

It is noted that in case of registered partnerships we have two situations:

1. *free unions;*

2. homosexual marriages.

The end of the twentieth century has been marked by spectacular transformations in family relationships such as *equal treatment of legitimate and natural children, the establishment of the principle of equal rights for spouses, the liberalization of divorce, and the legalization of free unions and homosexual marriages*[36].

6. *The notion of "unmarried couple"*

The notion of "unmarried couple" is not defined. In the EU member states different terms are used for the notion of "unmarried couple": cohabitation, concubinage, free union, unmarried couple, couple in fact, registered partnership, registered contract.

Most EU Member States do not define in their legislation the notion of "unmarried couple". However, jurisprudence stipulated that: either there is concubinage when two people live together in a stable and continuous way (France is the case), or this union is characterized by a "residential, economic and sexual community" where the main difference between union and marriage is exclusively, the will regarding this couple relationship (the case of Austria, Belgium and Greece).

Currently in EU Member States it can be noticed that there are two categories of unions:

– the unmarried couple referred to differently as "couple in fact", "concubinage", "cohabitation", "free union" and which is not regulated by legal provisions;

– the unmarried couple, regulated by legal provisions and between which there is a contract or partnership registered by the competent public authority (partnership-contract and partnership-institution).

[35] interprets EU law to ensure that it is applied in the same way in all member countries and resolves **legal disputes** between national governments and European institutions

[36] C Hageanu reference 3 "*We refer here to the levelling the treatment of legitimate and natural children, establishment of the principle of equal rights for spouses, the liberalization of divorce, legalization of free unions and homosexual marriages*" p.149.

III. The scope of the notion of marriage in Romanian private international law [37]

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 asked16 the following question: How should the Romanian authorities deal with those human relations which despite the fact that they acquired abroad the status of marriage, do not contain the fundamental characteristics of marriage in Romanian law? The answer to this question is topical, we believe, after the entry into force of the new Civil Code. Thus, this issue was answered in the research literature by the attenuating effects of public order theory, which states: "We shall recognize the right born abroad, even if the law competent there and applied is contrary to a fundamental principle of Romanian private international law even if the act was handled differently than the Romanian law provides, for example: a marriage concluded by mutual consent or a marriage concluded by religious consent. [38]

The same view is supported by another author "...there may be some legal relations which could not have been born under the local law, because *the public order* would have opposed it; once they are born in a foreign country, they are recognized even within the law of the forum territory." After explaining the way in which a polygamous marriage is recognized in a country that applies the principle of monogamy, the same expert makes the following statement: "The attenuating effect of invoking public order in the matter of rights acquired abroad does not occur in all cases, namely automatically. The court will decide in each case whether the right acquired abroad will become effective in the forum country, and in the affirmative case they will determine to what extent these effects will occur, namely what is that the attenuating effect of invoking public order assumes. [39] This statement reconciles the attenuating effects of public order theory of private international law with the ambiguous wording[40] of art. 2567 of the Civil Code which states that: "The rights earned in a foreign country are respected in Romania, except those which are contrary to Romanian private international law public order."

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[37] N., C., Aniței.*The law applicable to matrimonial agreement. Romanian private international law*, Editura Lambert Germania, 2013, pp. 1-60.

[38] Pr.D. Belu, Pr. I. Tudoran, I. Iorgu, *Catehismul creştinului drept credincios (The Catechism of the Christian Believer),* The Romanian Orthodox Archdiocese from Iasi Publishing House, Iaşi, 1957, pp. 49-50. 14 I. Gramunt. *The definition of marriage in the Code of Canon Law*, article found on Internet at the following address: http://www.catholic.netz RCC/Periodicals/Homiletic/0696/2/2html. Anitei Nadia-Cerasela. *Private International Law. The law applicable to property relations between spouses under international treaties, conventions and regulations*, Lambert Publishing House Germany, 2012, pp.115-118; N.C.Dariescu. *Raporturile patrimoniale dintre soții străini având aceeaşi cetățenie şi cu domiciliul în România (Economic Relations between Foreign Spouses of the Same Nationality and residing in Romania)*, Lumen Publishing House), Iaşi, 2006, pp. 21-28.

[39] I.P. Filipescu, A.I. Filipescu, *Tratat de dreptul familiei (Family Law Treaty),* op. cit., p. 148.

[40] Art. 9 of Law no. 105/1992 had the same content as cu art.2567 of the new Civil Code.

The provisions of the Civil Code (as it was stipulated in the old regulation) restrict the possibility of recognition of a marriage concluded abroad which does not possess one of the fundamental characteristics required by Romanian law, in cases where these relations only involve foreign citizens or stateless persons without domicile or residence in Romania.

This is because a marriage concluded abroad by a Romanian citizen or by a stateless person domiciled in Romania, in violation of the substantive conditions imposed by the Romanian law (which are among the fundamental characteristics of Romanian marriage) such as monogamy, the difference of sex etc. shall not be acknowledged in Romania, because, according to art.2586 paragraph 2 of the Civil Code the substantive conditions of marriage that concern the Romanian citizen or the stateless person with the main housing or residence on the Romanian territory are subject to the Romanian law. Also, by a *per a contrario* interpretation of paragraph (2) of art.2587 of the Civil Code, according to which the Romanian citizen may conclude a marriage abroad only "before the competent State or local authority or before the diplomatic agent or consular officer of either Romania or of the other spouse's state" expressly prohibits the recognition of marriages concluded abroad by a Romanian citizen, in violation of the civil form of marriage.

In order to perform the primary classification of the notion of marriage in Romanian private international law we have to start from the meaning that this notion plays in the Romanian law, specifically in family law.

According to art. 259 paragraph 1 of the new Civil Code "Marriage is the union freely consented between a man and a woman, contracted under the law". The provisions of the Civil Code (as it was stipulated in the old regulation) restrict the possibility of recognition of a marriage concluded abroad which does not possess one of the fundamental characteristics required by Romanian law, in cases where these relations only involve foreign citizens or stateless persons without domicile or residence in Romania.

This is because a marriage concluded abroad by a Romanian citizen or by a stateless person domiciled in Romania, in violation of the substantive conditions imposed by the Romanian law (which are among the fundamental characteristics of Romanian marriage) such as monogamy, the difference of sex etc. shall not be acknowledged in Romania, because, according to art.2586 paragraph 2 of the Civil Code the substantive conditions of marriage that concern the Romanian citizen or the stateless person with the main housing or residence on the Romanian territory are subject to the Romanian law. Also, by a *per a contrario* interpretation of paragraph (2) of art. 2587 of the Civil Code, according to which the Romanian citizen may conclude a marriage broad only "before the competent State or local authority or before the diplomatic agent or consular officer of either Romania or of the other spouse's state" expressly prohibits the recognition of marriages concluded abroad by a Romanian citizen, in violation of the civil form of marriage.

In conclusion, *the scope of the concept of marriage in private international law is much broader. So, the Romanian authorities are free to acknowledge as marriage or not, the relationships, born abroad, which do not have the fundamental characteristics of marriage as stipulated in the Romanian family law. The same conclusion can be*

drawn from the affirmation that the notions used in the content of the conflict of laws become through primary qualification adaptations of concepts used in intern law.

For Romania, the term ***"spouse"*** includes "*within the meaning of the provisions of Union law on the freedom of stay of Union citizens and of members of their families, the same-sex spouses,* of whom one is a Romanian citizen *and the other spouse is a European citizen, of the state which governs homosexual marriages or a European citizen spouse of the state that does not regulate homosexual marriages, or the spouse is a third-country national (US citizen) of the same gender as the Union citizen and will have a right of residence for more than three months the territory of the Member State in which the citizen of the Union is a national.*

IV. The law applicable to the substantive conditions necessary for the conclusion of marriage according to the Civil Code?[41]

From the provisions of Article 2586 paragraph (1) of the Civil Code it results that for a valid marriage it is necessary to meet the substantive conditions established by national law of each of the spouses at the time of the marriage ceremony. So, whatever the situation:

a. Prospective foreign spouses of the same nationality, if they want to enter into marriage on Romanian territory, must meet the substantive requirements laid down by the national law of each one. For example, two future spouses British citizens who want to enter into marriage on the Romanian territory will have to comply with the substantive requirements imposed by the English legal standards.

b. The future spouses have different but foreign citizenships but if they want to conclude a marriage on the Romanian territory must meet the substantive requirements established by the national law of each of them. For example, one of the future spouses is English and the other is Italian if they want to conclude a marriage on Romanian territory they must meet the substantive requirements established by the national law of each of them respectively the English and Italian laws.

c. The future spouses who are of different nationalities, if one is a Romanian national and the other is English, if they want to conclude a marriage on Romanian territory, they must meet the substantive requirements established by the national law of each of them.

We note that the provisions of Article 2586 paragraph (1) of the Civil Code relating to the substance of marriage from the perspective of Romanian private international law do not specify what happens if the substantive conditions of the national law between future spouses are breached.

[41] N.C. Aniței. *Which is the law applicable to the substantive conditions required for the conclusion of marriage under Romanian Civil Code provisions?* pp. 24-32, The Centre s Journal: International Family Law, Policy and Practice, More Cross-Border Influences in the Modernisation of Family Justice in England and Wales, Volume 3, Number 1 • Summer 2015, online at www.famlawandpractice.com. *http://www.famlawandpractice.com/journals/journal4.pdf*

From the *per a contrario* interpretation of the provisions of Article 2586 paragraph (1) of the Civil Code we consider that the domestic law of each of the future spouses is one that provides what happens where this law is violated.

From the provisions of Article 2586 paragraph (2) of the Civil Code we note that there is an exception where there is *an impediment to marriage which, according to Roman law is incompatible with the freedom to conclude a marriage provided by one of the foreign laws, and marriage will be validly concluded in terms of the substantive conditions where one of the future spouses is a Romanian citizen and the marriage is concluded in Romania.* In this context we have the following situations:

However, applying these provisions there is the risk for a marriage concluded *in Romania* by a future foreign citizen spouse with a future spouse Romanian citizen *to be null in the country the nationality of which the other future foreign spouse has.*

A marriage concluded with the observance of the substantive conditions in accordance with the provisions of national law of each spouse must meet the provisions concerning the impediments to marriage from their national law even if it is concluded in Romania and one of the spouses is a Romanian citizen.

We believe as *lex ferenda* that this paragraph should be reconsidered and to consider the impediments to marriage established by the national law of each of the future spouses namely for the future Romanian spouse citizen to take account of impediments to marriage established by the Romanian law and for the future spouse foreign citizen to have in mind the impediments to marriage established by own national law even if the marriage is concluded in Romania.

V. What law governs marriage formal conditions in Romanian private international law? [42]

According to article 2587 Civil Code with the marginal name "*The law applicable to marriage formalities*" states: "*The form of the marriage is subject to the law of the state on the territory of which it is celebrated. (paragraph 1) Marriage which is concluded before the diplomatic agent or the consular officer of Romania in the state in which he/she is accredited is subject to the formalities provided by the Romanian law. (paragraph 2)*

From the provisions of article 2587 Civil Code it is clear that the law governing the formal conditions of marriage is the law of the State in the territory of which it is celebrated except where marriage is concluded before the diplomatic agent or consular officer of Romania in the State in which he /she is accredited when it will be subject to the formalities of the Romanian statute.

[42] Ce lege guvernează condițiile de formă ale căsătoriei în dreptul internațional privat român?/ What law governs the formalities of marriage in Romanian private international law? Revista Moldoveneasca de Drept international si Relatii internationale/ Moldavian Journal of International Law and International Relations/ Молдавский журнал международного права и международных отношений, no. , 2017 SSRN, ISSN 1857-1999, pp.. 385-391. http://rmdiri.md/wp-content/uploads/2016/03/RMDIRI-nr.-3-2017..pdf

It is noted that we have two situations regarding the law governing the marriage conclusion formal conditions:

1. the foreign law governs the marriage formal conditions as *law of the state on the territory of which marriage is celebrated;*

2. the Romanian law governs marriage formal conditions if:

a. marriage is celebrated on Romanian territory;

b. marriage is concluded before the diplomatic agent or the consular officer of Romania in the state in which he is accredited.

Formal conditions for the conclusion of marriage are governed by foreign law from the perspective of Romanian private international law in the following situations:

1. if a foreign citizen marries a Romanian citizen abroad, *the foreign law shall apply as a law of the state on the territory of which marriage is celebrated;*

2. if two Romanian citizens marry abroad, *the foreign law shall be applied as a law of the state on the territory of which marriage is celebrated;*

Formal conditions for the conclusion of marriage are governed by Romanian law from the point of view of Romanian private international law in the following situations:

1. if a foreign citizen marries a Romanian citizen on the territory of Romania, the Romanian law shall be applied *as the law of the state on the territory of which marriage is celebrated;*

2. if two foreign citizens marry in Romania, the *Romanian law will be applied as a law of the state on the territory of which marriage is celebrated.*

3. if the two future spouses are persons without citizenship and marry on the territory of Romania, *the Romanian law will be applied as a law of the state on the territory of which marriage is celebrated*.

As an exception, from the situations listed above, we have the situation in which marriage is concluded before the diplomatic agent or the consular officer of Romania in the state in which he is accredited, and will be subject to the formalities of the Romanian state in the following cases:

1. if a foreign citizen marries a Romanian citizen and wishes to celebrate their marriage in terms of formal conditions according to the provisions of the Romanian Civil Code;

2. if two Romanian citizens are abroad and wish to celebrate their marriage in terms of formal conditions according to the provisions of the Romanian Civil Code;

3. if the two future spouses are citizens without citizenship and wish to celebrate their marriage in terms of formal conditions according to the provisions of the Romanian Civil Code.

VI. What law governs the nullity of marriage and the effects of this nullity according to the provisions of the Romanian Civil Code?[43]

1. The law applicable to the nullity of marriage and the effects of this nullity according to the law applicable to the substantive conditions required for the conclusion of the marriage

From the provisions of article 2588 paragraph (1) Civil Code it can be observed that the law applicable to the nullity of marriage and the effects of this nullity is the law governing the legal requirements for the conclusion of marriage.[44]

Studying the provisions of article 2586 paragraph (1) Civil Code on the conclusion of the marriage[45] and applying it to the nullity of the marriage and the effects of this nullity, we shall note that:

a. If the spouses are foreigners with the same citizenship and concluded the marriage on the territory of Romania, to the nullity of marriage and the effects of this nullity the common national law must be applied. For example, two spouses of English citizenship have concluded the marriage on Romanian territory, the English legal norms will have to be applied both in the case of the nullity of the marriage and to the effects of this nullity

b. If spouses have different but foreign citizens and have married on Romanian territory, the national law of each of them must apply in case of nullity of marriage and to the effects of this nullity. For example, one of the spouses is English and the other spouse is Italian and if they have married on the territory of Romania the national law of each of them respectively the English rules on the nullity of marriage and the effects of this nullity on the British citizen spouse and the Italian law on the nullity of marriage and the effects of this nullity on the Italian citizen spouse must apply in the situation where the nullity of the marriage and of the effects of this nullity are found.

c. If spouses have different citizens of which one is Romanian citizen and the other Spanish citizen if they have married on the Romanian territory and the nullity of this marriage is established, they must be governed by the national law of each of them regarding the nullity of the marriage and the effects of that nullity respectively: the Romanian law on the nullity of marriage and the effects of this nullity for the

[43] *Ce lege guvernează nulitatea căsătoriei şi efectele acestei nulități conform dispozițiilor din Codul civil român? What law governs the nullity of marriage and the effects of this nullity under the provisions of the Romanian Civil Code?* Universul Juridic no 12/2017, ISSN 2393-3445 http://revista.universuljuridic.ro/ce-lege-guverneaza-nulitatea-casatoriei-si-efectele-acestei-nulitati-conform-dispozitiilor-din-codul-civil-roman/ ,http://revista.universuljuridic.ro/2017/12.

[44] N.C. Aniței. *Which is the law applicable to the substantive conditions required for the conclusion of marriage under Romanian Civil Code provisions?* pp. 24-32, The Centre s Journal: International Family Law, Policy and Practice, More Cross-Border Influences in the Modernisation of Family Justice in England and Wales, Volume 3, Number 1, Summer 2015, online at www.famlawandpractice.com. *http://www.famlawandpractice.com/journals/journal4.pdf*

[45] The conclusion of a valid marriage assumes the existence of three conditions: a) substantive conditions; b) lack of impediments; c) formal conditions

Romanian citizen spouse and the Spanish law on the nullity of marriage and the effects of this nullity for the Spanish citizen spouse.

In conclusion, **from the interpretation of the provisions of article 2588 paragraph (1) of the Civil Code, we notice that it is the national law of each spouse is the one that governs the nullity of marriage and the effects of this nullity.**

Article 2586 paragraph (2) of the Civil Code provides: "*If one of the foreign laws thus determined provides for an impediment to marriage which, under Romanian law, is incompatible with the freedom to conclude a marriage, that impediment shall be removed as inapplicable if one of the future spouse is a Romanian citizen and the marriage is concluded on the territory of Romania."*

From the provisions of article 2586 paragraph (2) of the Civil Code results the exception, in the situation where *there is a impediment to marriage in respect of the substantive conditions established by the foreign law which according to Romanian law is incompatible with the freedom to conclude a marriage, however, the marriage will be concluded validly from the point of view of the substantive conditions in case one of the future spouses is a Romanian citizen and the marriage is concluded on the territory of Romania.*

In this context we have the following observations:

1. There is risk that a marriage concluded on *the territory of Romania* by a future foreign national spouse with a future Romanian citizen spouse *to be null and void in the country the nationality of which the other future foreign national spouse has.*

2. A marriage concluded in compliance with the substantive conditions in accordance with the provisions of the national law of each spouse shall also comply with the provisions on marital impediments in one's own national law, even if it is concluded on the territory of Romania and one of the future spouses is a Romanian citizen.

In conclusion, there may be situations in which although marriage is null in terms of substantive conditions from the point of view of foreign law, as a national law, *it may be valid for its own citizen in terms of substantive conditions if one of the future spouses is a Romanian citizen and marriage is concluded in Romania.*

2. The law applicable to the nullity of marriage and the effects of such nullity according to the law applicable to the formal conditions necessary for the conclusion of marriage

From the provisions of article 2587 Civil Code it can be seen that the law governing the formal conditions of marriage is the law of the state on the territory of which the marriage is celebrated except when the marriage is concluded before the diplomatic agent or the consular officer of Romania in the state in which he is accredited, being subject to the formalities of the Romanian state law.

Based on the provisions of article 2588 Civil Code and Article 2587 Civil Code we have two situations regarding the law applicable in case of the nullity of the marriage and of the effects of this nullity according to the law governing the formal conditions of the conclusion of marriage:

1. we shall apply to the nullity of the marriage and to the effects of this nullity the foreign law *as the law of the state on the territory of which marriage was celebrated*;

a. if a foreign citizen marries a Romanian citizen abroad, the foreign law shall be applied as a law of the state in whose territory the marriage was celebrated;

b. if two Romanian citizens marry abroad, *the foreign law shall be applied as the law of the state on the territory of which the marriage was celebrated;*

2. We shall apply to the nullity of the marriage and the effects of this nullity the Romanian law as the law of the state which governed the formal conditions of marriage if:

a. the marriage was celebrated on Romanian territory;

b. the marriage was concluded before the diplomatic agent or consular officer of Romania in the state in which he is accredited.

As an exception to the rule set out in paragraph (1) of Article 2588 Civil Code we have paragraph (2) of the same article, which shows that if the marriage was concluded abroad in breach of the formal conditions established by the foreign law, we will recognize the nullity of that marriage in Romania only if the sanction of nullity regarding the formal conditions of the conclusion of marriage is stipulated in Romanian law[46].

We considered as *lex ferenda* that both paragraph 2 of article 2586 and paragraph (2) of article 2588 Civil Code should be reanalysed by considering the impediments to marriage established by the national law of each of the future spouses respectively for the future Romanian spouse we should take into account the impediments to marriage established by the Romanian law and for the future foreign national spouse to have in view the impediments to marriage established by its own national law, even if the marriage is concluded in Romania *because there is a risk that a marriage concluded on the territory of Romania by a future foreign national spouse with a future Romanian citizen spouse to be null and void in the country the nationality of which the other future foreign national spouse has.*

In conclusion, *per a contrario*, if the marriage was concluded based on the foreign law and is null in respect of that law, it will be considered valid on the territory of Romania if it respects the formal conditions of marriage established by the Romanian law.

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[46]N.C. Aniței. *Ce lege guvernează condițiile de formă ale căsătoriei în dreptul internațional privat român?/ What law governs the formalities of marriage in Romanian private international law?* Revista Moldoveneasca de Drept international si Relatii internationale/ Moldavian Journal of International Law and International Relations/ Молдавский журнал международного права и международных отношений, 2017 SSRN, ISSN 1857-1999, http://rmdiri.md/wp-content/uploads/2016/03/RMDIRI-2016-nr.-3.pdf (in course of publishing).

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CONSIDERATIONS ON THE ROLE AND PLACE OF THE EUROPEAN COUNCIL IN THE INSTITUTIONAL SET-UP OF THE EUROPEAN UNION

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Abstract: *This year, on May 9 (a day full of significance, both for the Union and for Europe and Romania) in Sibiu the first Informal Meeting of the Heads of State or Government hosted by Romania has taken place, almost 12 years after the European Union became a member of the European Union. In this context, we appreciate that it is of interest to take a general look at the different roles the European Council fulfills within the European Union's institutional set-up.*

Keywords: *European Union, European Council, institutional set-up, political consensus, decisional process.*

1. Introductive considerations. European Union institutional set up

According to art. 13 of the Treaty on European Union, it has an institutional framework to promote its values, to pursue its objectives, to support its interests, to its citizens and to the Member States, and to ensure the coherence, effectiveness and continuity of policies and actions[1]. The framework I have referred to is made, according to the same art. 13 TEU, the European Parliament, the European Council, the Council, the European Commission (hereinafter referred to as "the Commission"), the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.

The institutions in question operate in accordance with a number of principles. Some of these (the principles of competence attribution and loyal cooperation) appear to be consecrated, among others, even in the same art. 13 TEU, which, in its paragraph 2, states that *„each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation"*[2].

In addition, the specialized doctrine has also noted, for example, the existence of principles such as autonomy of will or institutional equilibrium. As regards the principle of autonomy of will, it mainly means that the EU institutions are entitled to elaborate their own Rules of Procedure[3]. As far as the principle of institutional balance is concerned, it reunites two main components, which are the separation of the

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[1] Treaty on European Union, art. 13(1).

[2] TEU, art. 13 (2).

[3] Augustin Fuerea, *Manualul Uniunii Europene*, Ediția a V-a revizuită şi adăugită, Editura Universul Juridic, Bucureşti, 2011, p. 86.

institutions' powers and competences and the collaboration, the cooperation between institutions

In this context, the separation of the powers and competences of the institutions as well as the cooperation between them, we want to place our analysis, along which we aim to identify the different positions in which one of the most important institutions of the Union can be found and, one of the most visible ones, namely the European Council, and, as far as possible, to capture the real importance of this institution in the Union's decision-making process, in the context in which, according to Art. 15 TEU, it „*does not exercise legislative functions*"[4] but, in practice, European Union legislative acts are also adopted on the basis of the guidelines adopted by the European Council.

2. European Council – Evolutive considerations

Among the seven European Union institutions, the European Council is distinguished by a feature that it does not share with any of these: it is the only institution that has emerged unconventionally. And when we use this expression, we do not refer only to the unique, unusual way in which it came into being, but we want to express that it was not established by the effect of an international agreement, a treaty like the other institutions, to start operating after its entry into force, but, on the contrary, began to de facto work long before being legally established.

In the specialized doctrine, the process of the emergence and development of the European Council was divided into five main stages, as follows: the first stage, characterized by meetings (of Heads of State and Government) at conferences (intergovernmental), the second stage, (1974-1987), the third stage: the formalisation of the European Council through the Single European Act (signed in 1986, which entered into force in 1987), the European Council, the fourth stage: the regulation of the European Council by the Maastricht Treaty (1993) and the fifth stage (in which we now find ourselves): the introduction (legal enshrinement) through the Treaty of Lisbon, the European Council among the EU institutions.[5]

The factors behind the appearance of the European Council are multiples and convergence, but their detailed presentation would go beyond the spatial framework of this paper. Indeed, it has already been made comprehensively by Emeline Chica in her work Le Conseil Europeen dans le processus decisionnel de l"Union Europeene. In short, it is about the fact that, over the seventh decade of the last century, a series of international crises, outside the Community space, have demonstrated the need to deepen cooperation and subsequently European engagement and another series of crises this date in the Communities (of which the most important example could be the "Empty Seat Crisis") demonstrated the limits of the capacity of institutions that at the time exercised the main prerogatives at the level of the Communities. This is where the representatives of the Member States have felt the need for political consensus at the

[4] TEU, art. 15(1).

[5] Augustina Dumitraşcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze şi aplicații*, Ediția a II-a, revizuită şi adăugită, Editura Universul Juridic, Bucureşti, 2015, p. 53.

highest level, which has made permanent the meetings of the Heads of State and Government.[6]

The decisive moment, however, was the Paris Summit in 1974, in the press release from which we find the commitment of the Heads of State and Government to meet, accompanied by the Foreign Ministers, three times a year and times as often as necessary[7], within the Community and European Political Cooperation.

Practically, from that moment on, it can be said that the de facto existence of what we now know as the European Council begins. Of course, its work until the time of institutionalization through the Treaty of Lisbon has produced many practical results, despite the difficulty of treating the effects of the acts of a conference on the unconfirmed intergovernments in the institutional treaties on the functioning of the Community institutions. However, the effects are there. For example, the political consensus reached at the level of the European Council has underpinned the development of policy directions such as environmental policy, European Political Cooperation, the European Monetary System (as its precursor to the Economic and Monetary Union) or the accession criteria applicable to the states want to accede to the status of Member States, still have a pre-existing primary law right. But their analysis goes beyond the scope of this study, being reserved for the doctoral thesis we are working on.

For these reasons, we will continue to analyze the main prerogatives of the European Council, which we will try to compare briefly with the prerogatives of similar institutions within the domestic legal orders of the Member States (with a special look at Romania) in order to identify possible assemblies or differences.

3. The European Council nowadays. Main functions.

3.1. The European Council as a guarantor of respect for the values on which the European Union is founded.

According to art. 2 TEU, *„the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"*[8]. The importance of these values lies both in the fact that art. 49 TEU raises their compliance with the condition for membership of the Union for third States wishing to acquire the status of

[6] Emeline Chicha, *Le Conseil Europeen dans le processus decisionnel de l"Union Europeene*, Mémoire de Quatrième année, Séminaire:L'Union Européenne à la croisée des chemins, évaporation, dislocation, élargissement et/ou approfondissement, Sous la direction de Laurent Guihéry (soutenu en Septembre 2011), passim.

[7] *Déclaration commune des chefs d'État et de gouvernement signée le 10 décembre 1974 lors du Sommet de Paris du 9 et 10 décembre 1974*, apud Emeline Chicha, op.cit, p. 16.

[8] TEU, art. 2.

Member State[9]. However, the effectiveness of these values would call into question whether compliance with them by the lawful subjects to whom the Treaties create obligations could not be subject to a verification mechanism. And, given the specific nature of the values in question, some of the most predisposed entities in their violation are the Member States.

Consequently, art. 7 TUE states, regarding the institution of the European Council, that, *„the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations"*[10].

To this end, the European Council can be compared to a hypothetical entity that borrows elements of parliamentary institutions and constitutional courts at the same time.

3.2. The European Council as part of the compliance to the compliance to the principle of representative democracy

According to art. 10 (1) TUE, *„the functioning of the Union shall be founded on representative democracy"*[11]. Typically, the reference to representative democracy predisposes to its identification with parliamentary institutions. In this idem, for example, the Constitution of Romania, which states in Article 61, states that the „Parliament is the supreme representative body of the Romanian people and the only legislative authority of the country"[12]. However, the two legal orders must not be identified with each other in absolute terms. As for the European Union, the same art. 10 TEU, this time in its art. (2), lists several institutions that give expression to the principle of representative democracy. Thus, it mentions that *„citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens"*[13].

In this context, the European Council, made up of Heads of State, directly elected by citizens or members of national Parliaments elected by citizens (noting that, in general, participation in the European Council is specific to the set of prerogatives of directly elected presidents) and the heads of government, who have received the confidence of national parliaments, are, in turn, an expression of representative democracy at the level of the European Union, but a rather indirect one, unlike the European Parliament.

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[9] Article 49 TEU states that „*any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union*".
[10] TEU, art. 7 (2).
[11] TEU, art. 10 (1).
[12] Constitution of Romania, art. 61.
[13] TEU, art. 10 (2).

3.3. The European Council as *sui generis* enitity, responsible for attaining political consensus

According to art. 15 TEU, *„the European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions"*. [14] Also, *„except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus"*[15]. Of course, there are a number of situations where the Treaties provide otherwise, some of which are also analyzed in this study. The fact that they "provide otherwise" means, for example, situations in which the European Council decides by unanimity or by a qualified majority.

Following consensus, its results are translated into a document called "European Council Conclusions" or sometimes "Presidency Conclusions". It usually includes guidelines expressed in general terms on the main challenges facing the Union, its development opportunities or its directions for action. Their importance is given in our opinion to the fact that it represents a political consensus reached at the highest level of representation of the states and therefore the same consensus is supposed to be achieved at the level of the Council, of the States and the fact that the Commission President, who can use its prerogatives to develop concrete proposals for legislative acts, based on the Conclusions of the European Council, also took part in it.

More concrete examples, somehow related to this prerogative, are also found in the TFEU, which sets out a series of situations where the European Council is called upon to identify priorities or lines of action in certain specific areas, and to identify consensus where institutions which ordinarily exercise legislative functions have failed to adopt certain acts.

For example, art. 48 TFUE provides that *„the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and selfemployed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States. Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either: (a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or (b) take no action or request the Commission to submit a new*

[14] TEU, art. 15 (1).
[15] TEU, art. 15 (4).

proposal; in that case, the act originally proposed shall be deemed not to have been adopted"[16].

Somehow similar to the regulations of the Common Foreign and Security Policy, which we are referring to below (somewhat explicitly, given the intergovernmental character that the former Pillars II and III had) art. 68 TFEU provides that the institution of the European Council defines the strategic guidelines for legislative and operational planning within the area of freedom, security and justice[17].

In the same spirit, art. 83 (3) TFUE provides that *„where a member of the Council considers that a draft directive as referred to in paragraph 2*[18] *would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure"*[19].

Without leaving the type of prerogatives analyzed in this section, we also mention art. 121 TFEU, that provides in paragraph (2), that the „*European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union*"[20]. Other examples include art. 148(1) TFEU („*the European Council shall each year consider the employment situation in the Union and adopt conclusions thereon, on the basis of a joint annual report by the Council and the Commission*"[21)] or art. 222(4) („*the European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action*"[22]).

3.4. The European Council as part of the choosing and naming the European Comission

According to art. 17 TEU, *„ţinând seama de alegerile pentru Parlamentul European şi după ce a procedat la consultările necesare, Consiliul European, hotărând cu majoritate calificată, propune Parlamentului European un candidat la*

[16] Treaty on the Functioning of the European Union (TFEU), art. 48.
[17] TFEU, art. 68.
[18] Art. 82 (2) TFEU provides that: *„To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals".*
[19] TEU, art. 83.
[20] TFEU, art. 121 (2).
[21] TFEU, art. 148 (1).
[22] TFEU, art. 222 (4).

funcția de preşedinte al Comisiei. Acest candidat este ales de Parlamentul European cu majoritatea membrilor care îl compun. În cazul în care acest candidat nu întruneşte majoritatea, Consiliul European, hotărând cu majoritate calificată, propune, în termen de o lună, un nou candidat, care este ales de Parlamentul European în conformitate cu aceeaşi procedură (…). *Preşedintele, Înaltul Reprezentant al Uniunii pentru afaceri externe şi politica de securitate şi ceilalți membri ai Comisiei sunt supuşi, în calitate de organ colegial, unui vot de aprobare al Parlamentului European. Pe baza acestei aprobări, Comisia este numită de Consiliul European, hotărând cu majoritate calificată"*[23].

In this situation, the European Council exercises approximately a role similar to that exercised in Romania's domestic law, for example, by the President, who proposes to Parliament a candidate for the post of Prime Minister and acquiesces the Government, after receiving the confidence of the Parliament.

3.5.The appointment prerogatives of the European Council

According to art. 18 TEU, *„the European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end his term of office by the same procedure"*[24].

Also, according to art. 283 TFEU, *„ The President, the Vice-President and the other members of the Executive Board* [of the European Central Bank] *shall be appointed by the European Council, acting by a qualified majority, from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council, after it has consulted the European Parliament and the Governing Council of the European Central Bank"*[25].

In this capacity, we can assume that the institution of the European Council exercises prerogatives that are similar to both the national Parliaments and the plenary bodies of international organizations, as the case may be.

3.6.Determining the structure of some institutions

In close connection with the above, the European Council is also involved in the establishment of certain aspects of the organization and functioning of certain Union institutions. For example, art. 244 TFUE provides that *„.in accordance with Article 17(5) of the Treaty on European Union, the Members of the Commission shall be chosen on the basis of a system of rotation established unanimously by the European Council and on the basis of the following principles: (a) Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as members of the Commission; consequently, the difference between the total number of terms of office held by nationals of any given*

[23] TEU, art. 17 (7).
[24] TEU, art. 18 (1).
[25] TFEU, art. 283.

pair of Member States may never be more than one; (b) subject to point (a), each successive Commission shall be so composed as to reflect satisfactorily the demographic and geographical range of all the Member States."[26]

However, following the difficulties caused by Ireland's rejection of the ratification of the Lisbon Treaty as a result of the first referendum held in that country, the European Council meetings held between 11-12 December 2018 and 18-19 July 2019 produced a consensus that the Commissions appointed after 2014 will also include a number of members equal to those of the Member States. This decision is based on the provisions of art. 17 (5) TUE, which states that *„as from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number"*[27], which really happened, as we said earlier.

Also, *„*(...) *the European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament* (…)[28]*"*.

At the same time, *„the European Council shall adopt by a qualified majority: (a) a decision establishing the list of Council configurations, other than those of the General Affairs*

Council and of the Foreign Affairs Council, in accordance with Article 16(6) of the Treaty on European Union; (b) a decision on the Presidency of Council configurations, other than that of Foreign Affairs, in accordance with Article 16(9) of the Treaty on European Union."[29].

Moreover, art. 86(1) TFEU provides that *„ In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament. In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption"*[30]. Also, *„the European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act*

[26] TFEU, art. 244.
[27] TEU, art. 17 (5).
[28] TEU, art. 14 (2).
[29] TEU, art. 236.
[30] TEU, art. 86(1).

unanimously after obtaining the consent of the European Parliament and after consulting the Commission"[31].

3.7. The European Council in the framework of the Common Foreign and Security Policy

One of the fields of action of the Union in which the European Council is the most influential is the Common Foreign and Security Policy, with its component, the Common Security and Defense Policy.

Consequently, art. 22 TUE provides that *„on the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union"*[32].

Their content is detailed in the same article, according to which *„decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States."*[33]

To adopt these, *„the European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area"*[34]. The importance of the decisions in question is given by the fact that they *„shall be implemented in accordance with the procedures provided for in the Treaties"*[35], therefore, have a binding force that the guidelines contained in the Conclusions of the European Council do not present.

Moreover, art. 24 TUE provides that the external politics and the common security politics *„the common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise* (…).[36]„

It is also the European Council that *"identifies the strategic interests of the Union, sets out the objectives and defines the general orientations of the Common Foreign and Security Policy, including on issues with defense implications. It adopts the necessary decisions"*[37], *and "the Council shall develop the common foreign and security policy and take the necessary decisions for its definition and implementation, on the basis of the broad guidelines and strategic lines defined by the European Council"*[38].

Moreover, the European Council holds, under the CFSP / CSDP, at least one prerogative that anticipates one of the next sections of our analysis. However, for reasons of coherence, we will include it here. It is, in particular, about building a

[31] TFUE, art. 86 (4).
[32] TEU, art. 22.
[33] Ibidem.
[34] Ibidem.
[35] Ibidem.
[36] TEU, art. 24.
[37] TEU, art. 26 (1).
[38] TEU, art. 26 (2).

common defense. In fact, art. 42 TEU provides that *„the common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements"*[39].

In these situations, and especially with regard to the Common Security and Defense Policy, we can see that there are similarities between both the European Council and a body such as the North Atlantic Council, within NATO, and between the European Council and the Supreme Defense Council The country, internally. In both situations, we appreciate that the similarities do not go up to identity and that in reality the role of the European Council takes over the roles of both of these entities, placing themselves on an imaginary axis starting from the way in which an organization belonging to an international organization classics and reaches an institution or body from a national state at halfway point.

Also in the wider field of EU relations with third parties, but in a number of special situations, namely the accession of a state to the Union or the withdrawal of a Member State from it, the European Council has a decisive role.

More precisely, art. 49 TUE, after stating the procedure by which a third State may become a Member State of the Union, it also states that *„the conditions of eligibility agreed upon by the European Council shall be taken into account"*[40].This is, in this case, the well-known Copenhagen Criteria contained in the Conclusions of the European Council held in that locality in 1993, supplemented by those of the 1995 European Council meeting in Madrid. We also note that the authors of the Treaties have no longer felt the need for explicit mention in the primary law of the criteria mentioned, but considered it sufficient to make a reference to the Conclusions of the European Council.

As far as art. 50 TUE is concerned, it provides that *„Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."*[41].

[39] TEU, art. 42 (2).
[40] TEU, art. 49
[41] TUE, art. 50.

In these situations, in the roles it fulfills, we appreciate that the institution of the European Council has similarities with both a State President, the national law of the Member States (especially Romania), being seen as a collective presidency, and with a Government or Foreign Ministry.

3.8.The European Council as the constituent of the Union

The European Council may unanimously adopt a decision providing that in cases other than those referred to in paragraph 2[42], The Council shall act by a qualified majority.[43]

As regards the role of the European Council in the ordinary and simplified revision procedures of the Treaties, it can be described according to the specificity of each of these categories.

Where the ordinary review procedure finds its applicability, art. 48 (3), which states that, *„if the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4. The European Council may decide by a simple majority, after*

[42] Art. 31 (2) TEU states that *„Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded. When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted. By derogation from the provisions of paragraph 1, the Council shall act by qualified majority: when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article 22(1), when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative, when adopting any decision implementing a decision defining a Union action or position, when appointing a special representative in accordance with Article 33. If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity. The European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in cases other than those referred to in paragraph 2 (...)".*

[43] TEU, art. 31 (3).

obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States."[44].

As for simplified procedures, Art. 48 (6) stipulates that *„the Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union. The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties"*[45].

In addition to the procedure of art. 48 (6), art. 48 (7), in turn, provides that *„where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence. Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure. Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision. For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members."*. A similar provision is also found in Art. 312 TFEU, on the multiannual financial framework, and states that the European Council institution *„ may, unanimously, adopt a decision authorising the Council to act by a qualified majority when adopting the regulation referred to in the first subparagraph."*[46].

[44] TEU, art. 48 (2)-(5).
[45] TEU, art. 48 (6).
[46] TFEU, art. 312.

4. Conclusions

As a result of what we have seen in this studio, we come to the conclusion that the institution of the European Council occupies, within the institutional framework of the European Union, a much more important role than would be understood by certain provisions of the Treaties, 15 TEU, which states that it does not exercise legislative functions. Thus, in the specialized doctrine it was emphasized that „the legislative process is governed by the process of cooperation between several institutions and, on the other hand, by the existence of several legislative procedures*"*[47]. Also, it was stressed that *„ EU legislatures are currently the Council and the European Parliament. These institutions are joined by the European Commission, the Economic and Social Committee and the Committee of the Regions as participants*"[48]. However, the Commission's initiatives, with the monopoly of the legislative initiative in the ordinary legislative procedure, are often based on the consensus reached within the European Council. Also, certain prerogatives specific to national presidencies or institutions responsible for external representation are also exercised by it. For this reason, we consider the European Council as a true catalyst of the European Union's decision-making process, its work contributing to the overcoming of a moment of crisis and indeed providing the necessary impulses for the development of the Union.

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[47] Augustina Dumitraşcu, *Dreptul Uniunii Europene şi specificitatea acestuia*, Editura Universul Juridic, Bucureşti, 2015, p. 73.
[48] Ibidem.

THE NOTION OF ACTION IN THE CRIMINAL PROCESS

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Abstract: *Criminal liability is bringing of a criminal, civil, administrative, disciplinary law conflict before the courts and is achieved by bringing legal action in a lawsuit. Thus, legal action is the means of the process whereby liability is breached for the violation of a rule of law and the legal instrument by which the conflict of law is brought to the settlement of the judicial bodies, according to the legal branch to which the legal rules belonging to which the violation determined the law conflict.*

It is a synthesis concept that designates all the legally established means of which it is possible to request the competent judicial body to resolve the conflict of law, arising from the non-observance of the provision of a legal norm. At the same time, the lawsuit is not confused with the right to action, since it is a virtual right enshrined in the legal norm, which protects a certain social value, or which establishes a subjective right or a legitimate interest (expressly protected by the provisions of the current Civil Code, as those inserted in art. 1349).

Keywords*: action, criminal proceeding, characteristics, liability, judicial bodies.*

1. Introduction

The right to legal action derives from the adoption of the substantive rule of law and consists in the legal empowerment of the injured party by committing an unlawful act of bringing legal action against the person who violated the law[1].

Therefore, the right of action may be exercised through legal action[2]. In the pre-existing doctrine of the Criminal Procedure Code, it has been pointed out that sometimes this is not necessary, i.e. when the exercise of the right to act is mandatory for the lawfully empowered bodies, as happens in the case of the criminal action[3]. Currently, reported to the provisions of art. 19 par. (3) in conjunction with art. 20 par. (1), (2) and (4) Criminal Procedure Code, the prosecutor, when acting in the name of and on behalf of persons with little or no capacity to exercise, must do so in the same way (term, form, content) as those who have full capacity act or as legal entities. The existence of a legal action is not absolutely necessary in the case of the dissolution of a document or the restoration of the previous situation because, as stipulated in Art. 25 par. (3) of the current criminal procedural regulation, the court decides in these cases even in the absence of a civil party.

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[1] Gr. Gr. Theodoru, *Tratat de drept procesual penal*, ed. a 3-a, Ed. Hamangiu, Bucureşti, 2013, p. 89.
[2] T. Joița, *Acțiunea civilă în procesul penal*, Ed. Național, Bucureşti, 1999, p. 9.
[3] *Ibidem*.

It should be noted, however, that the legal action should not be confused with legal action, since the first notion is merely the initial procedural act by which the action is brought before the court, while the legal action is still exercised, proceeding until a final court decision is reached[4].

2. Action in Criminal Proceeding

Action in criminal proceeding means the legal way in which the legal conflict arising from the commission of a criminal offense is brought before the judicial authorities in order to engage the criminal and civil liability of the culpable person and to apply the state constraint to it and to compel it to compensation for the damage caused by the offense where appropriate[5].

This way it was emphasized that the action is a legal empowerment (*potestas agenda)* which justifies the bringing of the conflict of law before the criminal justice bodies and makes it necessary for them to exercise their attributions according to the law[6].

The criminal action is aimed at suppressing any violation of social order, being an act that is the result of a crime, while civil action is caused by the prejudice[7].

Like any other legal action, the civil action has two aspects: a substantive one (being the expression of the right that was injured by another's deed in order to obtain the right remedy) and another procedural (by using it, according to the law of procedure)[8].

We prefer to *define* the action in the criminal trial as the legal way in which the legal conflict arising from the offense which is the object of the criminal action and which can constitute a criminal offense is brought before the judicial bodies with a view to incurring criminal liability and civil matters and the application, if necessary, of the constraints provided by the criminal and civil law respectively[9]. This is because the criminal nature of the offense is a further matter, which falls within the jurisdiction of the court, being a time when the law conflict is brought before the judicial bodies.

In this regard, even Art. 19 par. (1) Criminal Procedure Code stipulates the idea of the possibility of taking civil liability in case of committing the "deed" that is the object of the criminal action, expressly avoiding the use of the term criminality. At the same time, it is clear from this text that the source of the civil action is itself the illicit

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[4] Gr. Gr. Theodoru, *op. cit.,* 2013, p. 90.

[5] Gh. Mateuț, *Tratat de procedură penală. Partea generală,* vol. I, C.H. Beck, Bucureşti, 2006, p. 536.

[6] I. Tanoviceanu, V. Dongoroz, *Tratat de procedură penală,* ed. a 2-a, vol. IV, Bucureşti, 1928, p. 103; V. Dongoroz, *Curs de procedură penală,* Second Edition, Bucureşti, 1942, p. 53; N. Volonciu, *În legătură cu noua reglementare a acțiunii penale,* A.U.B., Series Ştiințe juridice, XVIII, no. 2/1969, p. 97; Tr. Pop., *Drept procesual penal. Partea generală,* vol. II, Cluj, 1947; G. Antoniu, N. Volonciu, N. Zaharia, *Dicționar de procedură penală,* Ştiințifică şi Enciclopedică, Bucureşti, 1988; I. Ionescu Dolj, *Curs de procedură penală română,* Bucureşti, 1926, p. 43; G. Vrăbiescu, *Curs de procedură penală,* Bucureşti, 1943, *apud* Gh. Mateuț, *op. cit.,* p. 536.

[7] About the fact that the French doctrine sometimes considered that criminal action and civil action had the same foundation: the offense, see Pradel, *Procedure penale,* 8e édition, Cujas, Paris, 1995, p. 176, *apud* Gh. Mateuț, *op. cit.,* p. 537.

[8] V. Dongoroz (coord.), *Explicații teoretice ale Codului de procedură penală român, Partea generală*, vol. I, Ed. Academiei, Bucureşti, 1975, p. 74.

[9] *Ibidem*.

civil act, causing damage, which may constitute an illicit criminal act, which may constitute an offense under the law. The offense provided by the criminal law becomes a crime only to the extent that it fulfils the conditions stipulated in art. 15 Criminal Procedure Code. (which states that an act is an offense if it is provided by the unjustified criminal law, imputable to the person who committed it and committed it guiltily). The finding of an offense is only at the end of the criminal trial, when it is ascertained by a court. Once the court finds that the elements listed above are met (even in the hypothesis of the agreement on the recognition of guilt), we may consider the act as a crime, and not before that moment.

3. The notion of criminal action and its features

Criminal action has been defined as the means by which a person who has committed a criminal offense is brought before the criminal jurisdiction of the court in order to prosecute and apply a criminal sanction[10]. Thus, criminal action is the legal means by which the purpose of the criminal trial itself[11] is carried out, namely that any offender should be punished according to his guilt (Article 1 C. Old Criminal Procedure Code, article 1 and article 8 Criminal Procedure Code).

The criminal action is not confused with its purpose, that is to say the case and the application of the criminal sanction, but the criminal prosecution signifies the entire complex of activities and the use of the appropriate means provided by the law throughout the criminal proceedings[12].

The doctrine presented the following specific features of criminal action:

– is a *state* action[13] (with the mention that some authors have spoken of an action of *public order* or *public action*[14]). It is exercised through the state judicial bodies, which are the organs that are actually invested in this respect[15], belonging to the state even in the assumptions that its putting into motion or its exercise would be subject to a procedural or prudent condition, including when the action criminal proceedings are left to the injured party[16]. Thus, criminal action always belongs to society, being a social action[17];

– it is *mandatory*, in the sense that it must be compulsory to move, ex officio, whenever the legal conditions are met[18], except in cases where it is necessary, according to the law, for the preliminary complaint, authorization or notification to the competent body[19]. It has been shown that this feature corresponds to the principles of

[10] Gh. Mateuț, *op. cit.,* p. 669.
[11] *Ibidem*.
[12] T. Joița, *op. cit.,* p. 12.
[13] See, for details, Gh. Mateuț, *op. cit.,* p. 670.
[14] I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală,* ed. a 2-a, Ed. Universul Juridic, Bucureşti, 2015, p. 257; M. Udroiu, *Procedură penală, Partea generală, Noul Cod de procedură penală,* ed. a 2-a, C.H. Beck, Bucureşti, 2015, p. 67.
[15] Gr. Gr. Theodoru, *Drept procesual penal,* vol. I, Univ. Al.I. Cuza, Iaşi, 1971, pp. 246-247, *apud* Gh. Mateuț, *op. cit.,* p. 670.
[16] N. Volonciu, *op. cit.,* Tratat, p. 228, *apud* Gh. Mateuț, *op. cit.,* p. 670.
[17] T. Joița, *op. cit.,* p. 13.
[18] V. Dongoroz (coord.), *op. cit.,* p. 63; T. Joița, *op. cit.,* p. 13; M. Udroiu, *op. cit.,* 2015, p. 67.
[19] I.Gh. Gorgăneanu, *Acțiunea penală,* Lumina Lex, Bucharest, 1998, *apud* Gh. Mateuț, *op. cit.,* p. 671.

lawfulness and formalism of the criminal proceeding, according to which the achievement of justice in criminal cases appears to be inappropriate and inevitable[20];

– is an *indispensable*[21] action, so that it follows its normal course of action from the time of its use until the case is resolved, but can not be withdrawn, but must continue until it is exhausted by the final settlement of the criminal case, except where permitted the withdrawal of the preliminary complaint or the reconciliation with the perpetrator[22], unless the prosecutor waives the prosecution, whether or not the criminal proceedings have been initiated, and even where the prosecution is *in rem* (Article 318 Criminal Procedure Code). With regard to this feature, in addition to unavailability, *irrevocability*[23] was also mentioned;

– it is *indivisible* because it extends to all those who participated in its commission, as it results from the unity of the offense and the indivisibility of the rule of incrimination[24]. In the case of participation, there will not be as many criminal actions as criminals, but only one criminal action against all participants[25]. It is worth mentioning that the current criminal procedural law in force no longer provides for the possibility of the court to extend the criminal proceeding to the newly discovered participant, with the criminal prosecution to begin the criminal prosecution[26]. At the same time, the deed attracts the criminal responsibility of all participants, even if the preliminary complaint was made only with one of them[27];

– it is a *personal*[28] action (also known as an *individual*[29] action), that is, it can be exercised only against the persons who have the capacity to participate in the offense, which results from the personal character of the criminal liability[30], which determines the impossibility to bear the consequences of the criminal action by other persons[31];

– it is an *autonomous* action, enjoying a certain legal autonomy that makes it conceptually and functionally distinct from other actions in justice[32], having a stand-alone existence, not subject to any other action, and is the *main* one, as it marks the

[20] E. Florian, *Diritto procesuale penale,* 3 edition, Unione, Torinese, Torino, 1939, p. 205; P. Bouzat, J. Pinatel, *Traité de droit pénal et criminologie,* T. II, Procédure pénale, Dalloz, Paris, 1970, p. 748, *apud* Gh. Mateuț, *op. cit.,* p. 671; Gr. Gr. Theodoru, *op. cit.,* 2013, p. 94

[21] I.Gh. Gorgăneanu, *op. cit.,* 1998, p. 44, *apud* Gh. Mateuț, *op. cit.,* p. 671; Gr. Gr. Theodoru, *op. cit.,* p. 95.

[22] Gh. Mateuț *op. cit.,* p. 671; T. Joița, *op. cit.,* p. 13.

[23] M. Udroiu, *op. cit.,* 2015, p. 68.

[24] Gh. Gorgăneanu, *op. cit.,* 1998, p. 44, *apud* Gh. Mateuț, *op. cit.,* p. 671.; T. Joița, *op. cit.,* p. 13; Gr. Theodoru, *m. cit,* 2013, p. 95.

[25] Gh. Mateuț, *op. cit.,* p. 672; T. Joița, *op. cit.,* p. 13. This feature, however, expressed by this last author, in criticism, is exclusively of the accessory character of civil action, in order to illustrate the solidarity between the defendants and the civil action.

[26] M. Udroiu, *op. cit.,* 2015, p. 68.

[27] *Ibidem.*

[28] *Ibidem;* Gh. Mateuț, *op. cit.,* p. 672.

[29] Some authors have argued that criminal action is individual, see N. Volonciu, Tratat, M93, p. 231; R. Merle, A. Vitu, *Traité de droit criminel. Procédure pénale,* Cujas, Paris, 1979, p. 622 and the following, Gh. Mateuț, *op. cit.,* p. 672; T. Joița, *op. cit.,* p. 13; M. Basarab, *Drept penal. Partea generală,* vol. I, Lumina Bucharest, 1997, p. 124.

[30] V. Dongoroz (coord.), *op. cit.,* 1975, vol. I, pp. 56-57, *apud* Gh. Mateuț, *op. cit.,* p. 672.

[31] I. Neagu, *Drept procesual penal, Partea generală,* Ed. Artprint, Bucharest, 1994, p. 158, *apud* T. Joița, *op. cit.*, p. 13.

[32] I.Gh. Gorgăneanu, *op. cit.,* 1998, p. 48, *apud* Gh. Mateuț, *op. cit.,* p. 672.

birth of the report procedurally fundamental, between the state and the offender, on which all the other relations depend[33].

4. The notion of civil action in criminal proceedings and its features

Civil action, as a criminal proceeding institution, has been defined as the legal means by which a person who has suffered an prejudice by an offense requests that he should be repaired in the criminal proceedings[34].

Corroborating this definition with the provisions currently in force inserted in Art. 19 par. (1), (4) and (5) of the Criminal Code as well as those contained in Article 6 of the Civil Code, relating to the timely application of civil law, and to Articles 1381 (2), 1386 (2) and 1523 (2) (e) Civil Code, concerning the late detention in the case of an obligation arising from an unlawful offense, and with Article 1349 paragraph (1) of the Civil Code, we will also provide a definition of civil action in the criminal proceedings.

Thus, we can *define* civil action in the criminal proceedings as the criminal proceedings institution that represents the whole legal means by which the persons who have suffered damage by committing the deed which is the object of the criminal action may request torting the civil liability of the persons responsible under the civil law, in order to obtain a remedy, in accordance with the provisions of civil law in force at the time of the commission of the unlawful deed infringing the legitimate rights or interests of persons.

The French doctrine[35] specified the *double effect* of civil action: on the one hand, to provide the victim with the opportunity to obtain compensation for the damage and, on the other hand, to give him the capacity to participate in the trial, which allows him to participate to judicial proceedings.

5. Conclusions

In the literature it was shown that the two categories of actions have the same legal basis: the offense committed (s.n.: the illicit act having a criminal and civil impact). In spite of this similarity, the differences between the two actions were also presented to illustrate that they are not identical[36].

It has been shown that the criminal proceedings have as a direct source the offense, while the civil action results from the damage caused by the offense, so that it does not

[33] M. Delmas-Marty, *Procédure pénale d'Europe,* PUF, Paris, 1995, p. 133 and the following, p. 273 and the following; D. Vandermeersch, *Elements de droit pénal et de procédure pénale,* Editions La Charte, Brugge, 2003, p. 266 and the following; A. Pinto, M. Evans, *Corporate Criminal Liability,* Edition Sweet and Maxwell, London, 2004, p. 101 and the following, *apud* Gh. Mateuț, *op. cit.,* p. 672.

[34] I. Tanoviceanu, *Tratat de drept şi procedură penală,* vol. IV, part I, 2 ed., Bucureşti, 1927, p. 305; N. Volonciu, *op. cit.,* vol. I, p. 251, *apud* Gh. Mateuț, *op. cit.,* p. 728; T. Joița, *Acțiunea civilă în procesul penal,* Național, Bucureşti, 1999, p. 30; I. Neagu, *op. cit.,* 2006, p. 237; I. Neagu, *Drept procesual penal. Partea generală,* Universul Juridic, Bucureşti, 2010, p. 312.

[35] M. Herzog-Evans, G. Roussel, *Procédure pénale,* 3e edition, Vuibert, 2012, p. 156.

[36] Gh. Mateuț, *op. cit.,* p. 667.

stem from the crime only through the damage it has caused[37]. In the international doctrine it was mentioned that the violation of the criminal law is the cause of the public action or the criminal action, while the cause of the civil action is the damage resulting from the violation of the criminal law[38]. Thus, the criminal proceedings can be exercised even when the offense has been committed, while the exercise of the civil action presupposes in addition to committing the offense the existence of a material or moral damage, in the absence of which the civil action can no longer be exercised[39].

Referring to the above, it was mentioned that criminal and civil action is distinguished by:

a. Different *purpose*:

Thus, the criminal action is intended to repress the prejudice caused to the social order, while the civil action is aimed at obtaining compensation for the damage suffered by the victim[40] of the offense, namely the deed which is the object of the criminal action.

Since social order refers to the normal development of social life, that is, to avoid conflicts, manifestations and disturbances of any kind[41], both actions are intended to suppress the attainment caused by social order. However, while the criminal action is intended to repress the interests of the public interests, the civil action aims at repressing the incriminating offenses caused to the legitimate rights and interests of the persons considered in terms of their private interest (Article 1349 Civil Code).

b. The distinct *object*:

While the object of the criminal action is the punishment or other measure provided by the criminal law, the object of the civil action in the criminal trial is to oblige the defendant or the civilly liable person to compensate for the damage[42] caused by the offense[43] (i.e. by the deed criminal proceedings, as expressly stated in Article 19 of the Criminal Code).

c. The different *nature* of the two actions:

Under the old criminal procedural rules it was shown that criminal action is a public order action, especially since the Public Ministry, which was responsible for its exercise, was unable to negotiate with the accused or to abandon or hinder the judgment or to waive appeals against court decisions[44].

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[37] Ibidem.

[38] G. Ştefani, G. Levasseur, B. Bouloc, *Procédure pénale,* Precis Dalloz, 17e edition, February, 2000, pp. 122-123, *apud* Gh. Mateuţ, *op. cit.,* p. 668.

[39] *Ibidem.*

[40] *Ibidem.*

[41] The legal order has been defined as a whole, a well-ordered and coherent set (by finding internal criteria according to whose logical requirements are constituted and validated) by legal norms and legal institutions through which a society is organized legally and politically, as well as the way of regulating, through such norms and institutions, the relations between the various subsystems of the globally considered society, the relations of the constituent parts of the normative and institutional ensemble itself, respectively, it was also shown that the juridical order means the multitude of legal norms both customary and conventional, as well as the institutions to which such rules are relevant and which have as a result the organization and organization of society; see, to that effect, E.G. Moroianu, *Conceptul de ordine juridică,* pe *http://www.rsdr.ro/Art-2-I-2-2008.pdf* (consulted in March 2015).

[42] Gh. Mateuţ, *op. cit.,* p. 668.

[43] I. Neagu, *op. cit.,* 2006, p. 237.

[44] Gh. Mateuţ, *op. cit.,* pp. 668-669.

In the context of criminal procedural provisions currently in force, criminal proceedings remain a public action, even if the Public Prosecutor's Office can conclude with the defendant an agreement on the recognition of guilt (when from the evidence result sufficient proof of the act for which initiated the criminal action and the guilty person's fault in the case of offenses for which the law provides for the punishment of the fine or the prison of maximum 7 years, an agreement which is subject to the control of the court – Article 478 et seq.) and even if the prosecutor can order the renunciation of the punishment (according to article 318 Civil Procedure Code). Beneficial by the changes made by O.U.G. no. 18/2016 and juvenile offenders may conclude agreements for the recognition of guilt by the consent of their legal representative.

Unlike criminal proceedings, it was shown that civil action, as it tends to reparation; damage is of private interest, the victim being able to renounce its exercise, to negotiate a mediation agreement or to give up, in whole or in part, civil claims (Articles 22 and C.C.P., Art. Old C.C.P., introduced by Law 202/2010). These provisions are intended to lead to the speedy resolution of civil action and even to the termination: in the event of damage being totally remedied, termination of the action that does not lead to the termination of criminal proceedings.

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JUDGMENTS OF THE CRIMINAL INSTITUTION IN CIVIL LAW

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Abstract: *If the two actions, both criminal and civil, are exercised concurrently within the unique framework of the criminal trial, the joining allowed by the mixed system embraced by the Romanian legislator, according to art. 346 par. (1) C.C.P. the court is obliged to adjudicate in the same sentence on the civil action (art. 25 par. (1) and art. 397 par. (1) C.C.P.]. Therefore, we can talk about the relationship between the two actions.*

It has been shown that the court can not leave the civil action unresolved, taking note of the declaration of the civil party that it understands its claims to the civil court, and that it has the civil part only in the case of the suspension of the criminal proceeding[1]. This solution is justified by the fact that once the option for joining the civil action to the criminal action is exercised, this option becomes final as an application of the principle "electa una via non datur recursus ad alteram". The adjudication of the two adjoining actions did not occur in the same sentence, according to art. 346 par. (1) Old C.C.P., in the case of civil action being disunited, according to art. 347 Old C.C.P., due to the delay in solving the criminal action due to civil action. At the same time, the disjunction was mandatory in the case of solving the civil action at the trial of the case in the simplified procedure for the recognition of guilt, if it was necessary to administer evidence, according to art. 320[1] par. (5) Old C.C.P.

Keywords: *action solving, solutions, rejection, unsolved solution, admission*

1. Introduction

Currently, the debated civil action is still pending for the entire criminal court, mentioning that the disjunction does not necessarily occur exactly when the criminal action can be resolved, but only if there is a violation of the reasonable duration of the criminal action, according to art. 26 par. (1) C.C.P., which determines the obligation of the criminal court to assess the reasonableness of the term and not the direct or imperative disjunction for the case in which the criminal action can be resolved.

However, as in the case of dismissal of the civil action, competent to judge the civil aspect of the criminal trial so deferred is also the criminal court, we are in a situation where the mixed system, although allowed, acquires its own valences. The evidence gained by the case until the disjunction will necessarily be used, so it will no longer be re-administered (Art. 26 par. (3) C.C.P.) as opposed to the situation where the claims are solved by the civil court as a result of the failure to resolve the civil action, when the evidence administered before the criminal court is only used voluntarily in the civil jurisdiction – art. 27 par. (2) C.C.P. Concerning a criminal

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[1] CSJ, s. pen., dec. no. 765/1991, *apud* I. Neagu, *Tratat de drept procesual penal, Partea generala, Universul Juridic, Bucharest,* 2015, p. 255.

judgment, generated by the disjunction, there is no question of the actual incidence of the provisions of art. 28 C.C.P..

It was fairly noted that the discontinuation of civil action is not equivalent to an unresolved leniency of the civil action[2], so it was not and was not granted the possibility of claiming damages by way of a separate civil action before the civil court, also as an incidence of the principle *electa una via non datur recursus ad alteram.*

In the literature, under the old criminal procedure, the opinion was expressed that the civil action disposed of by the criminal action could be suspended at the request of the parties, being incidents the provisions of art. 242 Old C.C.P., currently art. 411 par. (1) point 1 C.C.P.[3]. In a contrary opinion[4], it was argued that civil action remains in the criminal trial and in this case of disjunction as it is subject to the rules of the criminal procedure, which would be disregarded in terms of operability, should the incidence of art. 242 Old C.C.P., currently art. 411 par. (1) point 1 C.C.P. [5]. The latter is the right solution today.

From the provisions of art. 25 par. (1) and art. 397 par. (1) C.C.P. as in the previous regulation, it is clear that the criminal court also makes *the same judgment* in civil proceedings. In fact, the two above-mentioned provisions express the same idea, although this repetition was not absolutely necessary. However, as in the old criminal procedural regulation, we note that the criminal court's solutions have not been covered in the express way of solving disjunctive civil action. It is a fact that we are no longer in the same criminal case where the criminal proceedings have been resolved, but also in the presence of a criminal court judgment, which, however, solves the separate civil action to be settled separately from the criminal action, a separate court judgment had its own remedies, distinct from those concerning the criminal action. As a result, we believe that, either in art. 25, or especially art. 26, or even art. 397, it would have been necessary to provide for a paragraph explicitly stating that "in case of a split of civil action, the provisions of art. 25 and art. 397 shall apply accordingly, in so far as they are compatible". Therefore, *de lege ferenda*, we propose the insertion of express provisions regarding the solving of the civil action in the event of its dissolution.

From the current way of settling the civil action in the criminal proceeding, we observe that the legislator maintained a series of general principles such as: cases of ex officio settlement of the civil action, the dependence of the civil action on the way the criminal action is solved, the dismantling of the civil action criminal proceedings, failure to solve civil action as a solution distinct from the admission and rejection of civil action, solving of civil action only by the court, not in the course of criminal prosecution, but adapted to the *new legislative vision*.

When referring to the current legislative vision, we refer, for example, not only to the assumption of the agreement on the recognition of guilt, regulated by art. 478 et

[2] Trib. Suprem, crim. s., dec. no. 536/1981 in RRD no. 11/1981, p. 55, and The Supreme Court, dec. no. 74/1983, in RRD no. 3/1985, p. 78, *apud* I. Neagu, *op. cit.,* 2006, p. 255.
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[4] V. Papadopol, notă in RRD no. 2/1984, pp. 92-96, *apud* I. Neagu, *op. cit.,* 2015, p. 255, and *apud* I. Neagu, *op. cit.*, 2015, p. 336.
[5] L Neagu, *op. cit.,* 2015, pp. 255-256; I. Neagu, *op. cit.,* 2015, pp. 340-342; I. Neagu, *op. cit.,* 2015, p. 336.

seq. C.C.P. [with civil implications, in the light of the provisions of Art. 86 C.C.P.), but also to the fact that art. 16 C.C.P.[6] proceeds to a re-systematization[7] of the cases that prevent the prosecution of the criminal action.

2. Criminal court solutions on the civil side

2.1. Solutions for the admission of the civil action

Independently of the solution given in the criminal area, in the cases below, the court may proceed to the admission of the civil action, in whole or in part, the last solution amounting to a partial rejection of the claims of the civil party.

The admission, in whole or in part, of civil action takes place in the following situations, conditional in all cases of causing damage to the civil party, that is to say, the cumulative meeting of the conditions of civil liability:

– when pronouncing the *conviction* of the defendant;

– when ordering a *payment solution* based on art. 16 par. (1) let. b) thesis II, C.C.P. (the act was not committed with the guilt of the law), art. 16 par. (1) let. d) C.C.P. (there is a justifiable or impracticable cause);

– when deciding to *terminate the criminal proceedings*, pursuant to art. 16 par. (h) [there is a cause of non-punishment prescribed by law, i.e. of general law, such as that provided by art. 34 C.C.P. or special ones, such as those stipulated in art. 273 par. (3) and art. 290 para. (2) and (3) CC.P.].

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[6] *Article 16, paragraph (1) of the present C.C.P. regulates: The criminal action can not be put into motion and when it is put into motion it can no longer be exercised if:*
a) the act does not exist;
b) the act is not provided by the criminal law or was not committed with the guilt of the law;
c) there is no evidence that a person has committed the offense;
d) there is a justifiable or unenforceable cause;
e) there is no prior complaint, authorization or notification to the competent body or another condition prescribed by the law, necessary for the commencement of criminal proceedings;
f) the amnesty or prescription, the death of the suspect or of the defendant was filed, or the removal of the suspected or accused legal person was ordered;
g) the preliminary complaint was withdrawn, in the case of offenses for which its withdrawal removes the criminal liability, the mediation took place or a mediation agreement was concluded according to the law;
h) there is a cause of non-punishment stipulated by law;
i) there is judgmental authority;
j) there was a transfer of proceedings with another state, according to the law.

[7] As elements of novelty in the current criminal procedural regulation (compared to the provisions of the Code) we mention: the elimination of the case provided by art. 10 let. b1) Old C.C.P., in order to remove the social danger between the essential features of the offense): express stipulation in art. 16 let. d) C.C.P. the cases of the existence of justifiable or non-imputability causes, general, corresponding to the modifications that are found in the new Criminal Code to art. 18-22 (the legitimate defence, the state of necessity, the exercise of a right or the fulfilment of an obligation, the consent of the victim) and articles 23-31 (physical constraint, moral constraint, unreasonable excess, minority of perpetrator, irresponsibility, intoxication, or special ones such as those in Article 272 paragraph (2), unification by merger of the two cases referred to in article 10 letters b) and d) Old C.C.P., in art. 16 lit b) C.C.P.; the regulation of art. 16 let. j) a new case for preventing the criminal proceedings.

Regarding the admission of civil action, we consider it necessary to make the following observations. Thus, according to art. 397 par. (6) C.C.P., if the civil action is admitted, the court shall order the payment of *bail* (if this measure was taken) of the indemnities granted for possible damages caused by the offense, under the conditions of art. 217 C. pr. pen.

Thus, the provisions of art. 217 para. (7) C.C.P. hereby declare that the following shall be paid by bail, in the following order expressly stipulated by the law: the monetary compensations granted for the repair of the damage caused by the offense, the costs or the fine. Therefore, the payment of civil compensation has a priority character, in relation to the express order enunciated by these legal provisions.

Practically, it is a case in which, in the course of the criminal prosecution, preliminary procedure or trial, was taken the precautionary measure of judicial control on bail or another preventive measure was replaced with the measure of judicial control on bail.

We, therefore, observe that the bail is primarily intended to repair the damage caused by the offense [as well as the other sums of money, with the titles mentioned in art. 217 par. (7) C.C.P.] and, only subsequently, the restitution of the bail is ordered by a decision [art. 217 par. (6) C.C.P.] or confiscation of the bail, if the measure of judicial bail was replaced by the measure of house arrest or preventive arrest [art. 277 par. (6) C.C.P.]

We also note that this bail can only be used to pay damages if the case goes to court because, according to Article 217 (8) C.C.P., in the case of non-court solutions, the prosecutor also orders the restitution of the bail. This occurs naturally, when the solving of the civil action really falls within the jurisdiction of the court of law (contrary to the isolated and criticised provision of Article 318 para. (3) letters a) and b) C.C.P, about which we will talk about the issue of solving the civil action in the criminal trial). We show that, in our opinion, if the case was solved in the criminal prosecution phase through a solution for the prosecution or abandonment of the prosecution [remained final under the conditions of art. 340 et seq. C.C.P.), the injured person should only have the opportunity to obtain material or moral damages, only by way of appealing to civil jurisdiction, for which, *de lege ferenda*, we propose the abrogation of the provisions of art. 318 par. (3) let. a) and b) C.C.P., concerning the order to renounce criminal prosecution, with the consequence of the correlative and partial modification of art. 318 par. (4) and par. (5) C.C.P..

In connection with these current provisions of art. 217 C.C.P., which is a novelty of the current regulation, we consider that, *de lege ferenda*:

– on the one hand, this text of law should be *rearranged*, from the necessity of accuracy in the expression of the legal order, to express, from the point of view of bail, as a criminal law institution, first the rule, then the exceptions. Thus, par. (1) to (4) should remain in the current order, paragraph [9] become par. (5), par. [7] become par. [6], to be adapted in the regard that the court, by judgment, orders payment by bail, in the following order: the monetary compensation awarded for the repair of the damage caused by the offense, the costs of the proceedings, the payment of the fine, and par. [5] and [6] become par. (7) and (8), and paragraph (8) become par. [9];

– on the other hand, from the point of view of the civil action in the criminal trial and the possibility that the civil and criminal proceedings will not be resolved at once,

we consider that it would be beneficial to *add* a paragraph (or even in the current art. 217 par. [6] C.C.P.] which expressly includes the maintenance of the bail at the court, until the final settlement and the civil action disjoined from the criminal court, for the sake of the celerity and priority of the criminal action.

2.2. Solutions to reject the civil action

The rejection of the civil action may take place in the following cases:

– when the *acquittal* under art. 16 let. a) C.C.P. [imputed deed does not exist], or referred to in art. 16 let. c) C.C.P. [there is no evidence that a person has committed the offense], being those cases which, previously, in doctrine [art. 10 let. a) and c) Old C.C.P.], were treated as a distinct matter of rejecting civil action[8], namely the situation of non-payment of civil damages, which, in fact, also occurs through a decision to reject civil action;

– where the action is *devoid of any legal basis*, that is to say, where the criminal court does not find a cumulative gathering of the elements of tort/delict [for example, lack of fault in the production of the damage].

We also show that the old doctrinal discussions on the reparation of the damage as a result of the *judicial errors* in the old criminal procedural regulation remain pending[9] because the current Criminal Procedure Code did not bring about substantial improvements under this aspect of the problem, 538-542 C.C.P. We, therefore, maintain the observations made above. In addition, we add that the principle and the consequences on the principle of avoiding unjust enrichment, not previously regulated by the civil material law, but recognized through judicial practice, were expressly stipulated by art. 1345 C.C.P.[10] and, at the same time, were maintained, by art. 1344 C.C.P., and the consequences of undue payment[11].

Regarding the cases where the formation of a civil party is late or does not contain the requirements stipulated in art. 20 par. (2) C.C.P., we reiterate that, according to art. 20 par. (4) C.C.P. the civil action is not capable of being settled in the criminal proceedings, and can only give rise to an action before civil courts. In this case *there is no proper solution* to the civil action as a sanction. As to the *constitution of an invalid civil party*, the court should expressly state this circumstance, moreover, to do so not only at the end of the case but by *concluding* (in which sense we proposed to complete this text of the law), at the time which finds these vices (for example, in order to avoid the use of unnecessary evidence). Therefore, it is not a genuine rejection of the civil action but the need for the court, in the conclusion or in the operative part of the judgment, to refer expressly to the *invalidity of the constitution and to the sanction* provided by art. 20 par.

[8] I. Neagu, *op. cit.,* 2015, p. 257.
[9] *Ibidem*.
[10] Article 1345 of the Civil Code provides that: "The person who unimportantly enriched himself unjustly to the detriment of another is obliged to restitution to the extent of the loss of property suffered by the other person, but not being kept beyond the limit of his own enrichment".
[11] Article 1344 of the C.C. provides that: "The repayment of the undue payment shall be made in accordance with the provisions of art. 1635-1649".

(4) C.C.P. and thus injured persons may be able to prosecute an action before civilian jurisdiction, sheltering from the eventual incidence of court-of-law.

In our opinion, in a case deducted from the judgment under appeal under the new regulation, which is immediately applicable, the constitution of a civil party without the filing of the proofs proving the damage and without requesting the administration of any probation should have led to the express application of art. 20 par. (4) C.C.P., and not to the dismissal of civil action as unproven[12]. Otherwise, the provisions of Art. 20 par. (4) C.C.P., and in a possible civil process would give rise to unnecessary discussions about the authority of the trial.

Not solving the civil action

The civil action is left unresolved in the cases covered by art. 25 par. (5) and (6) C.C.P. and art. 486 par. (2) C.C.P. These are the following cases:

– when the court has ordered payment on the basis of art. 16 par. (1) let. b) thesis I C.C.P. (the act is not provided by the criminal law) – art. 25 par. (5) C.C.P.;

– when the court pronounces the termination of the criminal proceeding under art. 16 par. (1) let. e) (there is no prior complaint, authorization or notification or other condition prescribed by law, necessary for the criminal action to be initiated), let. f) (the amnesty, the prescription, the death of the natural person or the dissolution of the legal person was ordered), let. g) (the previous complaint was withdrawn in the case of offenses for which the withdrawal of the action removes the criminal liability, the mediation occurred or a mediation agreement was concluded according to the law) C.C.P. – art. 25 par. (5) C.C.P.

Following the decision of the Constitutional Court no. 586 of 13 September 2016, in the case of criminal liability, civil action can be further resolved in the criminal proceedings.

Regarding the situation in which the failure to resolve the civil action regarding the *reconciliation* of the parties occurs, we notice that this text is in *contradiction* with the provisions of art. 159 par. (2) C.C.P., which expressly speaks of the extinction of civil action, which was judiciously appreciated as capable of generating non-uniform practice.[13]

It is obvious that, *de lege ferenda*, it is necessary to reconcile these provisions, no matter what solution is embraced;

– when a transfer of proceedings took place with another state under the law, according to art. 16 par. (1) let. j) C.C.P. – art. 25 par. (5) C.C.P.;

– when, according to art. 25 par. (5) C.C.P., the court accepts the agreement on the recognition of guilt and the parties have not entered into a transaction or mediation

[12] Ap. C. Cluj, Criminal decision no. 34/A of February 6, 2014, in BJ, Annual Reporter, 2014, op. cit., pp. 661-662

[13] *Just starting from this discrepancy, interesting are the opinions expressed after a meeting from 27-28 November 2014 of the CSM representatives with the chambers of the ICCJ and the Courts of Appeal. Thus, it was decided that in the case of civil action by persons other than the victim of the offense (for example, hospital units in the case of road events) there should be an express mention in the device of the unresolved lapse of the civil action (thus running the Code of Criminal Procedure), while the civil action brought by the injured person who is reconciled will be extinguished on the basis of the provisions of the Criminal Code. See to this, http://www.juridice.ro/351877/aspecte-de-practica-neimitara-in-materia-dreptului-pena- si-procesual-penal-minuta-intalnirii-reprezentantilor-csm-cu-presedintii-sectiilor-penale-de-la-iccj-si-curtile-de-jŢ el.html (consulted in May 2015).*

agreement on the civil action, according to art. 486 par. (2) C.C.P. with the observation that it is expressly stipulated that the decision by which the agreement on the recognition of guilt was accepted does not have the authority to work on the extent of the damage before the civil court. However, by reference to the provisions of art. 28 par. (1) thesis I C.C.P., the judgment of the criminal court accepting the agreement on the recognition of guilt has the authority of judgment to the existence of the offense and the person who committed it. Moreover, this judgment has civil judicial authority and the existence of the prejudice and guilt of the perpetrator of the offense, which is inferred from the contrary interpretation of the provisions of Art. 28 par. (1) and II C.C.P. (not a case of acquittal or termination of the criminal trial). Therefore, from the point of view of civil claims, in practice, civil jurisdiction will be administered the necessary evidence to quantify the damage, a matter left unresolved in the criminal trial, in the absence of an agreement between the parties and the impossibility of losing the civil aspect, deduced from the provisions art. 486 par. (2) C.C.P.

3. Conclusions

We consider that the adoption of this solution provided by art. 486 par. (2) C.C.P. is unfair from the point of view of protecting the rights and interests of persons injured by crimes, and they are in practice obliged to make new efforts and diligence in order to take legal action before civil courts, thus seeing even postponed the possibility of their indemnification. Since the agreement on the recognition of guilt is in the jurisdiction of the court of law (Article 485 of the Criminal Procedure Code), and in case of admission of this agreement we are basically in the hypothesis of a court decision, we believe that, *de lege ferenda*, given that the Romanian legislator continued to opt for the system of the possibility of training the civil action in the criminal proceeding, it would be beneficial to have the possibility of exercising the civil action in the criminal trial (if this was trained in the criminal trial and is necessary to administer the evidence)? If so chosen, civil action should be compulsorily *disjunct* to be settled by the criminal court. In the sense of such a modification of art. 486 par. (2) C.C.P., consisting in the adoption of the solution of the dissolution of the civil action, we believe that there are also the judgments which have edited a similar case, that of the simplified procedure in case of recognition of the guilt – art. 374 par. (5) in conjunction with art. 26 C.C.P. It is curious how the legislator intended to protect the victim's interests in the case of the prosecutor's decision to renounce criminal prosecution (Article 318 C.C.P.), but did not proceed in the same way with the special procedure in question.

So even if the guilty recognition agreement is meant to ensure celerity, we believe that the victim should still be left to opt if he wishes or not to use his claims in the criminal process, and not to restrict his right of option by starting from a way of settling the criminal law conflict over which he has nothing to say. Until such an

amendment to the law, only the courts leave unresolved the civil action, as is currently the case[14];

– when, according to art. 25 par. (6) C.C.P. the heirs or, as the case may be, the successors in title or the liquidators do not express their option to exercise the civil action or, as the case may be, the civil party does not indicate the liquidators of the civilly liable party within the term stipulated in art. 24 paragraph (1) and (2). This is a maximum of two months from the date of knowledge of the circumstance, but for accuracy in expression, we consider that, *de lege ferenda*, it would be correct the following format of art. 25 par. (6) C.C.P. "The court shall leave unresolved the civil action, and if the heirs or, as the case may be, the successors in title or the liquidators of the civil party do not express the option to continue the exercise of the civil action within the term stipulated in art. 24 paragraph (1) or, as the case may be, the civil party or the defendant does not indicate the heirs, the successors in title or the liquidators of the civilly responsible party within the term stipulated in art. 24 paragraph (2)";

– when, according to art. 25 par. (5) C.C.P., the criminal proceedings terminate as a result of the withdrawal of the prior complaint. In this respect, the initial provisions of art. 25 par. (5) have been modified by Art. II point 2 of U.G.O. no. 18/2016. In this way, the withdrawal of the preliminary complaint only produces an impact on the criminal process, not on the civil claims that can be capitalized on a purely civilian action.

It can be observed that in the current regulation, cases in which civil action is not solved in the criminal proceeding, leaving only the way of appeal to civil jurisdiction, are much more numerous than in the previous regulation. Thus, the case currently governed by Art. 16 par. (1) let. f) did not constitute an impediment to solving the civil action in the criminal trial – see the case regulated by art.10 let. g) Old C.C.P. That is why we appreciate that, unfortunately, the present Code represents a regression in the interest of the victims of crime, assisting in an increasingly open, even if not expressly, recognition from the mixed system of the possibility of joining the two actions in the criminal trial.

It is also important that the failure to resolve the civil action in the criminal proceeding is *not a rejection of the civil action*, so that the way of appealing to the civil jurisdiction for the recovery of the damage remains open, and the prescription of the civil action before the civil jurisdiction must relate to the date to pronounce the criminal sentence. In this respect, the observations of the jurisprudence prior to the entry into force of the current Code of Criminal Procedure[15] remain valid today. Correctly, therefore, from the point of view of the immediate application of the provisions of the current Code of Criminal Procedure (non-equitable provisions, given the prolongation of the court proceedings on the recovery of the damage, through a

[14] Jud. Cluj-Napoca, Criminal sentence. no. 326 of 28 march 2014 (def., unpubl.)

[15] ICCJ, civ. dec. no. 1479 of 29 april 2010, on http://legeaz.net/spete-drept-comercial-iccj-2010/*decizia-1479-2010* (consulted in May 2010), which states that: "How in the matter by criminal sentence no. 32 of 17 January 2008 of the Constanța County Court of Appeal, the civil action brought by the applicant has not been resolved, it can not be remembered – as the appeal court did – that it amounts to the rejection of the applicant's civil claim, so that the prescription of the applicant's right of action against the defendant restarts from the date on which that judgment was delivered (...), the date on which the action was brought (...) within the limitation period (...), the solutions held by the appellate courts are therefore unlawful and non-industrial".

new civil lawsuit in the event that it is desired recovery of the damage), the civil action of all civil parties was left unresolved as a result of the interference with the prescription of criminal liability[16].

At the same time, as a guarantee of the reparation of the prejudice, it is possible to take precautionary measures in the criminal proceedings, regardless of the procedural stage, which are even mandatory for the protection of persons protected by art. 19 par. (3) C.C.P.. As a protection of the constituted civil party victims whose actions have been left unresolved in the criminal trial, according to art. 397 par. (5) C.C.P. they shall be maintained provided that the injured party brings an action before the civil court no later than 30 days after the final judgment has been passed. This safeguard of the victims' interests is provided only for the non-solving of the civil action under art. 25 par. (5) C.C.P., not that of art. 25 par. (6) C.C.P. in the latter case, the failure to resolve the civil action is regarded as a sanction of a culpability resulting from a procedural passivity.

By means of these provisions, the precautionary measures established before criminal jurisdiction may be prolonged, even if the criminal proceedings have ceased by a final judgment, before the civil courts. The continuation of the civilian offense thus shelters the victims from the risk of having already completed procedures or the insolvency of the debtors [former passive subjects of the civil action exerted in the criminal proceeding]. Therefore, it remains for victims to exercise the necessary diligence to act before civil courts within the time-frame prescribed by law.

However, we consider that the 30-day deadline *could be extended* (for example, to 60 days), not enough to safeguard the victim's interests and to shelter him from the sanction of the legal termination stipulated in art. 397 par. (5) C.C.P.. The term thus proposed would appear to be a reasonable one, being the most appropriate for the introduction of a new court action, thoroughly prepared, possibly even with the applicant's consideration of some of the arguments for the final judgment of the criminal court, the reasoning of which is subject within 30 days [art. 406 C.C.P., which this time has the nature of a term of reference, unless expressly stated otherwise).

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[16] Jud. Cluj-Napoca, crim. sent. no. 505 of 7 may 2014 (def., unpubl.).

THE RIGHT TO REPUTATION IN THE RECENT CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract: *As a consequence of the new social realities, and here we refer to the diversification of the methods of information of the public, it can be seen an increase of the cases pending before the court of laws in which there are required moral damages by natural and legal persons, damages which come from the breaching of the right to reputation, especially by the media.*

As it was set by the Court, the right to protect the reputation is a right protected by art 8 from the convention, being an element which belongs to the private life. It was shown that the notion of "private life" is a wide notion, which cannot have an exhaustive definition and which includes the moral and physical integrity of the person and, thus, can include the multiple aspects of the identity of a person, as well as the identification and sexual orientation, name or elements in regard to the image right.

As in the last years, as a consequence of diversifying the means of global information, the cases before the courts in which it is claimed the right to reputation have increased, it is necessary to analyse some aspects regarding this matter, in the recent case-law of the European Court of Human Rights, in the cases against Romania.

In our opinion, the CEDO case-law is relevant due to the incidence of the European Convention of the Human Rights in the Romanian Law.

Keywords: *right to reputation, the freedom of speech, case law of the European Court of Human Rights, European Convention of the Human Rights, mass media.*

1. Premises

In this paper, a few case-laws of the European Court of Human Rights will be analysed in the field of respecting the right to reputation by the mass media.

The judicial undertaking starts from the incidence of applying the European Convention of the Human Rights by the national courts in the cases where there are required moral damages as a consequence of breaching the right to reputation, especially by the mass media.

The analysed problem is a matter of interest, is common practice, given the increase of the online means of information of the public, reality which often leads to exceeding the limits of the freedom of expression with the consequence of breaching some fundamental human rights, the right to reputation included.

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2. Definitions

A relevant definition of the research of the matter is conditioned by the definition of the presented judicial institutions.

Reputation[1], f.n. Public opinion, favourable or unfavourable of someone or something; the way in which someone is known or appreciated * Renown, fame, celebrity [Var: (inv) reputation noun] – from fr. Reputation, lat reputatio, -onis.

The freedom of expression is a fundamental human right, which includes the freedom of opinions and to express them, to communicate information or ideas.

Mass-media[2] noun which designates the totality of modern technical means and methods of information and of influencing the public opinion, including the radio, television, press, internet, etc.; means of mass communication [Pr.: -di-a] – Cuv. Engl.

Case-law, case-laws[3], noun. 1. The totality of decisions ruled by the case-law authorities in a specific field; *spec*. totality of decisions belonging to a court; the method in which a litigation is commonly judged in a court of law. 2. The analysis of the nature of the law and judicial systems; the philosophy of rights – From fr. Juris-prudence, lat. *jurisprundentia*.

The European Court of Human Rights[4]: (hereinafter C.E.D.O. or the Court) court created by the European Council to ensure the compliance with the rights provided by the European Convention of the Human Rights.

The European Convention of the Human Rights[5] – Signed in 1950 by the European Council, CEDO is an international treaty, which protects the human rights and fundamental freedoms in Europe. All 47 countries, which form the European Council, participate at the convention, 28 of these being also EU members.

The Convention created the European Court of Human Rights, whose objective is to protect the natural persons against the breaching of human rights. Any person whose rights conferred through the convention have been breached by a signatory state can start a trial at this court. Creating CEDO represented an innovation, because through this there are granted rights on an international platform to the natural persons.

The decisions, which rule breaches, have mandatory character for the states in question. The committee of ministry of the European Council monitors the application of the decisions.

The convention includes several protocols of changing its frame.

The Lisbon treaty, in force since December 1st 2009, allows EU to adhere to CEDO and in 2013, an agreement project concerning the adherence was finalized.

[1] https://dexonline.ro Source: DEX'09 (2009).
[2] https://dexonline.ro Source: DEX'09 (2009).
[3] https://dexonline.ro Source: DEX'09 (2009).
[4] https://e-justice.europa.eu/contect_international_case_law-150--maximize.ro.do, website managed by the European Commission.
[5] https://eur-lex.europa.eu/summary/glossary/eu_human_rights_convention.html?locale=ro the portal of the Office for Publications of EU.

3. Introductory notions regarding the right to reputation in the Romanian Law

In the Romanian Law, the right to reputation is regulated in the Civil Code[6], Chapter II – The respect owed to the human being and their inherent right, Section 3 – The respect owed to the private life and human dignity, in art 72 – The right to dignity (1). Any person has the right to have their dignity respected and paragraph 2 states that it is forbidden any prejudice brought to the honour and reputation of a person, without its consent or without complying with the limits provided for at art 75.

As it can be seen, the right to reputation is not an absolute right, but it is exercised in certain limits set by art 75 Civil Code, thus: paragraph (1) It is not a breach of the rights provided for in this section the prejudice that is allowed by law or by the international conventions and agreements regarding the human right to which Romania is a party. (2) Exercising the constitutional rights and freedoms in good faith and complying with the international conventions and agreements regarding the human right to which Romania is a party does not represent a breach of the rights provided for in this hereby section.

Art. 75 from the Civil Code is applied in the conditions of art 3 from the Code of Civil Procedure[7] with marginal name – The priority application of international treaties regarding human rights – which states, in paragraph 1, that in the matters regulated by this hereby code, the provisions regarding the rights and freedoms of the persons will be interpreted and applied in accordance with the Constitution, The Universal Declaration of the Human Rights, with the agreements and with the other treaties to which Romania is a party, and in paragraph (2) If there are any inconsistencies between the agreements and treaties regarding the fundamental human rights, to which Romania is a party, and this code, the international regulations have priority, except the cases in which this hereby code has more favourable provisions.

As a consequence, it comes up this type of analysis of the right to reputation in the light of the recent case-law of the European Court of Human Rights, especially in the context where the Court has had, in the past years, an abundance of cases in this matter.

4. Introductory notions regarding the right to free speech in the Romanian Law

The analysis of the right to reputation is important reported to the right of free speech exercised by the mass media, press, online, social media, etc.

In the Romanian Law, the right of free speech is regulated in the Civil Code, Chapter II – The respect owed to the human being and their inherent right, Section 3 – The respect owed to the private life and human dignity, in art 70 – the Right of free speech (1) Any person has the right to free speech. (2) Exercising this right can be limited only in the cases and limits provided for in art 75.

[6] Law no 287/2009 regarding Civil Code, published in the Official Gazette no 511/24.07.2009.
[7] Law no 134/2010 regarding the Code of Civil Procedure, republished in the Official Gazette no 247/10.04.2015.

5. The right to reputation and the right to free speech in the European Convention of the Human Rights

Article 8 from CEDO – Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence.2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 from CEDO – 1. 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.2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Further, starting from these two articles in the European Convention of the Human Rights, it will be presented an analysis of the recent case-law of the Court, in cases against Romania.

6. The analysis of the case-law in C.E.D.O. regarding the protection of reputation

European Court of Human Rights acknowledges the right to the protection of reputation as a component of the right to private life. Thus, the Great Chamber has noted in the case Axel Springer AG against Germany (Request no 39954/08) that the right to protect the reputation is a right protected by art 8 from the convention, being an element regarding private life. It was shown that the notion of "private life" is a wide notion, which can not have an exhaustive definition and which includes the physical and moral integrity of the person, and as a consequence, it can include multiple aspects of the identity of a person, like the identification and sexual orientation, the name or elements regarding the image rights (p. 83).

In this way, the Court has shown that the right to protect the reputation is an element of the private life, is a right that is within art 8 from the Convention (Tănăsoaica v Romania, p. 37).

When it examines the necessity of an interference in a democratic society to "protect the reputation or others' rights", the Court can verify if the national authorities have kept an even balance between the protection of two values granted by the convention and which can be in conflict in certain cases: namely, on the one hand, the

freedom of expression, as it is protected by art 10 and on the other hand, the right to respect the private life, as it is granted by art 8 (Tănăsoaica v. Romania, p. 36).

It is noted that the right to protect the reputation was analysed by the Court either from the perspective of a breach of art 8 in the Convention, when it analysed the existence of a possible interference in the private life through the detriment brought to the reputation of a person and the right to own image, or from the perspective of a breach of art 10 in the Convention, when it analysed the existence of a possible interference in exercising the right of free expression as a consequence or censoring an opinion or application of a sanction for the detriments brought to the reputation of a person. Thus, the Court showed that it analyses the report between art 8 and art 10 of the Convention, if the request was filed before it, based on art 10 from the convention by the journalist who published the article in the litigation, or based on art 10, by the person which is the object of that article (Tănăsoaica v. Romania, p.39).

The Court has also stated that those rights deserve a priori fair consideration, so that the margin of discretion should be, in principle, the same in both cases (Tanasoaica v. Romania, p.39).

The Court has established six criteria to be considered when balancing the right of freedom of expression and the right to respect the private life: contribution to a debate of general interest, the reputation of the person concerned and the subject matter, the previous behaviour of the person concerned, the information and their veracity, the content, form and effects of the publication and the severity of the imposed penalty (Axel Springer AG, previously quoted, point 90-95, mentioned in Tănăsoica v. Romania, p. 41).

Further, some of the decisions of the Court, given in cases against Romania, which deal with the protection of reputation, either as an element of the right to private life or as an aspect of the extent of the right to free speech, will be analysed.

6.1. The protection of reputation as a legal aspect connected to the right of respecting the private life

With regard to the protection of reputation, the Court has pointed out that the notion of "private life" extends to aspects of personal identity and reputation, showing that the publication of a photograph of a person relates to their private life, even when the person concerned is a public figure – the case of Ion Cârstea v. Romania (Decision from 23.10.2014 – request 20531/06, p. 29).

However, in order for art. 8 to be taken into account by the Court, the attack on personal reputation must reach a certain level of gravity and has been achieved in a manner that prejudices the personal benefit of the right to respect the private life (Tanasoaica v. Romania, p.37).

When investigating a possible violation of art. Article 8 of the Convention, the Court mainly addressed the issue of a fair balance between the protection of reputation as an element of private life and the right of the other party to free expression, as guaranteed by art. 10 of the Convention. (case Ion Cârstea v. Romania, p. 31).

One of the criteria investigated in this analysis is the contribution of an article or photo published by the press to a general interest debate on politics, crime, sport or

arts. Thus, the Court has held that the presumed marriages of the head of state, the financial difficulties of a famous singer, health or sex-related data are a matter of private life and can not be regarded as matters of general interest (case Ion Cârstea v. Romania, p. 33).

Another criteria taken into account by the Court is the role or function held by the person concerned by the disputed claims, this criteria being corroborated with that relating to the nature of the activities covered by the report. The Court therefore pointed out that a clear distinction must be made between the presentation of factual matters capable of contributing to a debate of general interest in a democratic society – such as the disclosure of the actions of some public officials – and the presentation of some details the private life of an individual who does not have such a function, with the sole purpose of satisfying public curiosity, in the latter case the freedom of expression being more restricted (case Ion Cârstea v. Romania, p. 36).

In the same sense, the Court has pointed out that Art. 10 par. 2 of the Convention leaves no room for restrictions on freedom of expression in the field of policy discourse or matters of general interest (Petrina v. Romania, p. 40).

Moreover, the Court held that the limits of the admissible criticism of a politician in that capacity are greater than that of a single individual: unlike the second, the first is inevitably and consciously exposed to a careful control of its actions and gestures both by journalists and by most citizens; Consequently, it must show more tolerance. This principle applies not only to political people, but extends to any person who can be qualified as a public figure, namely that through his acts falls within the scope of the public arena (Petrina v. Romania, p. 40; Tănăsoiaca v. Romania, p. 34).

On the other hand, the Court makes a distinction between the way in which the accusations were brought. Thus, in the case of the written press, the Court took into account whether the person concerned was given the right to reply in the very same article published (the case of Ion Cârstea v. Romania, p. 35). In another case, it held that the disputed statements were verbal at a meeting, which prevented the applicant from reformulating, supplementing or withdrawing them (Boldea v. Romania, p. 58).

Also, in order to protect the reputation, the Court has shown that the act of making serious accusations against a person identified by name and occupation implies an obligation for the journalist who presents him to produce sufficient factual bases in support of what he relates. Thus, the Court attributed particular importance to investigating aspects of how the information was obtained, whether it was verified or whether the person concerned was given the right to reply in the very article generally published (case Ion Cârstea v. Romania, p. 35).

Also, in its practice, the Court distinguishes between facts and value judgments. If the precision of bonuses can be proven, the following can not prove their accuracy. For value judgments, this requirement is unrealistic and affects the freedom of opinion itself, a fundamental element of the law provided by art. 10 (Petrina v. Romania, p. 41, Boldea v. Romania, p. 54). However, C.E.D.O. has held that the fact of accusing certain persons implies an obligation to provide a sufficient real basis, and that including a value judgment can prove to be excessive if it is totally lacking in a real basis (Petrina v. Romania, p. 42, Cumpănă and Mazăre v. Romania, p. 99).

Thus, according to the Court, although by virtue of the role assigned to it the press has a duty to alert the public when informed about the existence of alleged illegalities committed by local elected officials and civil servants, the reference to designated persons, mentioning names and functions, implies an obligation to provide a sufficient factual basis (Cumpănă and Mazăre v. Romania, p. 101).

Moreover, the Court emphasized that the exercise of freedom of expression includes "duties and responsibilities" which are also valid for the public, even when it is a matter of general interest. Such duties and responsibilities may be of particular importance if there is a risk of harming the reputation of a nominated person and of violating the "rights of others". Thus, there must be specific reasons for being able to relieve the public of its obligation to verify de facto defamatory statements. In that regard, the nature and degree of the charge in question and the extent to which the public can reasonably consider its sources to be credible in relation to those allegations (Tănăsoaica v. Romania, p. 35).

When examining the need for an interference in a democratic society to "protect the reputation or the rights of others", the Court can verify whether the national authorities have maintained a fair balance between the protection of two values guaranteed by the Convention and which may conflict in certain cases: namely, on the one hand, freedom of expression, as protected by art. 10, and, on the other hand, the right to respect the private life, as guaranteed by art. 8 (Tănăsoaica v. Romania, p. 36).

In regards to the obligations of the State to protect the right to privacy in terms of the protection of the reputation, it is noted that they are both negative, consisting in refraining from committing such interferences, as well as positive ones, respectively to ensure the mentioned desideratum by adopting effective measures for this purpose (Sipoş case against Romania (Decision from May 3rd 2011 – Request no 26.125/04).

Thus, the Court has pointed out that, although Art. 8 has as its main object the protection of the individual against arbitrary interference by public authorities, it is not limited to obliging the state to refrain from such interference: this negative engagement may add positive obligations inherent to the effective observance of private or family life. These may require the adoption of privacy measures, including on the relationship between individuals. The limit between the positive and negative obligations of the state in relation to art. 8 does not lend itself to a precise definition, but the applicable principles are comparable. In particular, in both cases, the right balance to be maintained between the general interest and the individual interests must be taken into consideration, with the state always enjoying a margin of discretion (p.29). Moreover, the Court has held that the positive obligation under Art. Article 8 of the Convention should apply if statements likely to affect the reputation of a person exceed the limits of acceptable criticism from the perspective of Art. 10 of the Convention (Sipoş v. Romania, p. 30).

Moreover, in the case of Ion Cârstea v. Romania, the Court has stated that the State's obligations are to adopt measures aimed at protecting private and family life, even in the case of relations between individuals (p.30). In essence, the Court observes that account must be taken of maintaining a fair balance between the general interest and the individual\s interests, while the State enjoys a margin of discretion (Case Petrina v. Romania, decision from 14.10.2008, request 78060/01, p. 35).

6.2. The protection of the reputation as a limit to the freedom of expression

The Court has held that freedom of expression is one of the essential foundations of a democratic society and that this freedom is valid not only for "information" or "ideas" gathered with goodwill or considered harmless or indifferent, but also for those who scandalize, shock or perturb. This imposes pluralism, tolerance and the spirit of openness without which there is no "democratic society". The press plays an essential role in a democratic society: if it does not have to go beyond certain limits, especially the defence of the reputation and the rights of others, it still has the task of communicating, respecting its obligations and responsibilities, information and ideas to all issues of general interest. Freedom of journalism also includes the possible use of a certain amount of exaggeration, and even a challenge of appreciation (Case Petrina v. Romania, p. 36; Ileana Constantinescu v. Romania, Decision from 11.12.2012, case 32563/04, p. 30; Case Mihaiu v. Romania, Decision from 04.11.1008, request 42512/02, p. 54, p. 57; Tănăsoiaca v. Romania, p. 32-33).

Although the Court has pointed out that freedom of expression is one of the essential foundations of a democratic society, one of the main conditions of its progress and individual development, it has been recognized that this freedom is accompanied by exceptions which nevertheless require a restrictive interpretation and the need for a limit must be convincingly established (case Boldea c. Romania, Decision from 15.02.2007, request 19997/02, p.45).

When investigating whether Art. 10 of the Convention has been violated, the Court proceeded from the analysis of the existence of an interference with the right to free speech and only affirmatively investigated whether this interference is justified in a democratic society (that is, if provided by law, if it is set up to ensure a legitimate purpose and if it is necessary in a democratic society), among other things, also reporting on the protection of a person's reputation.

For example, the Court held that the conviction of a person for offences of insult or slander (provided for and punished by Articles 205 and 206 of the 1969 Criminal Code, now abrogated) is an interference with the right to free speech (Cumpănă and Mazăre v. Romania, p. 85).

The condition of "necessity in a democratic society" requires the Court to determine whether the incriminated interference corresponded to "a pressing social need" (Cumpănă and Mazăre v. Romania, p.88; Mihaiu v. Romania, p. 55). In the case where the "imperative social need" was represented by the protection of a person's dignity and public image, the Court pointed out that an important element must be taken into account: the indispensable role of the "guard dog" of the press in a society (Cumpănă and Mazăre v. Romania, p. 93).

However, the Court notes that the press must not exceed certain limits, in particular by protecting the reputation and rights of the others. It has, however, the task of communicating information and ideas on political issues and on other topics of general interest in order to carry out its tasks and responsibilities (Cumpănă and Mazăre c. României, p. 93).

Regarding the legitimate purpose which can justify an interference in the right of free speech, the Court showed that this can be represented by the protection of reputation or respecting another's person private life (case Tănăsoiaca v. Romania, Decision from 19.06.2012, request 3490/03, p. 31, Boldea v. Romania, p. 51).

Another aspect taken into consideration to find out whether the interference was justified is the proportionality of the punishment applied. Thus, the Court held that the nature and severity of the penalties applied are elements to be taken into account in assessing the proportionality of a limitation to the right to freedom of expression guaranteed by Art. 10 in the sense that maximum care must be taken when measures taken or penalties imposed by national authorities are such as to discourage the participation of the press in the debate on issues of general legitimate interest (Cumpănă and Mazăre c. Romania, p.111).

The Court has pointed out that although States-Parties have the possibility and obligation to regulate how to exercise freedom of expression so as to ensure the proper protection of the reputation of individuals by law, they must avoid taking measures that discourage the press from doing its public alert function in case of apparent or alleged abuses by the authorities (Cumpănă and Mazăre v. Romania, p. 113).

In the Court's view, the measures restricting the activity of journalists in advance must be examined in detail and justified only in exceptional circumstances, and the principle that the press should be able to perform its function of "guard dog" within a democratic society must be respected (Cumpănă and Mazăre v. Romania, p. 118-119).

Summarizing the above, it is noted that the Court held that the arguments put forward by the national authorities to justify the interference should be "relevant and sufficient" and that the measure in question be "proportionate to the legitimate aims pursued. In this context, the Court must convince itself that the national authorities, on the basis of a reasonable appraisal of the relevant facts, have enforced rules in accordance with the principles provided for in Art. 10 in conjunction with art. 8 (Ileana Constantinescu v. Romania, p. 32; Case Cumpănă and Mazăre v. Romania, Decision from 17.12.2004, request 33348/96, p. 90).

7. Conclusions

From the analysis of international and applicable domestic law, as well as the case law of C.E.D.O. presented the principle that both the right to reputation and the right to free expression are relative rights which involve limitations. Thus, interference with the right to private life or freedom of expression is permitted, as long as these interferences comply with the conditions imposed by C.E.D.O., namely that they are provided for by law, pursue a legitimate aim and are necessary in a democratic society. It is also noted that the particular circumstances of a case (such as the quality of a person, the manner in which the information is presented, the interest which the exposed situation poses for society) weigh heavily in the Court's analysis to determine whether they have violated the rights guaranteed by the Convention.

It is therefore taken into account that both the applicable law and the case-law of the Court ensure the protection of reputation to the extent that this right has been

caused by an unjustified interference caused by overcoming the limits of the exercise of another right or other freedom.

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THE RESOLUTION OF THE CIVIL ACTION BY THE PROSECUTOR

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Abstract: *As we have noticed, the settlement of the civil action in the criminal proceedings falls within the competence of the criminal court, which can admit, reject or leave the civil action unresolved. However, in relation to the provisions of art. 318 par. (3) let. a) and b) C.C.P. [of the previous U.G.O. no. 18 of January 20, 2016], as an element of novelty with respect to the previous regulation, an exception to the principle that the issues related to the settlement of civil action fall exclusively within the jurisdiction of the court. This is a special case for solving the civil action by the prosecutor. At present, even if the order for the abandonment of criminal prosecution is subject to verification by the hierarchically superior prosecutor [according to art. 318 par. (10) and (11) C.C.P. as amended and supplemented] and, respectively, confirmation by the judge of the preliminary chamber (according to art. 318 par. (12) – (16) C.C.P.], it is the prosecutor who, on a voluntary basis, proceeds to solve the civil action in the manner provided by the current art. 318 par. (6) let. a) and b) C.C.P.*

Keywords: *civil action, criminal proceeding, competence, the prosecutor.*

1. Introduction

Referred to the provisions of art. 318 C.C.P., the solution to waive of criminal prosecution may be ordered both when the author is known and when he is not known. For the situation in which the author is aware, the legislator states that the appreciation of the public interest shall be on the one hand the conduct before committing the offense and the attitude of the suspect or the defendant after committing the offense, including *the efforts made to remove or mitigate the consequences of the offense* [paragraph (3) let. g)].

The provisions of art. 318 par. (3) letter g) paragraph (6) let. (a) and (b), (7) and paragraph (9) C.C.P. are capable of transforming the private interest, concerning the repairing of the damage, into a public one, which is not judicious, since civil[1] action, irrespective of the jurisdiction in which it is exercised, defends essentially individual interests. Therefore, we consider that the victim's private interest in repairing the damage should not be transformed into a public interest that could lead by himself to the failure to renounce criminal prosecution or even to revoke it.[2]

At the same time, it would not appear equitable that this solution could be embraced if the author is not known (independent of civil aspects), but there is the possibility of excluding it from the situation where the author is known but does not work for removing or mitigating the consequences of the offense. Reporting should be done strictly to the

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[1] Denisa Barbu, *Some aspects concerning the civil action in the criminale proccedings*, European Proceedings Social and Behavioural Sciences, vol 15, Lumen, 2016, p.98.

[2] Denisa Barbu, *The principle of separation of judicial functions*, in LESIJ, no 1/2016, p.146.

public interest, with the exclusion of the private one, leaving the injured person open only to the way of using civil claims before civil courts when the amicable settlement has not succeeded. It does not appear just that the prosecutor retains the faculty (the phrase "may") to solve the civil side as a discretionary right, nor does the solution to renounce the criminal prosecution or the revocation of the ordinance by which it was ordered become incidents depending on the prosecutor's will to solve or not private matters, civilly.

2. Some of the proposals *de lege ferenda*

For these cumulative reasons, we propose, *de lege ferenda*, the removal from the art. 318 C.C.P. of the references and implications of the civilian side. Moreover, neither the solution to criminal prosecution from the previous regulation, on the ground that the deed does not present the social danger of an offense (art. 11 pt. 1 let. b) corroborated with art. 10 let. b^1) Old C.C.P., applying art. 18^1 C.C.P.) – with which it somewhat resembles that of abandoning the criminal prosecution provided by art. 318 C.C.P. – did not provide for such restrictive conditionality. It is also worth mentioning that, in the literature[3], it was rightly considered[4] that the provisions of art. 318 C.C.P. have a *mixed nature*, both procedural and substantive criminal law, containing provisions that lead to the exoneration of the author from the criminal responsibility and imposing obligations whose enforcement is dependent on the exoneration of criminal responsibility itself.

Therefore, we consider that the criminal and the civilian must remain at this stage of the proceedings in separate plans, and that the private interest arising from the specificity of the civil action should not be transformed into an absolutely public one, which would prevent the exoneration of criminal liability or resume the criminal process as a result of the revocation, and these for the simple fact that the author is known.

Furthermore, if the legislator has understood to protect the rights and interests of victims in the case of abandoning criminal prosecution, it does not appear fair that the same protection should not be stipulated and if an agreement on the recognition of guilt is reached [art. 488 (1) and (2) do not contain provisions similar to those of Article 318 (6) (a) and (b) (7) and paragraph (9) of the Criminal Procedure Code], and in the case of failure to conclude a transaction or a mediation agreement on civil action, the civil action shall remain unresolved, being open only to the appeal to the civil jurisdiction. It is desirable to maintain the conditioning of the waiving of criminal prosecution to resolve the conflict of civil law, such conditionality should be similarly stipulated in the mediation agreement (the judgments being even stronger in this case).

The provisions of art. 318 par. (6) let. a) and b) C.C.P. establishes, as an element of novelty, a case for solving the civil side of the criminal trial, but, in our opinion,

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[3] Florin Streteanu, *Documentare privind aplicarea în timp a legii penale în condițiile intrării în vigoare a noului Cod penal, p. 17, pe* http://www.justro/LinkClick.aspx?fileticket=j6vg%2Flz8r40%3D&tabid=2112 *(consulted in January 2015).*

[4] CC, dec. no. 1470/2011, Of. M. no. 853 of 2 december 2011, concerning the criteria for delimitation between the rules of criminal law and criminal procedure, that the placing of such rules in the Criminal Code or the Criminal Procedure Code does not constitute a criterion for distinguishing them *apud* F. Streteanu, *op. cit.,* pe *http://www.]ustro/LinkClickaspx?fileticket=]6vg%2Flz8r40%3D&tabid=2112 (consulted in January 2015).*

inappropriately. We propose, *de lege ferenda*, the removal of these criminal procedural provisions which represent an interference in the judge's competence in solving civil claims resulting from an unlawful act that could constitute an offense. Perhaps the legislator wanted to relieve the civil courts and bring about a speedy resolution of the entire conflict of law in all its criminal and civil matters, but did not do it in the most appropriate way possible[5]. Even if, following the changes made by U.G.O. no. 18/2016, the preliminary chamber judge confirms the prosecutor's decision to renounce criminal prosecution, he does not really proceed to solve the civil side, but also the prosecutor by his ordinance. Furthermore, it would not be fair to offer the possibility for the preliminary chamber judge to proceed, according to art. 318 par. (15) letter a) C.C.P. (including a general and permissive text), to the refutation of the solution waiving on the sole ground that the prosecutor did not solve the civil party or solved it in a non-traditional way. Thus we shall be arriving at a vicious circle which may originate in the private interest of civil law, and, moreover, the prosecutor's faculty to dispose of the obligations under Article 318 paragraph (6) letters a) and b) C.C.P. to become an obligation in his charge, determined by the possibility of a preliminary chamber judge to abolish the prosecutor's solution.

Regarding the provisions concerning waiving the criminal prosecution in the light of civil claims, we have the following:

– the prosecutor is not obliged to order, within the respect of art. 318 par. (6) C.C.P., he just "may", so he has a simple faculty, which is a gratifying thing, referring to the criticism of art. 318 par. (6) let. a) and b) C.C.P. However, the positive aspects are diminished by the discretionary right of the prosecutor to deal with the civil party or not, but also by the right of the preliminary chamber judge to confirm or not the prosecutor's decision depending on the civil aspect (the analysis on the solution or the failure to solve the prosecutor's right civil remedies or the merits, and the extent of such a remedy];

– the prosecutor has, within the meaning of art. 318 par. (6) C.C.P. after consultation with the suspect and the defendant. The consultation term means that there is no need to reach an agreement between the suspect/defendant and the prosecutor. Thus, if the consultation does not lead to an agreement in principle, the disposition of the regulated measures (especially those under letters a) and b) becomes unnecessary and can lead to postponing, just as unnecessary, the disposal of the decision to renounce criminal prosecution. Unfortunately, there is also no consultation with the injured persons, whose protection is sought by the provisions of art. 318 C.C.P., so that the remedies ordered by the prosecutor may not circumvent the principle of full reparation;

– regarding the use of the term "suspect", the possibility of placing the ones inserted in article 318 paragraph (3) letters a) and b), the provisions in question are criticized. The suspect quality concerns the situation in which the action The prosecution of the criminal action is a condition for joining the civil action of the criminal one, so we can not talk about claims, i.e., civil action, except for the indictment, therefore, the suspect should not be subject to measures that may be taken

[5] By way of observation, we show that we did not find in the explanatory memorandum regarding the new Criminal Procedure Code the reasons behind the edict of the stipulations currently criticized – on https://www.google.ro/#q=expunere+de+motive+la+noul+cod+de+procedura+penala.

by the prosecutor under article 318 par. (6) let. (a) and (b), (7) and (9) of the Criminal Procedure Code. We consider that such provisions conflict with those of article 19 (1) and (2) of the Criminal Procedure Code;

– the measures referred to in art. 318 par. (3) and paragraph (6) let. a) and b) C.C.P. have the obvious purpose of repairing material or moral damage [as the text of Art. 318 par. (6) let. a) makes no distinction], but the repair of the damage, according to art. 19 par. (5) C.C.P., is in harmony with civil law. The provision of these measures does not cover all the situations that lead to the reparation of the civil law damage. For example, the public request for apology to the injured person (art 31i par. (6) let. b) C.C.P.] is in fact a component of the repair of the moral prejudice (except for a civil party), along with others regulated by Article 253 et seq. C.C.P. Thus, the regulation of Article 318 paragraph (6) let. a) C.C.P., which regards repairing the damage produced, without any distinction between the types of damage and repairs, is insufficient. Also from a civil point of view, by removing the consequences of the illicit deed, it is understood the actual reparation of the damage, by consistent provisions of civil law referred to in article 19 para. (5) C.C.P.;

– regarding the disposition, according to art. 318 par. (6) let. b) C.C.P., to agree with the civil party a way of repairing the damage, this must be regarded only as a desideratum, not as an obligation of result for various reasons (the defendant – because we exclude the idea that the suspect may be compelled – maybe has no financial means, the victim may not wish, for psychological reasons to settle with the defendant outside a trial, the victim seeks compensation which the defendant disagrees on the amount or the means of repairing the damage). However, the sanction provided by art. 318 par. (9) C.C.P. seems to impose a result obligation, related to the sanction of revocation of the order to renounce criminal prosecution. The fact that this last text of the law provides for the revocation only in the case of bad faith failing to fulfil the obligations imposed within the meaning of art. 318 par. (6) let. a) and b) C.C.P. is not sufficient to exclude the idea of a result obligation and, in addition, raises questions as to how the prosecutor appreciates the defendant's good faith or bad faith. For example, failure to remedy the harm/failure to conclude a convention with the civil party is an absolutely relative and subjective matter (especially in the case of moral damages, but even in the case of material damage, for which no evidence has been filed and no complete probation – for example, witnesses when there are no receipts, expertise if applicable). As a result, the prosecutor, who is not a judge, should not be able to take the role of judge on the civil side of the criminal proceedings. Related to relativity, subjectivism and the incipient nature of judicial proceedings, such a role would lead to unjust choices either for the defendant (if it is considered bad faith) or for the civil party (whose claims as reasonableness, and/or variants of the request should not be judged by the prosecutor). The discretionary or relative nature of the decision to revoke the order for the prosecution to be prosecuted is all the more evident as it is not subject to appeal, any control by the preliminary chamber judge. *De lege feranda,* it would be useful to have control of the court's revocation solution, following the model existing in verifying the order of abandoning criminal prosecution;

– also if the measure under art. 318 par. (6) let. b) C.C.P. seems sufficiently determined in relation to those of art. 318 par. (6) let. a) C.C.P. the legislator's intention

is unclear. Thus, by ordering the defendant to remove the consequences of the criminal deed or to repair the damage, one can understand a general notion, but at the same time it may also be a matter of strict determination (i.e. to do a certain thing, to pay a certain amount of money). However, generality is not sufficient to lead to a full compensation effect (so regulation could lead to the idea of valences of futility), and a specific stipulation is believed to cause a real intrusion into the jurisdiction of the courts, beyond that the fact that it could lead to erroneous and unfavourable solutions to the civil party (which would no longer be able to benefit from the double degree of jurisdiction, mercy and appeal, as only the way to file a complaint against the acts or measures of the prosecutor in the basis of article 336 et seq. of the Criminal Procedure Code).

3. Conclusions

In conclusion, this regulation, which wished to be beneficial to the full and swift resolution of the conflict of law born from the commission of a criminal act, actually presents multiple *valences of illegality and futility*, as we have tried to underline above. Therefore, we consider that, *de lege ferenda*, the stipulations of art. 318 par. (6) let. a) and b) C.C.P. should be *abrogated*, with the consequent correlation and partial modification of art. 318 par. (4) and (5) C.C.P. Therefore, in the case of waiving the criminal prosecution, as in the case of the previous settlement (i.e. of the criminal prosecution or termination measures) and the same as with the current classification solution (in relation to art. 315 par. (2) lit a) C.C.P. which expressly affirms the possibility of reparation of an action for damages before the civil court], the damage should always be recovered only by way of appeal to the civil court, in the event that it is not amicable (by transaction or mediation) to solving this issue of private order. In addition, if the legislator wished, by the provisions of art. 318 par. (6) let. a) and b) C.C.P. to quickly resolve all the consequences of the criminal offense in the criminal and civil law, we do not see why, instead of extending or maintaining the non-solving cases of civil action in the criminal proceeding, they have reduced them.

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COLLECTIVE RIGHTS IN THE LABOUR LAW OF THE EUROPEAN UNION

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Abstract: *The purpose of this paper is to suggest a reflection on the European model of industrial relations, which is understood as the (possible-and it is still in its consolidation phase-) configuration of a supranational dimension of industrial relations. Starting by introducing the fundamental elements of the legal, political, economic and social integration that characterize the European project, this paper continues reflecting on the dimensional complexity that exists at the moment that the European Union's social law is analysed as a space for the recognition and development of fundamental social rights, especially of those of a collective nature. The rights to freedom of association, collective autonomy, strike and collective bargaining find a particular development in the peculiar community dimension that is worth being analysed. In the absence of a constitutional framework similar to those existing in the national legal systems of member States, the recognition and development of these fundamental rights acquire particularly interesting specific characteristics which make it possible to imagine a European model of industrial relations, even though its most critical and problematic aspects. This model, which is in constant evolution and dialectic (and sometimes confrontation) with the different national models of industrial relations, achieves a very encouraging expressive level in the development of different kinds of autonomous and free collective bargaining, which constitute -particularly in a transnational dimension- the ultimate boundary of the collective autonomy that is regulated in regional terms. Therefore, this paper seeks to open a window to the European Union and thus contribute to a global discussion on the internationalization of industrial relations and the structure of fundamental social rights in supranational terms.*

Keywords: *European Union; Industrial Relations; Collective Autonomy; Fundamental Rights.*

1. The collective dimension of the social law in the European Union.

More than sixty years have passed since it was signed the first Treaty[1] that bound six European countries (France, Germany, Italy, Belgium, the Netherlands and Luxembourg) in a regional integration project that resulted in the current European Union. At that time, Europe began a very important journey from different perspectives. The economic integration, in its initial stage, as well as the progressive legal, social and political integration provides a unique scenario for decoding fundamental social rights in supranational terms.

The European integration project is built by placing the elaboration and consolidation of an inherent legal order in its barycentre. That is, a legal system that acquires specific identity, content and drive, eliciting feedback from and influencing the

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[1] Treaty establishing the European Economic Community (TEEC), of 25 March 1957.

legal systems of the member States at the same time. In the particular context of labour law, what is known as the social law of the European Union is identified step by step.

This definition suggests the idea that the European Union is in charge of the legislation -according to a coherent and organized system of principles-of an entire sector of the European social reality that can be identified with subjects of a social nature. However, in order to delve into the analysis of this supranational order, it is relatively easy to realize that the "classic" subjects of Labour Law, such as the rights to a wage regulation, freedom of association, strike and collective disputes, do not find any regulation in the European legislation. This does not mean that the different labour laws of the member States are not (increasingly)being "Europeanised", that is, integrated, influenced, modified and interpreted in the light of a legal system which is constantly developing.

There are those who define the European legal order as "an order of a constitutional nature without a Constitution" or who –particularly in the past decade and coinciding with the "debate on the Constitutional Treaty of the European Union"[2]- prefer to identify it with a "constitutional legal order in which the Constitution is partial or, rather, it has not yet been developed", implying that the supranational order is in a long pre-constitutional phase that has crystallized and become the identity mark of the system itself.[3] This consideration is particularly interesting if it is contextualized in a reflection, such as the one proposed in this paper, regarding the supranational dimension of fundamental social rights of collective exercise and nature[4]. Especially considering the peculiar scheme on which the functioning of the European Union is based.

On the one hand, it constantly receives feedback from national constitutionalism through the determined "clauses of constitutional openness" which are present in the different national Constitutions of the member States. In this sense, they are recognized to be open towards European sources (respecting the limitations of powers, evidently), contributing to what has been defined as the phenomenon of "the erosion of state constitutionalism due to the loss by national states of their capacity to regulate basic aspects of their political order, thus being compelled to be open towards a supranational order, which is represented in Europe by the EU, in such a way that the national constitutionalism anticipates itself Europe through its openness clauses."[5]On the other hand, the constitutional values and traditions of the member

[2]Treaty establishing a Constitution for Europe, signed in Rome on October 29, 2004 and which never entered into force due to the rejection by a majority of the ratification *Referenda* in the Netherlands and France in 2005 (two founding countries of the European Union in 1953). This paralyzed the whole process resulting in the failure of the constituent process.

[3]After the failure of the Treaty to establish a Constitution for Europe and the adoption of the Treaty of Lisbon (December 13, 2007) there is a certain rejection to talk about the Constitution, although it is true that the European Union System of Treaties presents a recognizable -although peculiar- constitutional dimension. Not only because it can recognize a certain set of values, rights and objectives but also because it operates defining the fundamental bases of the legal-political order, that is, it appears as "functionally" constitutional.See, MONEREO PÉREZ, J. L. (2009), *La protección de los derechos sociales fundamentales. El modelo europeo*,Albacete: Bomarzo ed, p. 164.

[4]SCIARRA S. (2010) "Diritto del lavoro e diritto sociale europeo. Un'analisi delle fonti", en SCIARRA, S. (ed.) *Manuale di diritto sociale europeo* (pp. 22 y ss.), Torino: G. Giampichelli ed.

[5]APARICIO TOVAR, J. (2005) Introducción al derecho social de la Unión Europea, Albacete: Ed. Bomarzo, p. 8.

States are an integral part of the European Union law, acting as an incentive and a barrier at the same time[6].

The basic functioning scheme of the European Union is completed, in its interpretation, with a fundamental perspective which constitutes another essential foundation of the European legislative structure: the regulation of a system of competences through an imperative transfer of sovereignty, together with the creation of trained institutions that are capable of exercising these competencies. And this issue presents the last introductory presumption of this paper: the resulting democratic deficit in the decision-making and enforcement mechanisms of the European law. It is precisely the scheme of transfer of sovereignty which conditions the legitimate and legitimating foundation of the Union in a legal system such as that of the European Union which lacks-in its traditional sense- a constitutional framework and presents a balance between basic tensions: those between the member States and the EU on one hand, and those adjusting the imperfect social integration against the most structured economic integration on the other. European institutions exercise competences that have been, in effect, transferred (or shared) by member States, and they preserve national legal systems and their respective public powers as a preferential and preferred intermediary at all times. It is difficult to identify a European people understood as an "organized political subject which the powers of institutions arise from and are bound to respond to" (in the purest sense of *demos*)[7]. The determined democratic deficit of the European institutions is even deeper than it seems at first and it is directly related to the configuration of the European Union as a "community of law". As a constant goal, the continued search for its solution covers the whole project of European integration, and it also guides and sets the conceptualization and the function of the European model of industrial relations, among other aspects, which this paper will try to explain throughout this reflection.

The establishment of the concept of "citizenship of the Union" is somewhat late and it appears as a result of the structural reform of the Treaty on European Union, signed in Maastricht in 1992, and it is consolidated in the Charter of Fundamental Rights of the European Union adopted in Nice in 2000, and its subsequent "legal enhancement" by Art. 6 of the current Treaty on the Functioning of the European Union[8]. The way towards the configuration of a "European citizenship", the recognition of social rights at European levels and the search for legitimacy constitute, in some manner, different reflections of the same flash of light and, as such, they must

[6]In this sense, the fact that almost all the European national Constitutions contain a clause of "social and democratic State of Law" is fundamental, which in some circumstances has served to guide and amend -from national to supranational levels- the community action. In this regard, see the German Federal Constitutional Court Judgment of June 30, 2009, which determined that the Law ratifying the Treaty of Lisbon was compatible with the German constitutional law, referring particularly to this specific clause. In this sense look at APARICIO TOVAR, J. y CENDÓN TORRES, R. (2009), "La "garantía de eternidad" de la cláusula social del Estado democrático de derecho frente a posibles agresiones por parte del derecho de la Unión Europea", *Revista de Derecho Social*, 48, pp. 135-144.

[7]APARICIO TOVAR, J. (2005), *Introducción al derecho social de la Unión Europea*, óp. cit., p.39.

[8]MIRANDA BOTO, J.M. (2009), *Las competencias de la Comunidad Europea en Materia Social*, Pamplona, Aranzadi ed., p. 377

be considered. It remains to be seen how all of this affects the regulation and development of collective rights in a legal space of such characteristics.

2. The European model of industrial relations as a space for the consolidation of collective rights

Regarding the European model of industrial relations, it is fundamental to understand the underlying legal context and to try to reveal its most recent manifestations, since the two approaches -theoretical and practical- are essential to get a reliable picture of it. The analysis of the European model of industrial relations can only draw from the study on how the Treaties recognize the European social dialogue[9], which is understood as a broad formula for the involvement and engagement of social actors in the decision-making process of the European Union.[10]The supranational dimension of social consultation is institution analysed through a complex mechanism of a compulsory two-stage consultation, where there is a partial recognition of collective autonomy at this level. In the absence of European powers in the area of freedom of association, strike and collective conflict, as well as of an explicit recognition in the Treaties[11] of the right to collective bargaining as a fundamental social right of collective exercise, social partners' capacity to act is integrated in the "more convenient "architecture of participation. Therefore, the readjustment of collective bargaining[12]in traditional terms is avoided, and the formal involvement of representatives of employers and trade unions at European level is intended to "replace the democratic deficit that the drafting of a legislative act represents."[13]As a result, part of the European doctrine[14]considered that the European regulatory framework lacked real space for free and autonomous collective bargaining i.e. separate from legislative procedures of an induced nature, and including contents that are more akin to the classic issues of industrial relations (working conditions). In this sense, it is true that there is a mismatch between the normative recognition and development of the rights of participation, information and consultation[15]defined in the European regulatory

[9]It appeared previously in the Agreement on European Social Policy annexed to the Treaty of Maastricht of 1992, and afterwards in the Treaty of the European Community of Amsterdam of 1998 and its subsequent recast in the Treaty on the Functioning of the European Union of 2007.

[10]BAYLOS GRAU, A. (2003),"La autonomía colectiva en el derecho social comunitario", BAYLOS GRAU A. (coord.), *La dimensión europea y transnacional de la autonomía colectiva*, Albacete: Ed. Bomarzo.

[11] Until the recognition of the binding legal value of the Charter of Fundamental Rights of the European Union (through the modification of Article 6 TFEU) the references to social rights of a collective nature remained strongly connected to trade union action and defense of workers' rights at national level.

[12] Véase BAYLOS GRAU, A. (2011)Derechos fundamentales y ciudadanía social en la Unión Europea, ORTEGA ÁLVAREZ L. I. – DE LA SIERRA MORÓN S. (coords.) *Los derechos colectivos en Estudios de la Unión Europea*, Toledo: Universidad de Castilla La Mancha ed.

[13]According to the words used by the European Court of Justice in the well-known Judgement of the Court of First Instance of the European Communities of 17 June 1998, Case T-135/96. CASAS BAAMONDE, M. E. (1998), "La negociación colectiva europea como institución democrática (y sobre la representatividad de los "interlocutores sociales europeos")", *Relaciones Laborales* n. 21.

[14]LO FARO A. (1999), *Funzioni e finzioni della contrattazione collettiva comunitaria. La contrattazione collettiva come risorsa dell'ordinamento giuridico comunitario*, Milano:Giuffré ed.

[15]BOGONI, M. (2010), *El comité de empresa europeo*, Albacete: Bomarzo ed.

system, with respect to the development of the right to free association, the right to strike and the right to collective negotiation at the supranational level (and in its collective dimension). However, the "European dimension of collective autonomy"[16]is not only recognizable but, even though it presents weaknesses and complexities, it also initially reached unexpected levels of development.[17]

Prior to the assessment of this "metamorphosis of the European collective negotiation"[18], which somehow allows its emancipation from the constant search for the democratic legitimacy that is inherent to the shaping and structure (barely reformed since its origin) of the European Union, it is important to underline another fundamental aspect of the European model of industrial relations which is related, once again, to the problem of the recognition of fundamental social rights at European level. The recognition of collective autonomy in national regulations, traditionally determines "the recognition of not only free and independent trade union organizations, but also of collective negotiation as the original normative process and also of the non-judicial powers that the right to strike represents".[19]Therefore, in national industrial relations, self-organization, collective bargaining and non-judicial powers represent the inherent dimensions of the same "power", that is, the collective autonomy which obtains its full recognition in the constitutional text. Instead, in the European dimension there exists the abovementioned "unequal balance": the regulation, both in primary and secondary law, of community policies on one side, and of the rights of freedom of association and to strike on the other, operates at different levels. First of all, by excluding Community competence (Art. 153 TFEU) in the areas of freedom of association and the right to strike. Second, by relegating the right to strike to the national-state legal context as a fundamental right that the European legal system admits as it is recognized by the "constitutional traditions" of the member States (with their subsequent legal fragmentations according to the different models and systems of national regulation[20]). A major disruption of this unequal balance gave rise to the well-known triad of Judgments of the European Court of Justice in Viking, Laval and Rüffert cases[21]and to the proliferation of *soft law* acts in which, in addition, the tension between the economic and social dimensions of the European integration is even more noticeable.[22]

Therefore, in this context it is not surprising that, on the one hand the system of European industrial relations has been developed somehow "in the shadow" of the institutionalization of participatory approaches, feeding deeply from its connections with different lower territorial levels, especially with national ones with consolidated

[16] This definition was borrowed from the title of the collective book coordinated by BAYLOS GRAU, A. (2003),*La dimensión europea y transnacional de la autonomía colectiva*, Albacete: Ed. Bomarzo.

[17]KÖHLER H. D. – GONZÁLEZ BEGEGA S. (2008) "El diálogo social: de la macro concertación comunitaria a la negociación colectiva transnacional", *Revista Ministerio de Trabajo y Asuntos Sociales* n. 72.

[18]As mentioned byGALLARDO MOYA R. (2008) "La metamorfosis de la negociación colectiva europea", *Relaciones Laborales* n.18.

[19]BAYLOS GRAU, A. (1991) *Derecho del trabajo: modelo para armar*, óp. cit., p. 109.

[20]LASSANDARI A. (2013)"El derecho de huelga en Europa. Elementos generales", en CABEZA PEREIRO J. – FERNÁNDEZ DOCAMPO B., *Participación y acción sindical en la empresa*, Albacete, Ed. Bomarzo.

[21]BAYLOS GRAU, A. (2008) "*El espacio supranacional de ejercicio del derecho de huelga y la restricción legal de sus capacidades de acción*", Revista de Derecho Social, núm. 41.

[22]CASTELLI, N. (2012) "Derecho de huelga en el espacio europeo y la propuesta de regulación Monti II", *Revista de Derecho Social* n. 59.

structures of collective organization and bargaining and certain constitutional force. On the other hand, however, a very special dimension of collective bargaining has been developed at European level, finding its natural habitat in a very interesting space that may know –better than others- how to offer tools shared by both legal worlds (national and international): the transnational company with European dimension[23]. The European Framework Agreements (EFA)[24] and the different kinds of transnational collective agreements are becoming frequent instruments of the European business scene that use bodies of representation and *ad hoc* participation (although without specific powers of negotiation) such as the European Works Councils. Especially, in times of crisis and subsequent business readjustment.[25]

3. Brief conclusions and a new approach to the study and development of collective rights in the EU.

The recent development of the European transnational collective bargaining at company level has shifted the traditional basis of the doctrinal discussion that abandons the study of social dialogue and European collective bargaining, which is constrained within the framework of an informed and participatory decision-making mechanism. These kids of negotiation experiences are receiving full attention since, even if they are rooted in the foundations of national legal systems, they are deeply Europeanized in terms of actors, content and efficiency. And that attention is paid not only by the European doctrine but also by the same institutions that have commissioned studies to assess the need to develop a legal framework of reference[26] and, subsequently, the possible legal formulations to ensure the effectiveness of the instruments developed in this context.[27]In this sense, my proposal is to contextualize again these latest manifestations of European collective bargaining at the centre of the (peculiar) European model of industrial relations and to use this (fragile and new) space of collective autonomy so that the discussion regarding its form, content and efficiency is developed without ignoring, on the one hand, the structural weakness of the fundamental social rights of a collective nature and, above all, the continued dialectic

[23]BOGONI M. (2015), *El espacio europeo para la negociación colectiva*, Albacete: Ed. Bomarzo, pp. 241 y ss.

[24]LEONARDI, S. (2012) *Transnational company agreements: a stepping stone towards a real internationalization of industrial relations?*, Executive summary of the "EUROACTA" project, published in Spanish in n. 58/2012 Studies of the 1º de Mayo Foundation, November 2012

[25]SCIARRA S. (2011)"Formas de avanzar en la negociación colectiva transnacional y europea", *Relaciones Laborales*, n. 12.

[26] The first was the so-called "Ales Report" which is in favor of an European legal framework on the subject and which is well reported by the director of the group of experts in ALES, E. (2009) "La negociación colectiva transnacional y la necesidad de una norma de la Unión Europea",*Revista Internacional del Trabajo*, Vol. 128 (no. 1-2). Regarding the further reflection and a second Report of experts, see: ZIMMER R. (2012) "Creación de un marco jurídico para la negociación colectiva transnacional en la Unión Europea", *Gaceta sindical: reflexión y debate* n. 18.

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tension existing between social integration and economic integration on the other.[28] An integral approach to the transnational company as a space of preferential action for collective rights in an international context, could be the only way to achieve that the legal instruments of collective bargaining used here acquire their own legal status, duly protected and recognized in the European Union law as well as in the different national legal systems. It is very likely that this specific dimension of collective rights needs strong institutional and legislative support; however, it is clear that its strength and effectiveness is connected to the deepest roots of the principles and rights of freedom of association and collective autonomy, so the "simple" *de facto* consolidation of these negotiation practices represents an essential commitment for its future regulation and protection.

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[28] In this sense, see the reflections of COMANDÈ, D. (2011) "L`integrazione europea via contrattazione transnazionale: quo vadis?", Lecture in *Seminario AIDLASS, Bari 11 y 12 of November 2011*, available text at http://www.aidlass.it/convegni/seminari/archivio/2011/

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THE ANNULMENT OF THE ACTS ISSUED BY THE AGENCY FOR PAYMENTS AND INTERVENTION IN AGRICULTURE (APIA) IN RELATION TO THE PROCEDURE OF ESTABLISHING TAX DEBTS FOR THE NATIONAL TRANSITIONAL AIDS GRANTED TO FARMERS

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Abstract: *The administrative acts issued by the Paying and Intervention Agency for Agriculture (APIA)* [1] *aimed at finding irregularities and establishing budgetary debts in the case of European and/or national funds granted to farmers are often challenged at the administrative litigation court and not often, the magistrate is the face of rigid, bulky, redundant and inadequate regulations sometimes rendered inadequate to provide the necessary legal support for the development of the legal syllogism that generates intimate conviction, and ultimately the solution in the present case. The high specificity and technicity of the concepts used in many areas of agriculture and the funds allocated from national and European budgets to support farmers often involve adjustments to European rules and regulations, especially as irregularities and deviations, with an impact on the national budget reverberate on the EU budget.*

The present study aims to address a small part of the problems in administrative litigation regarding debt securities issued by APIA, when it finds that there are irregularities regarding the access and use of national funds, starting from general elements applicable in all cases, with some customizing on concrete situations, identifying the correctness or inaccuracy of some points of view and solutions, surprising part of the attributions of APIA in this field.

Keywords: *fiscal administrative act, decoupled national transitional production aid, debt claim, minutes, annulment.*

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[1]The Paying and Intervention Agency for Agriculture was established by Law no.1/2004 published in M. Of. Part I, no. 162 / 25.02.2004. APIA is a specialized body of the central public administration, subordinated to the Ministry of Agriculture and Rural Development, with legal personality, financed entirely from the state budget.

Pursuant to Article 3 of Law no.1/2004, APIA has the following duties: a) to ensure the conduct of financial operations related to the management of the allocated funds;b) ensures the verification of the payment requests received from the beneficiaries; c) authorizes the payment to the beneficiaries following the verification of the payment requests or informs them of any irregularities reported, with a view to their settlement; d) executes the authorized payments to the beneficiaries; (e) keep accounts of payments made, h) ensure that the Agency's economic, administrative, accounting, staffing and audit activities are carried out in good working order; i) collaborate to fulfil specific tasks with the central and local public administration bodies ...u) substantiates and issues financial recovery decisions on the basis of verifications carried out in the framework of the control of operations forming part of the European Agricultural Guarantee Fund financing system and notifies the final result to the Ministry of Agriculture and Rural Development and the European Commission.

I. General considerations

The European funds provided through the Payment and Intervention Agency for Agriculture (APIA)[2] programs are and will continue to be for many farmers, an extremely valuable support, through which they manage to start an agricultural activity or develop the existing one and reinforce it.

In the context of dense legislation and many rigid and sometimes absent procedures, there are obviously situations where the amounts provided by the EU or the Romanian state have been recovered from farmers accused of not complying with the regulations in force, committing irregularities and deviations.

Of course, frauds with European funds are not new and often blame is shared between farmers, agriculturalists and even employees of the institutions responsible for paying the money.

APIA through its Directorate for Anti-Fraud, Internal Control (DACI) cooperates with the Anti-Fraud Department (DLAF), the national contact institution with the European Anti-Fraud Office (OLAF) within the European Commission. 25 of the Treaty on the Functioning of the EU, ensures the protection of EU financial interests in Romania.

APIA carries out activities for finding and sanctioning the irregularities and frauds occurring in obtaining and using the European funds and/or national public funds related to them, as well as preventive and internal control actions regarding the observance of the provisions of the national and Community legislation in force, such as procedures, by the APIA staff.[3]

If there is evidence of fraud in obtaining and using European or national funds[4], APIA is obliged to immediately notify DLAF and the criminal prosecution authorities.

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[3]According to Government Emergency Ordinance no.66/2011 on the prevention, detection and sanctioning of irregularities in obtaining and using European funds and/or national public funds related to them, published in Of.M. PartI, nr.461/30.06.2011.

[4]According to art. 2 paragraph 1, let. b) of GEO no.66/2011, fraud is the crime committed in connection with obtaining or using the European funds and/or the national public funds afferent to them, incriminated by the Criminal Code or other special laws.

If irregularities are detected[5], the APIA has full competence and performs the recalculation of the applicants' rights and verbal reports of irregularities and establishment of budgetary debts.

In recent years, APIA has taken actions to detect irregularities and issued verbal reports on the establishment of budgetary debts for acts attributable to farmers, which constitute deviations from the relevant regulations in the matter, the share of acts drawn up for the purpose of recovering the National Aid Transfers[6] undue paid being numerous enough.

It is noteworthy that, at the same time, many files are in the hands of the courts, in which farmers challenged the documents issued by APIA for the detection of the irregularities and the determination of the amounts to be refunded.

In this respect, we point out that according to art. 21, paragraph 19 and 20 of GEO no.66/2011, the report on the establishment of irregularities and establishment of the budgetary debt issued by APIA is an administrative act and title of debt and it can be filed in administrative-fiscal dispute in accordance with the rules of the Fiscal Procedure Code[7], Government Emergency Ordinance no.66 / 2011 and Law no.554 / 2004[8].

The report on the finding of irregularities and the establishment of the budgetary debt shall contain the following: the name of the issuing authority, the date on which it was issued, the identification data of the debtor or of the person empowered by the debtor, the amount of the budgetary debt established as a result of the findings, the grounds for the law, the name and signature of the head of the issuing authority, the stamp of the issuing authority, the possibility of being appealed, the deadline for filing the appeal and the authority to which the appeal is lodged, the point of view of the debtor and the position expressed by the competent control structure.

It should be noted that according to Government Emergency Ordinance no.66/2011, the maximum period for carrying out the verification and issuing of the reports for finding the irregularities and establishing the budgetary debts is 90 days

[5]According to art. 2 paragraph 1, let. a, of GEO no. 66/2011, the irregularity is any deviation from legality, regularity and compliance with the national and/or European provisions and with the provisions of the contracts or other legal commitments entered into on the basis of these provisions, an act or omission of the beneficiary or of the authority with competence in the management of European funds, which has or has been prejudiced by the budget of the European Union/the budgets of the international public donors and/or the national public funds related to them through an amount unduly paid.

[6]According to art. 1 paragraph 3 of GEO no. 3/2015 for the approval of payment schemes that apply in agriculture in the period 2015-2020 and for the modification of art. 2 of the Law no. 36/1991 on agricultural companies and other forms of association in agriculture, published in Of. M., Part I, no. 191 of March 23, 2015, the transitional national aid – NTA is granted in the field of plant and livestock within the limits of the annual budgetary provisions allocated to the Ministry of Agriculture and Rural Development. They are granted to farmers who have benefited from complementary national direct payments in 2013.The complementary direct national payments – NDP – are payments that supplement those received under the single area payment scheme – SAPS. The source of funding is provided by the national budget. The complementary national direct payments are granted in compliance with the general SAPS conditions and the specific conditions imposed by the European and national legislation for the respective crops, in accordance with the provisions of OUG 125/2006, as subsequently amended and supplemented, OMADR no. 246/2008, as amended and supplemented.

[7] Law no.b207/2015 published in Of. M., PartI, nr.547/23.07.2015, as subsequently amended and supplemented.

[8] Law no.554/2004 of the administrative litigation published in Of. M., Part I, no.1154/07.12.2004, as subsequently amended and supplemented.

from the date of finalizing organizing the verification activity. From this rule, which has the character of a recommendation (no sanction being provided for in the GEO to overcome this deadline), there are two exceptions: when there are DLAF control papers or an OLAF inspection report (the term is maximum 60 days when communicated) and when there are audit documents issued by the Audit Authority within the Court of Accounts (the term is 60 days from the date of their communication).

We should add that both the limitation period for the execution of the budgetary debt resulting from the act issued by APIA, as well as the limitation period of the right to set the budgetary debt is 5 years, while the first one flows from 1 January of the year following that in which this right arises[9], the second does not run from 1 July of the year following that for which the tax obligation[10] is due (the general rule), but from 1 January of the year following the closing date of the program communicated by the European Commission by issuing the final closure declaration.[11]

Within 3 days of the APIA's issue of the minutes, it shall be communicated to the farmer and the budgetary debts resulting from the irregularities entered in this document shall become due upon expiration of the deadline set in it, respectively within 30 days from the date of communication of the minute. After expiration of the payment deadline (30 days after the minutes have been communicated), it becomes an enforceable title and on the amounts written in the document interest will be calculated on each day of delay.[12]

It is also an enforceable title and the final court decision which resolved the action regarding the cancellation of the minutes issued by APIA.

Against the measures ordered by the title of the debt may be appealed in accordance with the provisions of art. 46 et seq. of GEO no.66/2011.

By reference to the provisions of Article 7 of Law no.554/2004 and the provisions of art. 268-281 Tax Procedure Code, we note that the procedure for solving administrative appeals against debt securities issued by APIA is a faster and more flexible one, much closer to the prior complaint procedure in the Law of Administrative Contentious, at least with regard to the terms of filing and settlement.

Thus, if the Tax Procedure Code provides for the possibility of challenging the tax administrative act (the taxing decision) within 45 days from the date of its communication, in the case of documents issued by APIA (the title of the debt), the deadline for filing the appeal is 30 days from the date of communication of the document to the debtor.

Unlike the provisions of Law no.554/2004, where the rule is that the preliminary complaint against unilateral administrative acts of an individual character shall be submitted to the issuer of the document or to the hierarchically superior, if any, within 30 days from the date of communication of the act, being able to lodge a graceful or hierarchical appeal, as the case may be, and beyond this deadline, for substantive reasons, but not later than 6 months from the date of issuing the act (limitation period), in the case of acts issued by APIA (debt securities), even if we find the same 30-day period after their communication, the legal nature of these is to *decline*. Moreover, in the tax procedure, the 45-day deadline for submitting the tax administrative appeal is still *declining*.

[9] According to art. 215 paragraph 1 of the Fiscal Procedure Code.
[10] According to art. 110 paragraph 2 of the Fiscal Procedure Code.
[11] According to art. 45 of GEO no.66/2011.
[12] According to art. 42 and 43 of GEO no.66/2011.

Contrary to the tax procedure, in the case of administrative appeal against the debts issued by APIA, its settlement is made within the same term of 30 days after its registration, the symmetry with the provisions of Law no.554/2004 being obvious and necessary in the light of the finality sought by the legislator.

The decision that can be given in the settlement of the administrative appeal, which can only concern the measures ordered by APIA and the amounts of payment, is fully possible also in the case of the fiscal administrative appeal based on the provisions of the Fiscal Procedure Code. Thus, we find a possible solution, either admitting the appeal and cancelling the debt title and, as the case may be, issuing a new title, which will take into account the considerations of the APIA Decision, either the rejection of the appeal and the maintenance of the debt title.

Regarding the absolute or relative nullity of the administrative act, in relation to civil law, both the protected interest (general or particular) and the legal disposition (imperative or enforceable) are taken into account.

However, the similar legal status of these sanctions renders the distinction of relevance only if we refer to the annulment of the court by the court in terms of the causes which determine them and the persons entitled to debt their application, that in the matter of the annulment of acts by administrative means there is no relevance to the way of legal nullity, which may even be ordered by the superior hierarchical authority[13], and intervening irrespective of whether the act in question infringed a rule that protects a general or personal interest, without a limitation period that will limit the legality control in this way.

In this respect, some administrative acts can be adopted or issued in violation of important, substantive legal provisions that lead to absolute nullity or disregard of formal conditions that cause relative nullity.

As in the case of the preliminary complaint regulated by Law no.554/2004, the introduction of the administrative appeal does not suspend the execution of the act, which may be ordered only by the court, subject to the payment of a security up to 20% of the amount of the contested amount. From the point of view of the legal nature of the administrative appeal against the debt securities represented by the records of the irregularities and the establishment of the budgetary debts issued by APIA, as in the case of the previous complaint regulated by the Administrative Contentious Law, we take into account that the purpose the law sought by the legislator is double, on the one hand, it is possible to settle the dispute more quickly, without court intervention, through APIA and, on the other hand, avoid unnecessary loading of the courts with disputes that can be remedied directly between the issuer and the addressee of the administrative act.[14]

Thus, as the doctrine[15] has often expressed and as it results from the judicial practice, "*the legal nature of the prior procedure, the condition for exercising the right to*

[13] Anton Trăilescu, *Unele considerații referitoare la necessitate unei mai stricte delimitări a nulităților în dreptul administrativ,* in Dreptul, no.12/2001, p.86.

[14] Dacian Cosmin Dragoș, *Legea contenciosului administrative. Comentarii ş iexplicații* ediția 2, C.H. Beck Publishing House, Bucharest, 2009, p. 228

[15] Mihaela Tăbârcă, *Excepțiile procesuale în procesul civil,* edition 2, revised and added, Universul Juridic Publishing House, Bucharest, 2006, pp.315-318, Gabriela Bogasiu, *Legea contenciosului administrative commented and annotated, contains legislation, jurisprudence and doctrine,* edition 4, revised and added, Universul Juridic Publishing House, Bucharest, 2018, pp.240-241.

action... was deduced from the provisions of art. 193 paragraph 1 of the Civil Procedure Code, a general rule whose hypothesis concerns precisely the situations in which, by special law, it is stipulated that the court may be referred only after a special procedure has been completed."

In other words, any action regarding the annulment of an administrative act issued by APIA (debt title) must be preceded by an administrative appeal against that act, and the institution's response (the decision to settle the appeal) or the deadline for reply must be expected without the decision being issued and communicated.

Otherwise, in the absence of administrative appeal, the administrative contentious court will dismiss the action as inadmissible.

Regarding the subject matter of the administrative litigation regarding the reports of irregularities and the establishment of the budgetary debts drafted by APIA, farmers have used and forfeited their right to demand the cancellation of these debt securities, invoking either substantive or formal aspects and the rules and aspects of the joint procedure governed by Law no.554/2004 are fully applicable, with some peculiarities determined by the specific nature of the intrinsic regulations in this field, to be further elucidated.

II. Particularities relating to the annulment of acts emitted by the Agency for Payments and Intervention for Agriculture in the procedure for observing and establishing budgetary debts for national transitional aids to agriculturers.

As we have seen before, there are numerous and difficult problems faced by magistrates in the field of the findings of irregularities regarding the granting and use of transient national aids, these being generated primarily by the conduct of subjects of the legal administrative law relationship, by the effervescent normative framework, appreciably quantitative, sometimes redundant, often unequivocal.

Thus, for the approval of the single application form for each calendar year, the Ministry of Agriculture and Rural Development issues annual Orders, based on the European framework legislation and the EU Council Regulations.[16]

[16]OMADR no. 619/2015 for the approval of the eligibility criteria, the specific conditions and the way of implementation of the payment schemes provided for in art. 1 par. (2) and (3) of Government Emergency Ordinance no. 3/2015 for the approval of payment schemes that apply in agriculture in the period 2015-2020 and for the modification of art. 2 of the Law no. 36/1991 on agricultural companies and other forms of association in agriculture, as well as the specific conditions for implementation for the compensatory rural development measures applicable on agricultural lands, stipulated in the National Program for Rural Development 2014-2020, published in Of. M. no. 234/06.04.2015, OMADR no. 352/2015 for the approval of cross-compliance rules in support schemes and measures for farmers in Romania, published in M. Of. No.363 / 26.05.2015, REGULATION no. 640/11-MAR-2014 supplementing the Regulation (EU) no. No 1306/2013 of the European Parliament and of the Council as regards the Integrated Administration and Control System and the conditions for refusing or withdrawing payments and administrative sanctions applicable to direct payments, support for rural development and cross-compliance, REGULATION no. 1306/17-Dec-2013 on the financing, management and monitoring of the common agricultural policy and repealing Regulations(EEC) no. 352/78, (EC) no. 165/94, (EC) no. 2799/98, (EC) no. 814/2000, (EC) no. 1290/2005 and (EC) no. 485/2008 of the Council, REGULATION No 1307/17-DEC-2013 laying down rules on direct payments to farmers under support schemes under the common agricultural policy and repealing Regulation (EC) Council Regulation (EC) No 637/2008 and Regulation (EC) 73/2009.

There are, therefore, annual[17]changes to the application of certain requirements regarding the payment debts mechanism, from deposit to settlement until, for example, the need to report on the specific implementation conditions for the compensatory rural development measures applicable to agricultural land, provided for in the National Rural Development Program 2014-2020.

Under these conditions, with volatile legislation for farmers and even those who need to verify and enforce regulations, it becomes very difficult to track and achieve compliance with the legal norm, often resulting in legal conflicts in which, the big poisoned farmer remains, what they see as lacking the money they could finance their activity and who struggles in court for their recovery after APIA suspends them and holds them after they are declared debts.

Many of the actions brought before the court by farmers against APIA are aimed at the cancellation of the debt securities established by this institution, and the common denominator of the pleas in the applications is the fact that the act of finding the irregularities is inadequate, the failure to correctly maintain the factual situation and the erroneous application of the law.

On the basis of the findings described in the minutes later contested by the farmers, the field inspections carried out by the APIA personnel for checking the cultivated areas, their correspondence with the acts of holding the declared areas as cultivated, and the telemetric determinations made by the APIA employees. On this occasion, overlapping of land, the declaration of areas larger than those actually cultivated and owned, the non-compliance of the land ownership documents, with the consequence of declaring the amounts received as ineligible for payment and their recovery as debts of the farmer are revealed.

The magistrates' decisions in such cases are based on the taking of evidence and the making of topographic expertise to clarify the facts.

In such a case, the magistrate of Tulcea Tribunal found that it was necessary to cancel the verbal record of finding the irregularities and establishing the budgetary debts and the decision issued in the resolution of the administrative appeal, not correctly taken into consideration by APIA, the premise: "there is a the difference of 6.07 hectares compared to the area owned and actually worked of 18.18 ha, in the context in which the applicant declared an area of 24.25 ha, representing 33.09% of the determined area, appreciating that, the legal provisions on direct area payments, V4.5 of the Manual of Procedures, have been breached and the difference between the declared area and the area determined by it is more than 20%, the applicant being excluded from the payment."

On the basis of the ownership documents submitted and the land plot and land delimitation plans held by the applicant and the topographic expertise drawn up in question, the court found that in reality only 6.23% of the 24.25 ha land had not been cultivated in 2015, which is below 20%, so the measure of exclusion from payment is

[17] OMADR no. 620/2015 regarding the approval of the standard application form for the year 2015, OMADR no. 249/2016 regarding the approval of the standard application form for the year 2016, OMADR no. 45/2017 regarding the approval of the standard application form for the year 2017, OMADR no.39/2018 regarding the approval of the standard application form for the year 2018, OMADR no. 99/2019 regarding the approval of the application form unique payment for 2019.

unlawful.[18] The appeal was appealed against by APIA CJ Tulcea, but unsuccessful, which was rejected by the Court of Appeal Constanta.[19]

In other cases, it is revealed that the requirements for delivery of the quantity prescribed by OMADR no. 619/2015 for obtaining the coupled national coupled aid for different crops are discovered and the issues are confirmed or refuted, on the basis of supporting documents in court, when the farmer challenges the fairness of the measure ordered by APIA on recovering the amounts of the money paid.

There are also cases when the APIA retains the money or takes steps to recover the decoupled national production aid, finding that the requirements regarding the technical conditions of crops, plant density and the quality of the delivered agricultural products have not been met.

In such a case[20], which concerns the tobacco culture, the applicant was excluded from the payment of PNDC 4 tobacco, with multi-annual sanctions of 11.182,50 lei being calculated. APIA Argeş, the issuer of the disputed decision, stated that the exclusion from payment was the consequence of the breach of the eligibility condition for the realization of the crop, both in terms of surface area and in terms of quantity and quality of the crop.

However, the defendant admitted that the term "decoupled from production" means that the producer is not conditional on obtaining a particular production from a quantitative point of view, but the law complies with certain quality standards.

In that regard, the Argeş Tribunal held that the parties did not contest the fact that the 3 ha declared by the applicant were entirely cultivated with tobacco. Their divergent point is given by the quality standards of the production.

Following the analysis of the evidence in the file, the magistrate concluded that, since the delivery declaration no.78/16.12.2013 (page 28) bears the visa for the Agriculture Department of Argeş (DAA) for the entire cultivated area of 3 ha, attesting according to the law, both the quantity and the quality of the tobacco delivered, the applicant was eligible for payment. As a consequence, APIA's decision to exclude from payment was annulled and the sanctions applied were lifted.

When challenging the acts issued by APIA, they are referred to the courts, including aspects that refer to the procedural and formal conditions of the record for finding the irregularities and the establishment of budgetary debts.

Thus, the activity of finding irregularities and determining the budgetary debts should be carried out by the control structures of the competent authorities in the management of the European/national funds, in compliance with the provisions of art.21 of GEO no.66/2011.

In practice, defences formulated by farmers were rarely retained in the sense that the following provisions were not observed:

– paragraph 6 – APIA control was made in the absence of the petitioner and was not convened for any analysis of the application and the submitted documentation.

[18] Civil Sentenceno.694/27.06.2016 pronounced by Tulcea Tribunal in file no. 1075/88/2015, available on http://rolii.ro .

[19]Civil Decision no.828/07.11.2016 pronounced by Constanta Court of Appeal in file no. 1075/88/2015, available on the site http://rolii.ro .

[20] Civil Sentence No. 1188 / 27.05.2015 issued by Argeş Tribunal, available on the site http://rolii.ro -

– paragraph 11 – the controlled farmer has not had the opportunity to express his views on the findings;

– paragraph 14 – the report on the establishment of irregularities and the establishment of budgetary debts has not been submitted in order to express its views on the findings and irregularities;

– paragraph 21 – the minutes do not contain any comments on the point of view of the petitioner, but only the position expressed by the control structure.

Most of the times, they have been removed on the ground that they are not grounds for annulling the sanctioning acts, as the petitioner's right of defence is not violated, since the law gives him the possibility to file an administrative appeal to the issuing body (APIA) and this pronounces by decision.[21]

Of course, there are situations where APIA findings are correct, decisions on administrative appeals are well motivated in fact and in law, and debt titles issued remain valid even after they are challenged in court[22], but it is equally true that, there are also major errors of the APIA officials who make decisions without support in the legal regulation, provided that such an act can only be issued as a result of the settlement of an administrative appeal to a record of the finding of the irregularities and the establishment of a budgetary debts.[23]

Regarding the annulment of the acts issued for the recovery of the national transnational aids in the vegetal sector – Tobacco ANT 4, starting from OMADR provisions no. 619/2015 and following the provisions of GEO no.66/2011, we take into account from the recent judicial practice two solutions which confirms the major mistakes of APIA in analysing and investigating debts for 2015, on this measure.

By the action filed on 25.07.2018, the applicant SNV PFA, ordered Dâmbovița Court to annul the decision no.286/P/27.06.2018, which dismissed the appeal against the PV finding of irregularities and establishing the budgetary debts no.2952/26.04.2018 and the annulment of this last administrative act, with the consequence of exonerating from the payment of the sum of 81,922 lei, representing the national transitional aid ANT 4 – tobacco, following the approval of the single application for area payment in the campaign 2015, no.24492/14.06 .2015.

APIA CJ Dâmbovița sought the dismissal of the action, arguing that, following the audit carried out by the Chamber of Accounts Dâmbovița and its checks, it was found that, although, it had produced less than the contracted production, only 252 kg instead of 10 tonnes, the applicant did not draw up an addendum (according to art. 10.1 of the contract) and the documents on the basis of which the single payment application (the raw tobacco contract and the delivery declaration approved by Dâmbovița County Agriculture Directorate) do not merge formally, to the requirements of the law (the type contract

[21]Civil Sentence no.85/25.01.2019 delivered by Dâmbovița Tribunal in the file no. 3410/120/2018 (not published); Civil Sentence no. 80/22.01.2019 issued by Dâmbovița Court in file no. 3262/120/2018 (unpublished).

[22] Civil Decision no. 3237/07.09.2017 pronounced by the Bucharest Court of Appeal, Section VIII – Administrative and Fiscal Litigation, available on the site http://rolii.ro .

[23] Civil Sentence No. 1406 / 21.12.2015, pronounced by Caraş-Severin Tribunal, Civil Section II, Administrative and Tax Litigation, available on the site http://rolii.ro .

approved by OMADR no.268/27.12.2012[24]) not including subsections 4.3 and 4.4 and 5.7, so that the crop contract no. P 170/27.02.2015, although targeted by DAJ DB, is null absolutely, because it does not comply with the conditions of validity provided by art.1242 Civil Code, and the delivery declaration violates the provisions of art.3 par. 1 of GEO no. 186/20.12.2011 because it does not show the plot from which the tobacco crop comes from.

In the statement of the reasons for the application, the applicant stated that ANT-4 tobacco is a decoupled measure of production, since the grant of the aid is not conditional on obtaining a certain amount of tobacco per hectare. It can not be accused of altering the content of the tobacco contract, as long as it is a standardized one, adapted to the actual situation and concluded with a unique national first processor. The processor adapts the contract to its needs, and the alleged "alterations" have been made by it and does not affect the essence and validity of the act, as to issues that do not apply in the present case.

Also, the non-specification of the cultivated tobacco area (indicating the plot) can not be attributed to it, because the document was elaborated by the first processor, the obligation to draw up and categorize it has to be handled to the processor in accordance with art.3 of GEO no.186/2001. In addition, all documents (payment request, delivery declaration, raw tobacco contract) were analysed by APIA in 2015, they have the DAJ DB and APIA DB visa and only the Court of Accounts control in 2017 determined the APIA DB to review the dossiers of the tobacco growers in Dâmbovița County, which has to comply with the measure ordered by the Chamber of Accounts Dâmbovița by Decision no. 6/2017, to re-examine the files and to recover the amounts granted by the non-observance of the law, to court. However, if, after 3 years, APIA DB reviews the payment request, only because it has been compelled by the DB Chamber of Accounts to do so, although it initially endorsed the documents and considered them to be lawful, it should be remembered, the fault of the public institution, being responsible as a tertiary authorizing officer according to art. 22 and 24 of the Law no.500/2002 for the hiring, liquidation and the authorization of the payments. In this respect, there were the findings of the external auditors team, which drafted the Report of the CC Dâmbovița no.1792/28.02.2017 (pages 38-43 of the report) setting APIA's fault in the wrong analysis and misinterpretation of the payment requests for tobacco producers.

After the administration of the evidence, Dâmbovița Tribunal, analysing the documents deduced from the judgment, validated the applicant's point of view, correctly holding on to the following:

"1. APIA DB's findings are devoid of legal basis since, according to the provisions of art.34, art.35 and art.38 of OMADR no.619/2015, ANT-4 tobacco is a decoupled measure of production.

2. APIA DB has fully taken over the PV issued by CC Dâmbovița's findings from the Decision no. 6/2017 and from the Report no. 1792/2017, and provided that no objection has been raised against these acts, the measures have become binding on it.

3. APIA DB was obliged according to art. 3, let. b, c and m of Law no. 1/2004 to verify the payment requests prior to their validation and to notify the beneficiary if they are aware of irregularities or are required to comply, or he did not take such steps.

[24]OMADR no.268 / 27.12.2012 regarding the approval of the raw tobacco cropcontract type was published in Of. M. no. 897/28.12.2012.

4. The deficiencies in the tobacco delivery declaration and the tobacco cultivation contract can not lead to the annulment of the acts, and are not able to lead to such a solution or to cause damage which can not be eliminated otherwise, than by cancelling the act, the more so as they are not imputable to the applicant, but at most to the primary processor. Moreover, the defendant has not proved that these formal and non-contractual deficiencies are an irregularity, and the financial correction should be appropriate to the intended purpose."

We consider that in this respect, it must also be borne in mind that the court has not been entrusted with the outcome of an action seeking the annulment of the tobacco contract, for which, as long as this contract has not been cancelled and produces effects between the parties, can not sustained that it is null.

Against the decision of Dâmbovița Tribunal to admit the action[25], APIA CJ Dâmbovița filed appeal and at the deadline of 04.06.2019, Ploieşti Court of Appeal dismissed as unfounded the remedy used[26], rejecting and validating as correct the points of view expressed by the magistrate from Târgovişte.

We state that in an identical case, in which only the applicant and the tobacco cultivation areas differ, namely the quantity of tobacco delivered, Dâmbovița Tribunal to another party[27], declared favourably to the applicant, and the same assertions were made. The case is *pendinte*, with the APIA CJ DB appealing to Ploieşti Court of Appeal.

These aspects reinforce the idea that, in the above-mentioned examples, APIA mistakenly traced the records of the irregularities and the establishment of the budgetary debts, on the grounds that the conclusions of the auditors from CC Dâmbovița, which revealed its fault in the handling and instrumenting the payment requests for ANT – 4 tobacco, in the 2015 campaign, at the level of Dâmbovița County.

Moreover, as it results from the analysis of the two solutions presented above, we believe that the *irregularity* within the meaning of Government Emergency Ordinance no.66/2011 may also consist in an imputable action or inaction, including the authority with competence in the management of national funds or European, which requires greater attention, diligence, prudence and competence from APIA officials when dealing with farmers' payment debts.

III. Short conclusions

The problematical of the acts issued by APIA in the procedure for finding irregularities and establishing budgetary debts in the case of the transitional national aids is extremely thorny in view of the consequences they may cause.

Of course, in all this legislative melange, both for APIA officials and for beneficiaries, but especially for magistrates, solutions are not simple.

[25] Civil Sentence no. 80/22.01.2019 issued by Dâmbovița Court in file no. 3262/120/2018 (unpublished).
[26] Civil Decision no.756/04.06.2019 pronounced by Ploieşti Court of Appeal, file no. 3262/120/2018 (unpublished).
[27] Civil Sentence no.85/25.01.2019 delivered by Dâmbovița Court in the file no. 3410/120/2018 (unpublished).

We believe that the state must find by effective legislative leverage, through clear, clear and simple regulations, the right balance between defending the public interest and implicitly of its budgets and the EU with funds and defending the private interest of farmers who can not survive or grow in the absence of coherent, fair and firm agricultural policies.

We have attempted to present a small part of the issues that accompany Apia's acts (budget titles) issued in the case of the recovery of ANTs, without wishing to make an anathema on the activity of this institution, which does its job well, protecting the interests the right farmers, the Romanian and EU states and in the absence of which, the agricultural policies by fields would be impossible to implement and sustain.

We advocate, however, for rigor and responsibility in the activity of any institution, and we believe that only knowing the shortcomings in each person's life can the actions be taken, so that it can be said that the law is respected.

Part of the reported problems are also generated by the staff shortage in the structure of APIA, the working conditions and the huge workload to which the officials of this institution are subjected, and if we add here the problem of constantly changing legislation, we have the image of the premises too weak to make performance.

We believe that clear manuals and procedures for correct payment order processing on different types of funds managed by APIA should be developed, revised and adapted to the internal and European legislation, so that the situations revealed in this study will not be repeated.

We also appreciate the need for better communication between APIA and farmers, with emphasis being placed on counselling, guidance, control and prevention, before sanctioning.

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THE BALANCED LOCAL POLICE MODEL: THE BALANCE BETWEEN THE PREVENTION, ACTION AND REACTION OF LOCAL POLICE TO ACTIONS RELATED TO ACTS OF GENDER VIOLENCE AND DOMESTIC VIOLENCE

José Luis CARQUE VERA*

Abstract: *The pattern of local police especially aims, from the perspective of the community police and of the police oriented towards issues, to manage the knowledge acquired in the history of contemporary police in order to structure an integral local police not to give up all its capabilities and to participate in the three moments of the criminal phenomenon and in civism: before, during and after, in a balance between prevention, action and reaction of the police, especially in the case of acts and actions of gender violence and domestic violence.*

From the point of view of community policy and problem-oriented police, the balanced policeman intends to use the knowledge accumulated in the history of contemporary police organizations to structure an integrated local police force, not to give up their skills and to work three times the criminal phenomenon and antisocial behavior (before, during and after) on a balance between prevention, action and police reaction.

Keywords: *local police; problem-oriented police; proximity and vicinity; prevention, action and reaction; balance in action.*

I. Introduction

There is an idea based on the fact that when a model of community police is used in a police organization, its structure and philosophy become incompatible with certain methods of police intervention. It is erroneously argued that taking a decision to guide a police force from community police necessarily means abandoning the maintenance of, for example, response units or maintaining order.

This is not an isolated process, but on the contrary, it is an excessively generalized error which impedes certain public policies to support the model of the police's proximity based on the alleged laxity of this model when dealing with serious issues such as spontaneous or organized violence and/or high intensity. And nothing is further from reality.

The model of the police's proximity (let's say that in the 5th part of this paper we shall try to differentiate it from the concept of community police) simply suggests that a democratic and advanced police organization engaged itself in serving the citizens and

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shall redirect its actions not only on knowing the needs of the mentioned community, but also in their participation and engagement in a model of co-responsibility.

The model does not impede the development of numerous intervention techniques and methods as police force, but it simply directs these efforts to a line convergent with the expectations of the vicinity, towards success. The philosophy of the community police, seen from the perspective we propose, does not really try to diminish the crime rates, but to provide means for the police science and technical capacity of professionals to minimize them.

This is the basic message of the method we call The Balanced Police Model (BPM) which seeks a balance between the three stages of police intervention (before, now and after) and between different police strategies, but always participates in the time and place to overcome the balance or balance according to the criteria of congruity, opportunity and proportionality

Using a single instrument among the plethora of science-based pleiades, it is wrong, but this tool is common and very used as a community police model, as Prof Ruíz Vázquez[1] (2008) well noted in one of his articles.

As effect of the agreement concluded between the Ministry of Internal Affairs, the Spanish Federation of Municipalities and Provinces and Local Council for combating gender-based violence, the engagement of the Spanish local police was to create a specialized unit, dedicated to this important task, thus providing protection and safety for the victims of such offence.

In order to improve the coordination between the security and public safety organs, the local police are integrated within the state system of the national police databases, through which the local PDs have access, among others, to background data, vehicle registration or monitoring of cases of gender-based violence.

II. The three moments of the criminal phenomenon of gender-based violence and domestic violence

"Prevention, action and response" are three generic terms that correspond to "police prevention, response and research" that we will use after this section, because now we just want to highlight the differences in the methods of police intervention for each moment, but above all, it shows that these are not impermeable moments, but fluids, and that what is done in one reverberates in the last, or that what is found in "after" can help us avoid it in "before".

As a conclusion, the activity performed by the policemen which are registered within the group against gender-based violence is very diverse, but we could summarize it in the following points:

- The presence in the moment of the complaint;
- Steps to follow, contact with social worker and psychologists;

[1]Vázquez, Juan Carlos, "*Poliția şi securitatea cetățenilor în Canada. De la fantezia Disney la represiune*". Perspectivele canadiene-columbiene, Revizuirea anuală a Asociației Studenților Canadieni din Columbia, Columbia, 1st Volume (2008), Studii columbian-canadiene, Nr. 2.

- Accompanying the victim for declarations in front of judicial or investigation authorities;
- Periodical interviews depending on the personal situation of each victim;
- Interviews with the alleged abuser;
- The surveillance of the house, workplace and/or school area where the victim woman's children perform their activities;
- Taking a statement in front of the police, informing the judge about the nature and the magnitude of the offence.

a. Instructions for police actions.

In accordance with our regulations in force and especially with the Organic Law No 1/2004[2] of 28 December on the protection measures against gender-based violence, the following police orientations may be identified:

1. A comprehensive intervention –Police intervention should aim at a comprehensive intervention where all the needs of victims are addressed and collaborated with other professionals working in the same case or who can do so;

2. An immediate intervention – the severity of these offences, their current magnitude, the existing social alarm and the consequences for the victims make the intervention a priority;

3. The multidisciplinary, coordinated and co-responsible intervention – because all forces and organisms for protection, including the Local and autonomous police, have competences in this area and, in addition, are involved other types of professionals, the collaboration and respect by which professional of his own responsibility being necessary.

The moment we worked the most as police forces was undoubtedly "***now***", the reaction to the point of becoming the traditional police model (random patrols, demand, etc.). In BPM, the answer "now" corresponds to the answer and becomes an essential façade to be the most endowed in staff since it has to respond to incidents and emergencies that may occur all hours of all days of the year. The reaction, as answer, becomes fundamental for the BPM, but because we have not abandoned the attention of the "before" and "after", as we shall see.

The other moment gifted with experience and means is that of the police post-investigation, dedicated to the identification and search of the culprit, and the collection and custody of the evidence for its transmission to the judicial authorities.

b. The concept of gender.

With gender, we mean the set of non-biological cultural models that give different power to men and women and put women in inferiority to men, constituting what was called "***the majority in inferiority***". This concept, created in 1970, is currently included in international standards and in our domestic law.

The Declaration of the United Nations on the elimination of gender-based violence, adopted in December 1993 by the General Assembly, reminds that violence against women represent a violation of human rights and fundamental freedoms and defines the gender-based

[2]Organic Law 1 of 24 December 2004 on protection measures against gender-based violence – known as LIVG or VioGen – is a law of the Spanish legal system having the nature of an organic law.

violence as being: "*any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life*".

From the BPM, this position does not end with the ones above-mentioned, does not conclude in a micro-research (which have as purpose the solving of the specific case), but feeds the laboratories of macro-research which analyze the causes in order to avoid them, based on the data gathered by the micro-scientists. Which brings us to the third moment from this point of view, the first in the temporal cycle.

The incriminating norm explaining the fact that the violence against women based on gender violence refers to:

- *Domestic violence*: physical, sexual and psychological violence within the family, including the rape, sexual abuse of the girls, violence related to dowry, marital rape, genital mutilation and other invasive traditional practices, violence committed by other members of the family and violence related to exploitation;
- *Violence outside the house*: physical, sexual and psychological violence committed against the women in the community, including rape, sexual abuse, harassment and sexual intimidation at the workplace, in educational institutions and in other places, trafficking in women and forced prostitution;
- *Institutional violence*: physical, sexual or psychological violence committed or tolerated by every state. Nevertheless, the final project of the Law No 9/2003[3] does not state a definition specific to maltreatment, which is not mentioned separately from the gender-based violence, limited only to stating that the violence endured by women and caused by their current or ex-partners, is a manifestation of gender-based inequality and, therefore, a type of the gender-based violence defined by Art 1 of the Organic Law dedicated to this subject: "1. The purpose of this law is to act against violence which, as a manifestation of discrimination, the situation of inequality and relations of power between men and women is exercised upon them by those who are or where their husbands or by those who were in emotional relations, even without coexistence; 2. This law states integral protection measures with the purpose of prevention, sanctioning and combating this form of violence and granting assistance for its victims; 3. The gender-based violence mentioned by the current law includes all acts of physical and psychological violence, including the attacks upon the sexual freedom, threats, coercion or arbitrary deprivation of freedom".

We call maltreatment (or domestic violence) any physical, psychological or sexual violence suffered at home or committed by men with whom an emotional relation was shared, even if the domicile is shared or not.

After women, the group with the highest risk of being maltreated is composed by boys and girls, in a dynamic of the maltreatment of the mother, which directly or indirectly includes them. The next risk group is represented by elder persons. Until now, such widespread situations have not been reached, as in the case of women's maltreatment.

Briefly, the domestic violence committed against women has particularities differentiating it from the domestic violence committed against men by their partners or elder persons by other family members:

[3]Law No 9 of 2 April 2003, for equality between men and women; Law No 7 of 23 November 2012 on the violence against women within the Valencian Community (Spain).

- Inappropriate treatment applied to women by their partner or ex-partner, is one of the most common forms of violence against women, with a high probability of suffering repeated attacks, body harm or rape;
- It is a global phenomenon spreading at all social levels and in all states;
- The impact of maltreatment applied to women against their health is so severe that it is considered as an important problem of public health, as well as physical harm, there are always psychological damages or lesions, sometimes there are modifications regarding the sexual health and there is a long-term risk against the general health condition.

Of course, every person who has suffered from a domestic violence is entitled to assistance and proper and efficient judicial treatment and, indeed, some of the intervention guidelines detailed in this handbook can be used to assist all types of victims, especially with regard to reception and crisis intervention.

But, since only in the cases of maltreatment against women (including children/ where involved) there are special difficulties concluding the situation, representing a social evil by extension, we are talking about the domestic sufferance endured by women, because they are women and have a smaller social power than men.

For the cases of maltreatment, the perpetrator and the victim have, or have had a sentimental relation, the perpetrator committing acts of aggression against the same victim combined with regrets and resentments.

We are talking about a circuit of violence[4]in order to describe the circular phases of maltreatment, consisting of:

1. An episode of violence;
2. The phase of relaxation;
3. An episode of reconciliation;
4. The phase of tension.

These episodes have a refuel, though the violence becomes more and more serios, the relaxation phase may diminish and even disappear.

For the offences of maltreatment, it is normal that women be deeply psychologically affected and to have a low capacity to undertake judicial procedures, which will result in her second victimization. The consequence of this deep affection is that during the process of these proceedings, the woman shall develop different contradictory behaviors, such as stating that she does not want something to happen to her husband, that it is not bad intended, that she wants to return with him, etc., which will gradually damage her image to the legal operators, often without knowing that such behaviors are just evidence of the psychological abuse suffered and the resulting helplessness.

One of the frequent behavior of women in court proceedings, which is the cause of surprises and misunderstandings if the mechanisms of this type of gender violence are not known, consists in the withdrawal of the complaint and the request for a protection order due to its psychological state of behaviors which the domineer develops at that time (either threats or promises of change) and the pressure of his environment to forgive him.

[4]Ramírez, Antonio. *Estrategias sociales de policía*. Madrid, Dykinson, 2005.

c. Orientations for police actions in cases of maltreatments.

The issue of maltreatment requires multidisciplinary interventions based on specialized criteria. Police intervention begins, mainly, from the same criteria of interventions as well as the rest of professionals, because the objectives are identical.

- General guidelines for professional actions;
- General guidelines for police actions;
- Specific orientations for police interventions to interact with the victim;
- Guidelines for discovering the maltreatment.

d. General instructions for professional performance.

All professional interventions in this area aim the fulfilling of the following objectives:

1. Participants in the victims' condition and needs, which are, in addition to women, their sons and daughters. From this premises, the interventions are pointed in two directions:

- Prevention of future violent acts and the protection of the victims;
- Recovery of the victims. In order to know the status of the victims and their needs, one of the most relevant interventions shall be the interview with the victims, especially in registering the complaints.

2. Emphasize the violence present in each case. This requires a comprehensive collection of data and documentary evidence about the whole range of abusive or violent behaviors that occur over time so that they can be considered by other professionals. The victims' declarations shall have a special importance for the correlation with the details of the behaviors which could be developed. Identifying the violence for the cases which women do not declare they are suffering from domestic, but there are clues about it; or for the cases in which the women declare that they suffer from a certain type of violence (for instance, physical), but there can be a different type of violence (for instance, sexual, psychological or economic).

III. General instructions and rules for police actions:

- Referring to institutions providing assistance to women who are victims of abuse and their children;
- As one can notice in the above-mentioned sections, the complexity of these offences and serious impact upon the lives of the victims is essential for their assistance provided by professionals from different areas;
- In our autonomous community, the Institute for Women, belonging to the Ministry of Equality and Social Protection, provides legal, social and psychological support, as well as shelters for the women who fled and hide from their aggressor; also, it provides an emergency hotline 24 hours at +34 900 200 999. Also, there are different townhalls supporting specialized care centers for the victims;
- Information about the situation and needs of the victims. As a prerequisite to providing protection to victims is to know their specific situation and needs, without forgetting those of their sons and daughters. For this, one of the most relevant interventions will be interviewing victims, especially in making complaints;

- As stated by Art 32 Para 4 of the Organic Law No 1/2004, the needs of women found in special difficulties because of the higher risk of suffering from domestic violence, difficulties in accessing services, belonging to minorities, immigrants, women found in situations of social exclusion or with disabilities;
- Assessing the continuity of the danger; shall be made from the first moment in which a woman declares to a policeman that she has suffered a physical or psychological aggression from the partner or ex-partner, or there are clues that this thing happened, it is necessary an assessment whether she is exposed to the risk of being assaulted again (physical or psychological), to suffer from a sever attack followed by death or suicide, as well as to confirm if other persons from their entourage are in danger (sons, daughters or other relatives, the woman's new partner etc.).

This assessment cannot be limited to the moment in which the police discovers the cause, but it is necessary a continuous assessment taking into consideration the new offences or the possible escalation of violence.

We need to emphasize here the important research conducted by Prof. PhD Jorge Mateu and his team from the EUROCOP Department of the Jaume I University of Castellon, Spain, working on the concept of *pre-crimen*[5] in a pattern called "PredCrime". The support from the university, as well as the professional knowledge and techniques used can only improve the management of civil servants from the police.

Pedro Ceballos, General Manager of the State Institute for Criminal Sciences and Public Safety from Sinaloa, stated during a seminar[6] held on this subject: "The police is a ship; and the science is his only beacon".

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[5] *Pre-crime* is a term inserted by the SF writer Philip K. Dick. It is more and more used by the academic literature in order to describe and criticize the tendency of the criminal law systems to focus upon the crimes which have not yet been committed. Some practical examples may be found in the European criminal law.

[6] Barberet, Rosemary (November 2013), "Fear of crime", International Congress on Public Safety and Intelligence; Cities: Preventing offences and incivilities, held on the campus of Jaime I University of Castellon, Spain.

THE PROCEDURAL ACT OF COMMENCEMENT OF CRIMINAL PROSECUTION, THE MOMENT THAT INITIATES THE CRIMINAL TRIAL

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Abstract: *The initiation of criminal prosecution is an important criminal procedural institution that marks the initial moment of criminal prosecution, the moment when the criminal trial starts, representing the birth of the legal framework for exercising the procedural rights and obligations.*

The criminal trial has four stages: criminal prosecution (which focuses on the deed immediately after the referral, and then on the person), the pre-trial chamber, the trial (in the first instance and, possibly, by appeal) and the execution of the final legal decision.

Prosecution is the first phase of criminal trial and is meant to prepare and ensure the smooth conduct of criminal proceedings in the trial phase, by detecting the offenses, identifying and apprehending the perpetrators, gathering evidence regarding the offense and the offender, so that the offense committed and the person to be tried, as well as other persons who may have a procedural capacity in the case, are known at the time the court is referred.

According to the current regulation, criminal prosecution is a judicial function (art. 3), which is exercised ex officio, unless otherwise stipulated by law, and in its exercise the prosecutor and the criminal investigation bodies collect the necessary evidence to determine whether or not there are grounds for referral.

Keywords: *criminal prosecution, referral, complaint, denunciation*

1. Introduction

As the first phase of the criminal trial and for the fulfillment of the specific judicial function, criminal prosecution is clearly delineated between the moment when the criminal prosecution is initiated and the moment when the prosecutor has a solution, representing the legal framework in which criminal prosecution action can be carried out.

Activities undertaken before this time have extra procedural nature and can not contribute directly to achieving the procedural object and purpose of criminal prosecution and evidence gathered are illegal and can not be considered in the case.

Consequently, the possibility of carrying out criminal investigations to prove the commission of a crime by a person, as well as the specific rights and obligations for both the criminal investigation bodies and the other participants in the criminal proceedings, arises only after the commencement of the prosecution criminal.

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2. Conditions

In view of the significance of this procedural act, which produces important consequences, both the conditions and the form in which the commencement of the criminal investigation materializes are regulated in detail.

From the interpretation of the provisions of article 305 of C.P.C., the cumulative conditions necessary for the commencement of criminal prosecution are resulting, one positive and the other negative:

– the existence of a referral to the criminal prosecuting authority, which may be external (complaint, denunciation, etc.), internal (ex officio) or by special means (prior complaint, notification to the competent body), containing a minimum of data or information on the basis of which it is possible to order the commencement of criminal prosecution;

– it is found that there is none of the cases which preclude criminal proceedings under Article 16, par. 1 of the C.P.C.

The conditions are cumulative and, once fulfilled, the competent criminal investigation body is obliged to initiate prosecution, since the new Criminal Procedure Code no longer regulates the stage of the preliminary acts, so that when the referral meets the formal and substantive conditions and does not exist in one of the cases that prevent the criminal proceedings, it will be ordered to start criminal prosecution.

Each of these conditions requires careful consideration because, if not met, in the absence of preliminary actions stipulated in the old regulation, criminal prosecution cannot be initiated, disposing the closing of the criminal files (art. 315).

As a practical matter, with the entry into force on February 1, 2014 of the new Criminal Procedure Code, in all criminal files registered in the prosecutor's offices, which were at the stage of the preliminary acts and in which the conditions for starting the criminal prosecution were met, the criminal prosecution of the crime was commenced, thus creating the criminal procedural framework required by the new regulation.

3. Means of referral

The initiation of criminal prosecution is always preceded by the notification of the criminal investigation bodies (or the disclosure) about the commission of a crime.

The way in which the judiciary is informed about the commission of a crime is the act of referral, which has the effect of investing the criminal prosecution body and creating the legal framework for carrying out this procedural activity. Referral to the judicial organs is the starting point of any criminal investigation, without which it cannot begin, and contains both the information element and the legal basis for starting the research activity.

Although not specifically provided for in the Code of Criminal Procedure, the doctrine has divided the referral modes into several categories:

a) External referral (complaint, denunciation, prior complaint, etc.) and internal (self-referral or ex officio);

b) Primary referral (represents an absolute novelty, which coming to the attention of a criminal prosecution body for the first time) and complementary referral (with subsidiary character, being subsequent to the primary referral);

c) General ways of referral (ordinary means of referral, equal in importance, with the consequence that they can supplement each other) and special means of referral (having an exclusive character, criminal prosecution cannot be carried out without them).

In the previous Code of Criminal Procedure, special referral modes were absolute conditions for starting criminal prosecution, but in the current regulation, their absence prevents the initiation of criminal prosecution[1].

Regarding the ways of referral article 288 of the Law no. 135/2010 preserved the ones enshrined in the previous regulation:

1. The criminal investigative body is notified by complaint or denunciation, by the acts concluded by other law enforcement bodies or ex officio.

2. When, according to the law, the criminal proceedings can be initiated only upon preliminary complaint of the injured person, at the request made by the person stipulated by the law or with the authorization of the body stipulated by the law, the criminal prosecution cannot be initiated in the absence thereof.

Paragraph 3 was added, which stipulates that in the case of crimes committed by soldiers, the commander's reminders are only necessary in respect of the offenses referred to in Articles 413 to 417 of the Criminal Code.

The provisions regarding expression of the will of the foreign state and the situation of the offenses whereby a damage occurred to a unit out of those provided by art.145 of the previous Criminal Code, are no longer available.

3.1 Complaint

According to art.289 paragraph 1 of the Criminal Procedure Code, the complaint is a report filed by a natural or legal person, on the harm which was caused by the offense.

The complaint, as a way of notifying the criminal prosecution bodies, should not be confused with the prior complaint, which is also a condition of punishment and procrastination. The absence of a prior complaint cannot be remedied by other means of referral, whereas an ordinary criminal complaint may be replaced by a denunciation or an ex officio referral.

The complaint must include the name, surname, personal identification code, the quality and domicile of the petitioner, the description of the deed which is the subject of the complaint, as well as the indication of the perpetrator and the means of evidence, if known.

The complaint may be made in writing (including electronically) or orally (including by calling SNUAU 112), in which case it is recorded in a minutes, and is optional, remaining at the discretion of the injured party if he or she formulates it or not.

[1]Zarafiu, Andrei, Procedură penală. Partea generală. Partea specială. Ediția a II-a, Ed. C.H.Beck, Bucureşti, 2015, p. 335.

As an element of novelty, art. Article 289 (par. 2) provides that for legal persons the complaint must include *the name, the registered office, the unique registration code, the fiscal identification code, the registration number in the trade register or the registration of the legal entities and the bank account, indicating its legal or conventional representative*.

There is also a novelty in paragraphs 4 and 5, concerning the obligation of the injured person or his trustee to sign the complaint and the conditions of the complaint in electronic form:

"(4) If it is made in writing, the complaint must be signed by the injured person or by the trustee.

(5) Complaint in electronic form fulfills the form conditions only if it is certified by electronic signature in accordance with the legal provisions. "

The complaint may be made personally, by a special trustee (the proxy remains attached to the complaint) or by a procedural substitute (the spouse for the other spouse or the parent for the parents), but the injured person may declare that he does not accept the complaint, and when done orally it shall be recorded in a minutes by the receiving body.

For persons deprived of legal capacity, the complaint is made by their legal representative, and in the case of persons with limited legal capacity, they are formulated by themselves with the consent of persons provided by the civil law, except when the perpetrator is a legal representative or a person provided by the civil law of the injured person, when the notification of the criminal investigation bodies is done ex officio.

A special situation concerns criminal offenses committed outside the territory of Romania when the complaint filed with the Romanian judicial body by the injured party, resident in Romania, is transmitted directly or, in the case of non-member states of the European Union, through the central judicial authorities, competent foreign authorities of the State where the offense was committed[2].

3.2. Denunciation

According to art. 290 of the C.P.C., the denunciation is the notification made by a natural person or by a legal person about the commission of a crime and, as well as the complaint, presents the same legal features – it is an external, general, primary and principal means of referral.

Denunciation is an optional way of referral to criminal investigation bodies, with no legal obligation to do so.

However, if the law provides for the legal obligation to denounce certain offenses, in this case the denunciation is mandatory, the non-notification being an offense (Article 266 of the Criminal Code). Sometimes, the law provides that some senior management persons have to report to the judicial authorities about the commission of a crime, in which case this is a special way of referring.

[2]Art.127[1] Legea nr. 302 / 2004,publicată în Monitorul Oficial al României, Partea I, nr. 377 din 31.05.2011

According to the provisions of art. 291 of the Criminal Procedure Code, the notification of the criminal investigation bodies is mandatory by any person with a leading position within public administration system or other public authorities, as well as by any person with control duties, who, in the exercise of their duties, have become aware of the commission of an offense.

Similarly, the same obligation applies to any person exercising a service of public interest for which he has been entrusted by the public authorities or is under their control or supervision, who, in the exercise of his duties, has become aware of the commission of an act provided for by the criminal law, obligation covering only offenses for which prosecution is initiated ex officio.

In some cases, the law provides that the denunciation can be done by the person who committed the offense (self-denunciation), and such denunciations lead either to the removal of criminal liability or to the alleviation of this liability. For example, according to Article 290, par. 3, of the Penal Code, the bribe is not punished if the perpetrator denounces the deed before the criminal investigative body is notified of the offense of bribery.

Unlike the previous regulation, art. 290, paragraph 2 provides that the denunciation may be made only personally, the provisions of art. 289 (paragraphs 2, 4 to 6 and 8 to 10),being applied accordingly (with elements of novelty in paragraphs 4 and 8)[3].

Like the complaint, given the consequences that may occur (including criminal liability of the author when it is not accurate), the denunciation must be assumed by signing it, when made in writing, or by attestation of denouncer's identity in the minutes that is recorded, when formulated orally.[4]

3.3. Special means of referral

The special means of referral cannot be filled in by other means, either general or special, being excluded ex officio referral as well and must be made in writing and signed by the competent body; they must include the content items provided for the complaint.

In this category, as example, are included the referrals made by the commander of a military unit (for the offenses referred to in Art.413-417 of the Penal Code, committed by the soldiers), by the commander, owner or operator of the ship in the case of some offenses stipulated in the Law no. 191/2003, or the notification of the Chamber of Commerce and Industry or of persons authorized by the Competition Council in the case of unfair competition offenses, according to paragraph 8 of the Law no.11 / 1991.

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[3]Art. 289 alin. 4 şi 8 C.pr.pen.
,, (4) If made in writing, the complaint must be signed by the injured person or the trustee.
……
(8) For any person deprived of legal capacity, the complaint is made by his/her legal representative. Any person with limited legal capacity can formulate the complaint by themselves with the consent of persons provided by the civil law. If the perpetrator is a legal representative or a person provided by the civil law of the injured person, the referral of the criminal investigation bodies is done ex officio."

[4]Zarafiu, Andrei, Procedură penală. Partea generală. Partea specială. Ediția a II-a, Editura C.H. Beck, Bucureşti, 2015, p. 337.

These special means of referral should not be confused with the authorization of the body provided by the law (authorization of the General Prosecutor of the Prosecutor's Office attached to the Court of Appeal or the High Court of Cassation and Justice for the offenses committed under the conditions of Articles 8 and 9 of the Penal Code, the authorization of the Senate, Chamber of Deputies or President of Romania for the initiation of criminal prosecution against the members of the Government), which is a prerequisite for initiating and carrying out the criminal investigation.

Also, while the lack of the special referral act impedes the prosecution, certain preconditions necessary to carry out concretely the acts of criminal procedure (approval for detention, arrest or search by the Chamber to which they belong, in case of lawmakers, or by the appropriate section of the SCM, in case of judges and prosecutors) do not prevent the commencement of criminal prosecution[5].

In the present Criminal Procedure Code, the ambiguous phrase in the old regulation (the unit referred to in Art. 145 of the Penal Code) has been replaced and the obligation to refer was reduced to the offenses for which prosecution is initiated ex officio[6].

The concept of civil servant has been defined and the obligation to refer the offenses for which prosecution is initiated ex officio has been reduced, being eliminated the condition that the offense must be related to the service.

Among the special means of referral, the prior complaint has a distinct regulation, the procedure of which is provided by art. 295-298 of the Criminal Code, but it does not initiate a special procedure for prosecution and trial in the cases in which it is formulated.

The significance of this type of referral results not only from the impossibility of initiating criminal prosecution, but also from the effects it produces in the course of the criminal trial, which can be stopped by reconciling the parties, withdrawing the preliminary complaint or concluding a mediation agreement.

The institution of prior complaint has a dual legal nature, being procedural as a special means of referral, a mandatory condition for starting and conducting criminal prosecution, and, from a substantive point of view, being a prerequisite for criminal liability of persons surveyed, its lack being a cause which removes the criminal responsibility.

The right to make a prior complaint lies with the injured person, namely the natural or legal person who has suffered physical, material or moral damage by the criminal offense, which confers a personal, indivisible and non-transferable character to this institution.

It may be formulated in person or by a trustee (with a special mandate attached to the complaint), and in the case of minors and incapacitated persons (lack of legal capacity) by their legal representative, but in the alternative, in this case, the criminal action may be initiated ex officio as well (art. 154 paragraph 4 of the Penal Code).

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[5]Zarafiu, Andrei, *Procedură penală. Partea generală. Partea specială. Ediția a II-a,* Ed. C.H.Beck, Bucureşti, 2015, p. 340.

[6]Art.291 alin. 2 C.pr.pen.: „Orice persoană care exercită un serviciu de interes public pentru care a fost învestită de autoritățile publice sau care este supusă controlului ori supravegherii acestora cu privire la îndeplinirea respectivului serviciu de interes public, care în exercitarea atribuțiilor sale a luat cunoştință de săvârşirea unei infracțiuni pentru care acțiunea penală se pune în mişcare din oficiu, este obligată să sesizeze de îndată organul de urmărire penală".

Also, when the injured person is an individual deprived of his or her legal capacity or has limited legal capacity, or a legal person, represented by the perpetrator himself, the criminal action is also initiated ex officio.

The personal nature of the prior complaint relates not only to the claimant, but also to the person against whom it is formulated, which must be known by the injured person and indicated, with the express wording that he wishes to be prosecuted.

In terms of form and content, the provisions of Article 289 par. 2 of the Penal Code are applicable, the major difference to the complaint being the time limit within which the prior complaint must be made, namely three months from the day the injured person learned about the commission of offence, whether or not he knew the perpetrator at that time.

The current regulation is deficient in this respect, because, in cases where the perpetrator of the deed is discovered after the passing of the three months, he cannot be held criminally liable, and we appreciate, by law ferenda, that it would be necessary to amend Article 296 paragraph 1 C by adding the phrase "or when the injured person knew who the perpetrator is", as provided for in Article 284 (1) of the previous Code of Criminal Procedure.

As in the case of other procedural acts, the prior complaint wrongfully referred to the criminal investigative body or the court, is to be sent by administrative means to the competent body, being considered valid if it was filed within the time limit with the incompetent body.

The period within which a prior complaint must be lodged shall not be interrupted or suspended, even if the injured person was objectively unable to formulate it, the only exception constituting the duration of the mediation.

However, if the objective impossibility of formulating the prior complaint was determined by the commission of the offense, the commencement of criminal prosecution and the pursuit of prosecution during the three-month term may also be initiated ex officio[7].

Special issues regarding the prior complaint procedure:

– upon receiving the prior complaint, the criminal investigative body verifies whether it fulfills the formal conditions and whether it has been filed within the time limit prescribed by the law (art. 297 paragraph 1 of the Criminal Code);

– in the case of a flagrant offense, the criminal investigative body is obliged to declare its execution, after which the injured party is called upon to declare whether or not he intends to file a prior complaint, proceeding accordingly (art. 298, art.)

– where a criminal investigation has been carried out in one case and the prior complaint is deemed to be necessary, the criminal investigative body proceeds as in the previous case (Article 297 of the Criminal Code);

– if the court amends the legal classification of the offense for which the court has been ordered to commit an offense for which the prior complaint is requested, the injured person will be summoned and will ask to understand how to make such a complaint (Article 386 2).

[7]Udroiu, Mihai, *Procedură penală. Partea specială,ed.a-II-a,* Ed. C.H.Beck, Bucureşti, 2015, p. 25.

3.4. Ex officio Referral

It is a means of self-notification of the prosecuting authorities when they find out in other ways (other than those discussed above) about commission of an offense, and it shall be done either by the direct finding of the commission of certain acts provided for in the criminal law or by means of mass information.

Ex officio referral may also have a subsidiary character in situations where another way of referral does not produce its effects (anonymous denunciation, complaint without the data of the injured person, complaint where the perpetrator is the legal representative of a person lacking legal capacity, etc.), in which case it takes on the legal form, using legally the information contained in an inappropriate way of referral, and it materializes in a minutes concluded by the criminal investigative body, from which moment it is legally invested with the settlement of the case.

It has a distinct regulation, compared to the previous C.P.C., in art. 292:

"*The criminal investigative body can use ex officio referral if it finds out that a crime has been committed in any other way than those provided under art. 289-291 and should conclude a minutes to that effect*".

Even if the prosecuting authority finds out directly about an offense, it can not act ex officio if the offense requires a prior complaint. In these situations, the criminal investigation body calls the injured person and asks if he or she wants to file a complaint.

The minutes concluded after the ex officio notification are not an act of criminal prosecution commencement (which must be ordered separately by ordinance), but only the way in which the criminal prosecution bodies are notified.

The simple referral of these bodies is not sufficient to order the commencement of criminal prosecution, those being compelled, upon the receipt of the complaint, to verify its competence, and if it finds that it is not competent to resolve the case, it shall submit it to the prosecutor, with the proposal to refer to the competent body

If the referral is addressed directly to the prosecutor, when ascertaining that he is not competent, either materially, terrestrially or by the quality of the person, to solve it, he shall send it to the competent prosecutor. It is not a matter of declining jurisdiction (the prosecuting authority is not legally notified), but a reference done by administrative means, a way considered in the doctrine as legally questionable (being an administrative measure) and under criticism from the point of view of regulation since it overlaps with the ways of regulating competence, provided by art.58 of C.P.C.[8]

In cases where the complaint or denunciation does not meet the form and substantive requirements of the law or the description of the deed is unclear or incomplete, it shall be returned administratively to the petitioner, specifying the elements to be filled in.

However, if the referral fulfills the legal conditions, but from its content results any of the cases preventing the criminal prosecution, stipulated by Article 16 paragraph 1 of the Criminal Code, it shall be forwarded to the prosecutor with a proposal for closing the case, otherwise the initiation of criminal prosecution will be ordered, and in

[8]Zarafiu, Andrei, Procedură penală. Partea generală. Partea specială. Ediția a II-a, Ed. C.H.Beck, Bucureşti, 2015, p. 344.

both cases the acts of referral shall be recorded in the criminal records, the prosecutor's office assigning a unique number to the file.

Art.294[1] of Criminal Procedure Code stipulates that whenever a prior authorization or other precondition is required for the purpose of initiating criminal prosecution, the criminal investigative body is required to carry out prior verifications, which are not criminal prosecution acts, having an extra-judicial character (being conducted prior to the commencement of criminal proceedings), but are carried out for trial purposes, and no evidence can be given at this stage, due to the fact that procedural safeguards guaranteeing the right to a fair trial would be avoided.

4. Procedural act ordering the initiation of criminal prosecution

According to art. 286, the prosecutor disposes of the procedural acts or measures and solves the case by ordinance, unless the law stipulates otherwise.

Article 305 paragraph 2 expressly provides that the commencement of criminal prosecution is ordered by an ordinance comprising (Article 286 paragraph 2 letters a – c and g):

– the name of the prosecutor's office and the date of issue;

– the name, surname and the quality of the person filling it in;

– the deed which is the object of the criminal investigation, its legal classification and, where appropriate, the data concerning the person of the suspect or defendant;

– the signature of the person who elaborates it.

The ordinance for the initiation of criminal prosecution may be issued either by the prosecutor or by the criminal investigation body (not subject to a reasoned confirmation by the prosecutor as in the previous regulation) and may be appealed with a complaint to the prosecutor supervising the prosecution or the hierarchically superior prosecutor in conditions art.336-339 of C.P.C.

A special situation regarding the initiation of criminal prosecution is the offense of audience, when it comes to the way in which this procedural act is ordered.

As a general rule, the prosecution will be ordered by ordinance, following the notification of the criminal prosecution body, by the conclusion of a hearing in which the act provided by the criminal law was established and the perpetrator was identified.

In exceptional circumstances, when urgent measures must be taken (including detention of the suspect or defendant) due to the manner in which the offense was committed or the perpetrator, the prosecution is initiated (in rem) by the oral statement of the prosecutor, which is recorded at the close of the meeting (art. 360 paragraph 2 of the Penal Code).

5. Initiation of prosecution, on offense

The procedural act of commencement of criminal prosecution produces important legal consequences, initiating the criminal prosecution (and, implicitly, criminal trial), the legal framework in which the investigations are to be conducted, being possible the

apprehension of evidence (taking of objects and documents, hearing of persons, searches, technical surveillance measures, etc.) or procedural acts or measures (seizure, retention of correspondence, attachment of accounts, etc.)

The Code of Criminal Procedure establishes, as a rule, the mandatory nature of the commencement of criminal investigations prior to the conduct of any investigation, except in cases where the document does not meet the conditions required or those from which it is apparent that criminal proceedings cannot be initiated.

As a result, no procedural act or procedure related act can be executed beyond the criminal trial, and no evidence can be administered outside that legal framework.

This new regulation on the limits and phases of criminal prosecution meets the requirements of strict observance of the principle of legality; the institution of the preliminary acts, of the old regulation, did not entirely met them (mainly because it allowed the gathering of evidence outside the criminal trial) and the weight that the use of this institution, had in the practice of the criminal prosecution bodies (often excessive, even in relation to the provisions of the old code) created the need to establish a regulation that would no longer allow the conduct of any specific activity of prosecution outside a well-defined procedural framework.

The initiation of criminal prosecution is ordered, as mentioned above by ordinance, both by the prosecutor and by the criminal investigation body. If the criminal investigation body is the one that commences the prosecution of the offense, its ordinance is not subject to the prosecutor's confirmation, but according to Article 300 paragraph 2 of the Penal Code, he will inform the prosecutor about the act, which may in turn deny it by virtue of art. 304, if he/she considers it illegal or unethical.

According to Article 305, par. 1,"when the referral act fulfills the conditions stipulated by the law and it is found that there is none of the cases that prevents the criminal action provided for in art. 16 par. 1, the criminal investigative body orders the commencement of criminal prosecution **on the offense**", the legislator introducing the obligation of the criminal prosecution body to start the prosecution, immediately after it has been legally notified. Practically, the act immediately following the referral, will necessarily in all cases be the ordinance to initiate the criminal prosecution of the offense.

Thus, no investigation can take place except in the conditions regarding the conduct of criminal prosecution acts, disappearing the phase prior to the commencement of criminal prosecution, that of gathering the necessary data "for the purpose of initiating criminal prosecution" (provided for in the Article 224 of the old Criminal Procedure Code).

There is no possibility of initiating the criminal prosecution directly against the person, even if he/she is indicated in the referral, since art. 305, par. 3, states that the reasonable indications that a person is committing the act should result from the data and evidence in question in the legal case or, according to Art. 97, paragraph 2, the evidence may be obtained only during the criminal trial.

The text mentioned above provides: "When the relevant data and evidence show reasonable evidence that a particular person has committed the deed for which the prosecution has been initiated, the prosecutor shall order that the prosecution be continued against him / her, who acquires the quality of suspect".

The person indicated to have committed the deed for which the prosecution was initiated has no procedural value, no rights and obligations are recognized for him/her during the criminal trial, since no official charge has been made in respect of it, and the witness statement given by the respective person (perpetrator) who, in the same case, prior to his/her declaration, or subsequently, had acquired the status of suspect or defendant, cannot be used against him.

Therefore, the mere initiation of criminal prosecution on the offense has not the character of an accusation against a person, but it only has the significance of establishing the procedural framework in which the first evidence can be collected about a particular deed.

These regulations ensure fairness in the conduct of criminal prosecution: on the one hand, they meet the requirement that any research work be carried out in a procedural framework (paragraph 1 of Article 305) and, on the other hand, establishes a guarantee in the notion that no person is charged because there is no reasonable indication that he has committed an offense under the criminal law (paragraph 3 of Article 305), a guarantee which prevails, especially in the case where, by means of referral, it is indicated a certain person as presumable author.

Indication of a person in the referral is not sufficient for that person to acquire the status of a suspect or to consider that the prosecution is aimed at him/her, this status being acquired only after the moment when, during the criminal prosecution and on the basis of the administered evidence, it will be ordered her/him to be prosecuted.

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BUSINESS NETWORKS AND LABOUR CONDITIONS OF POSTED WORKERS AFTERADOPTION OF THE DIRECTIVE (EU) 2018/957 AMENDING DIRECTIVE 96/71/EC

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Abstract: *The posting of workers in the framework of the provision for services is a dynamic and problematic socioeconomic phenomenon. Labour doctrine maintains that, in certain cases, this expression of labour mobility causes social dumping, unfair competition and numerous conflicts of legal interpretation, motivated by an inefficient regulation (and its jurisprudential development), by the lack of legal harmonization in the geographic scope of the European Union (EU) and the use of competitive advantages arising from differences in labour costs between Member States and in collective bargaining systems. However, the legislation that regulates this type of labour mobility (Directive 96/71/EC) has been updated. This text shows the possible consequences that the modifications introduced in the new article 3.1 of the Directive (EU) 2018/957 will have on the working conditions of the posted workers. This legislation has been drafted and awaiting its transposition, which must take place before July 30th, 2020, establishes a minimum core of working conditions of mandatory application that is more consistent with the search for equality of compensation treatment between posted workers and the local workers.*

Keywords: *European Union Law, Internal Market, posting of workers, freedom to provide services.*

I. Introduction

Almost 22 years have passed since the adoption of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services; this regulation (finally) has been modified. Its unavoidable revision had been repeatedly highlighted by the social partners, Member States, economic operators and scientific doctrine. However, its materialization is due a reflection of certain priorities raised by the current president of the European Commission Jean-Claude Juncker who, in the opening statement in the European Parliament Plenary Session held in Strasbourg on July 15, 2014, as a candidate for the presidency, he declared: "I will ensure that the Posting of Workers Directive is strictly implemented, and I will initiate a targeted review of this Directive to ensure that social dumping has no place in the European Union. In our Union, the same work at the same place should be remunerated in the same manner"[1].

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[1] JUNCKER, J.C. "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change", Strasbourg, July 15, 2014, p. 7. Available on: https://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf.

And it fulfilled its promise, at least partially; the European Commission, after public consultation which showed the divergent positions and reactions on the issue, published on March 8, 2016, the proposal of amending Directive 96/71/EC[2]. As stated in its explanatory memorandum, its main objective is to tackle fraudulent practices in the posting of workers and promote the principle that "[..] the same work at the same place should be remunerated in the same manner"[3].

After intensive negotiations for two years under the ordinary legislative procedure, this proposal as finally approved resulting in the new Directive (EU) 2018/957 of the European Parliament and of the Council, on June28, 2018, *which amends Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.* Its main purpose, as described in the first recital, is to ensure a level playing field for companies that provide services and respect for worker's rights.

Logically, this legal novation will have practical repercussion on business networks through which international posting of workers in the EU, as it will oblige the employer who uses this labour mobility formula to fulfil a transnational service provision, to respect the working conditions of the host State, theoretically and as codified, on the basis of equal treatment. Particularly in the retributive aspect which is one of the conditions which have proved *ab initio* the inequalities between posted and local workers, as well as between posted and native companies for the provision of the same service in the same place.

2. Business networks and intra-community posting of workers

Although the concept of business network is considered a fundamentally economic term[4]whose unique conceptual delimitation is complex, from the organizational-legal perspective, it can be said that the business network is understood as an informal macro-organization for the realization of common projects where a combination of legal autonomy and functional and economic interdependence is produced, articulated through links of a business nature and of trust among its members[5].

In this sense, business networks can materialize mainly in two ways that, although not clearly defined, are well recognized. The first is through one-off informal agreements between independent companies that establish cooperative links that are often not the subject of creating mutual rights and obligations. The second is through various legal formulas who articulate reciprocal obligations. In this sense, there are multiple contractual mechanisms to

[2] *Vid.*, GUAMÁN HERNÁNDEZ, A., "La propuesta de reforma de la Directiva 96/71 de desplazamiento de trabajadores en el marco del Plan de trabajo de la CE para 2016", *Revista de Derecho Social*, nº. 73, 2016.

[3] EUROPEAN COMMISSION, "Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services", COM(2016) 128 final, Strasbourg, p. 2.

[4] ECHEVARRÍA SÁENZ, J., "Los grupos por coordinación como instrumento de red", en RUIZ PERIS, J.I., (director), *Nuevas perspectivas del Derecho de Redes Empresariales,* Tirant lo Blanch, Valencia, 2012, p. 249.

[5] SANGUINETI RAYMOND, W., *Redes empresariales y Derecho del Trabajo*, Comares, Granada, 2016, p. 14.

formalize interdependence or collaborative links, such as the formalization of subcontracting contracts via leasing / execution of works or services, contracts of mercantile sale or supply, collaboration contracts, and, also the formation of joint ventures, among others.

This diversity of legal structures of collaboration constitutes a complex reality at the service of the business project which, as CASTELLS points out, is today represented by a network and not by individual undertaking or groups of companies[6]. From a broad perspective, business networks can be considered another consequence of the economy transformation during the second half of the 20thcenturywhere contemporary globalization has inevitably affected supranational economic integration and business practices of (re) organization[7].

When the expressions of outsourcing or productive decentralization indicated have a transnational character and involve the intra-community mobility of companies and their workers for the execution of an eventual provision of services, we are witnessing a temporary posting of workers. This expression of international geographic mobility[8]where an employer temporarily transfers workforce to another State in order to comply with a commercial contract, is a manifestation of the economic freedoms existing in the EU, specifically the freedom to provide services. This right is recognized for natural or legal persons who, located in a Member State, temporarily carry out an economic activity outside their country of establishment[9].

When the exercise of this freedom involves the intra-community mobility of employees, Directive 96/71/EC[10]takes place. This norm with a social nature but with a predominantly economic purpose (ensuring freedom to provide services and avoiding distortions in the competition)[11], establishes rules in relation to the applicable law to posted workers in the EU, and does so in the following way: the employment contract of the posted worker, remains subject to the labour legislation of origin, and at the same time, is affected by the application of a core of minimum protection working conditions established in the country of destination. The aim is to prevent companies from carrying out transnational economic activity under more favourable conditions of competitiveness, by taking advantage of differences in labour costs and social protection because this circumstance entails the risk of generating, in addition to disadvantages for workers, distortions of competition between companies[12].

In its original article 3.1, the Directive expressly defines the matters related to the minimum conditions of work and employment applicable to posted workers. These are,

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[6] CASTELLS, M., *La era de la información. Volumen 1. La sociedad red*, Alianza, Madrid, 2000, p. 216.

[7] HELD, D., "Globalización: tendencias y opciones", en BARAÑANO, M., (directora), *La globalización económica. Incidencia en las relaciones sociales y económicas*, Consejo General del Poder Judicial, Madrid, 2002, p. 155.

[8] *Vid.,* G. LYON-CAEN, *Les relations de travail internationales,* Editions Liaisons, Paris, 1991, p. 17.

[9] *Cfs*., articles 56 to 62 on the Treaty on The Functioning of the European Union (TFEU).

[10] Specifically, it applies to companies established in a Member State which send workers to another State, either as part of a recruitment or subcontracting operation (international outsourcing), or in cases of intra-enterprise mobility within the same group, or in operations where the employer is a temporary employment agency (TEA) which makes previously recruited workers available to a user undertaking. Conforming with art. 1.3 of Directive 96/71/EC.

[11] RODRIGUEZ-PIÑERO ROYO, M., "El desplazamiento temporal de trabajadores y la Directiva 96/71/CE", *Relaciones laborales,* nº 2, 1999, p. 82.

[12] CASAS BAAMONDE, M.E., *Los desplazamientos temporales de trabajadores en la Unión Europea y en el Espacio Económico Europeo,* Civitas, Madrid, 2001, p. 18.

in particular, maximum work periods and minimum rest periods; minimum duration of paid annual holidays; minimum rates of pay; the conditions of hiring-out of workers, by temporary employment undertakings; health, safety and hygiene at work; protective measures applicable to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and young people; equality of treatment between men and women and other non-discrimination provisions.

However, this same article states that for its application, these terms and conditions of employment of the host State must be established by laws, regulations or administrative provisions, and/or by collective agreements or arbitration awards declared universally applicable (construction activities). This circumstance, together with the unequal transposition resulting from the diversity of collective bargaining systems in the EU[13], has led to a multitude of application problems which were amplified by the interpretation of Directive 96/71/EC by the Court of Justice of the European Union (CJEU) in the now famous *Laval, Rüffert, Comisión/Luxemburgo* and *Isbir* judgements[14].

These were cases marked by a kind of acceptance of the competition between the salaries of European companies, in the words of RODRIGUEZ-PIÑERO, "a *pro-business* line" justified by the fact that they validated the use by companies of their competitive advantage based on their various labour costs giving primacy to the freedom to provide services with the consequent sacrifice of any workers' rights recognized by Directive 96/71/EC[15].

However, the judgment of February 12, 2015 (*Sähköalojen ammattiliittory*, case C-396/13) has led to a revision of this case-law. As far as the remuneration aspect is concerned, in this particular case and "in light of the freedom to provide services", the Court gave an expansive interpretation of what is to be understood by minimum wage, concluding that: first, a daily allowance recognized by collective agreement for posted workers (posting allowance) is part of the minimum wage insofar as it is not paid as reimbursement of expenses; second, that a daily commuting allowance for commuting to the job provided for in the implementing agreement constitutes a commuting allowance and is part of the minimum wage; third, that the holiday allowance provided for in the implementing agreement as a supplement is also part of the minimum wage[16]. In short, an interpretation of Directive 96/71/EC which is more sensitive to the social protection of posted workers in order to ensure greater equality of treatment. As we shall see, this jurisprudence has been codified in the new Directive (EU) 2018/957 with the aim of fighting against the wage inequality between posted and local workers which, as some studies show in the matter, is a source of unfair competition and social dumping[17].

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[13] *Cfs.,* EUROFOUND, *Posted workers in the European Union*, Dublin, 2010. Available on https://www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn0908038s/tn0908038s.pdf

[14] CJEU cases of December 18, 2007 (Laval, C-341/05); April 3, 2008 (Rüffert, case C-346/06); June19, 2008 (Comisión/Luxemburgo, case 319/06) and November 7, 2013 (Isbir, case C-522/12).

[15] RODRIGUEZ-PIÑERO Y BRAVO FERRER, M., "Un nuevo enfoque de la Directiva 96/71 sobre la protección de los trabajadores desplazados", *Derecho de las Relaciones laborales,* nº. 5*,* 2015, p. 485.

[16] *Cfs.* CJEU case of February 12 2015 (Sähköalojen ammattiliittory, C-396/13), paragraph 70.

[17] This is recognised in the *Opinion of the European Economic and Social Committee on «Fairer labour mobility within the EU»* which states that in certain sectors (construction and transport) posted workers earn up to 50% less than local workers. *Vid*., O.J. C 264/11 of 20th July 2016, p. 6, point 4.2.3.

3. The unavailable core of applicable conditions as revised by Directive (EU) 2018/957.

3.1. Remuneration of posted workers.

The revision of Directive 96/71/EC seeks to give equivalent protection for the working conditions of posted workers and local workers for the same work in the same place. The stated aim is to eliminate some of the differences which the original rule currently causes, particularly the remuneration. To this end, the wording of article 3.1 has been amended and the list of working conditions to be guaranteed during the period of posting has been extended.

The revised provision is worded as follows: "Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in article 1(1) guarantee workers posted to their territory, on the basis of equal treatment, the working conditions in the Member State where the work is carried out (..)". As can be seen, the most important novelty here lies in the term introduced "on the basis of equal treatment"; although it is not a transcendental amending element, it does represent a new way of interpreting the Directive and its network of rights and obligations[18].

The article goes on to state that the working conditions of the host State must be established "by laws, regulations or administrative provision, or by collective agreements or arbitral awards declared universally applicable or by any other applicable award, in accordance with paragraph 8". Novelty, first, because unlike the previous wording, the rule now refers to collective agreements of universal application or any other mode of application and, second, because in the reference to collective agreements or arbitration awards, the sectorial restriction on the activities contemplated in the annex of the original rule (construction) has been eliminated. Indeed, as from its entry into force, companies in all sectors which use this formula of labour mobility and fall within the scope of Directive 96/71/EC must respect both the legal, regulatory or administrative conditions, as the conditions established in collective agreements or arbitration awards which are applicable. Inevitably, this amendment is necessary in order to equate the rights of posted workers in any sector of activity who will see their legal status equated with that of posted construction workers[19].

Regarding the remuneration of posted workers, it is important to remember that two main problems have been causing unequal treatment and unfair competition. The first has to do with the controversial concept of minimum wage amounts included in the original Directive; studies of empirical analysis on this aspect show that in many EU countries there are no clear and transparent criteria established for the term minimum rates of pay (European concept), so that the diversity of national situations has caused confusion between this concept and the legal minimum wage (national concept)[20]. The second

[18] *Cfs.* LOUSADA AROCHENA, J.F., "El desplazamiento de trabajadores en el marco de una prestación transnacional de servicios: el estado de la cuestión", *Ciudad del Trabajo,* nº. 2, 2018, p. 70.
[19] *Ibídem.*
[20] *Cfs.,* EUROPEAN COMMISSION, *Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors*, European Union, Luxembourg, 2016, pp. 95-121

problem lies in the obligation to pay posted workers exclusively within the minimum wage levels of the host Member State. This regulation, with the safeguard of certain national transpositions which, as the Spanish clarified this element[21], has meant that, in certain cases, the same work in the same place is paid unequally.

On this situation, Directive (EU) 2018/957 has intervened modifying, in paragraph c) of article 3.1, the term minimum wage amounts for the concept of remuneration. In this respect, one of the final paragraphs of the article clarifies that the concept of remuneration shall be determined by the national legislation or practices of the country in whose territory the worker is posted and that it shall include all the elements constituting remuneration carried out by laws, regulations or administrative provisions, or by collective agreements or arbitration awards declared universally applicable or, in any other manner, in accordance with paragraph 8[22].

In addition to this important amendment, the two new subparagraphs (h) and (i) incorporated in the new minimum working conditions statute contained in revised article 3.1 should also be highlighted. The first point refers to "the conditions of workers´ accommodation where provided by the employer to workers away from their regular place of work". And secondly, "allowance or reimbursement of expenditure to cove travel, board and lodging expenses for workers away from home for professional reasons" when they have to travel to and from their usual place of work in the Member State in whose territory they are posted and have paid these expenses. In application of the new rule and where they are contained in the legal or conventional rules of the host State, these two new working conditions will form part of the minimum core of working conditions to be guaranteed to posted workers.

However, the second paragraph of the revised article 3.7 states that "where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure". In other words, a presumption has been introduced in favour of treating the posting supplement as reimbursable expense. Otherwise, they will be regarded as part of the remuneration.

It is undisputed that all these changes with an impact on the remuneration of posted workers entail an alteration *in meius* of some of the most controversial aspects of the posting and that, moreover, they comply with the terms of the *Sähköalojen ammattiliitto* case.

Some Spanish authors conclude that the definition of remuneration provided by the new Directive is not sufficient to solve implementation problems, because it remains the responsibility of the Member States to lay down rules on remuneration in

[21] *Vid.,* art. 4.1 Law 45/1999, of November 29, *on the posting of workers in the framework of transnational service provision.*

[22] It should be noted at this point that the new Directive requires Member States to publish information on working conditions according to their national legislation or practice on a single national website, ensuring that the information is accurate and up to date. It is striking, however, that if the information collected on the website does not indicate the working conditions to be applied, this will be taken into account when setting (mitigating) penalties for infringements of the relevant national provisions. *Cfs.*, art. 3.1 *in fine* of Directive 96/71/EC as revised by Directive (EU) 2018/957.

accordance with their national legislation and practices; and, because it is still necessary to justify that the protection of posted workers with regard to remuneration in no way restricts the freedom of companies to provide services. Inevitably, this struggle, and the uncertain scope of the concept of remuneration which must be present in the posting which take place after approval, transposition and entry into force from30 July, 2020, will lead to new conflicts which, more than possible, will oblige national courts to submit preliminary questions to the CJEU so that this legal concept can be positioned, and interpreted, under the prism of Union law[23].

3.2. The duration of the postings

The new Directive has addressed the issue of the temporariness of this type of labour mobility by finally establishing a quantitative reference or limitation of the maximum duration which, if it is expected to be exceeded prior to the posting or, if the expected duration is shorter but subsequently exceeded, will have an effect on posted workers and their employment protection: this will be reinforced by the application of conditions additional to those contained in the minimum statute ex. art. 3.1.

The revised Directive has set in its new article 3.1*bis*a reference period of 12 months, exceptionally 18 months when the service provider submits a reasoned notification, on the basis of which, apart from complying with the new minimum employment conditions laid down, posting undertakings must apply all the terms and conditions of employment of the Member State in which the work is carried out (laid down by law or by applicable conventional rules)except those relating to the conclusion and termination of employment contracts and to supplementary pension schemes.

It is positive that, unlike the original Directive which did not provide for the possibility of replacing posted workers and thus rotation for the same job, the modification has incorporated rules to avoid it; article 3.1 *bis in fine* provides that when posting undertaking replaces a posted worker by another posted worker performing the same work in the same place, the duration of the posting shall be the cumulative duration of the posting periods of each of the workers concerned. In theory, this situation will mean that when it is established that workers have been replaced, the periods of posting will be accumulated as a single period, which means that this new rule will limit the duration of the posting itself. The question is how this new mandate will be fulfilled. For example, in the construction sector it will be difficult to estimate the possible duration of the work or project and it will also happen with the inspection bodies for which it will not be easy to prove[24].

[23] Extensively, LHERNOULD, J. and PALLI, B., "Posted workers remuneration: Comparative study in nine EU countries and four sectors", *Maastricht Journal of European and Comparative Law,* Vol. 24 (I), 2017, p. 126.

[24] In this sense, EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, Opinion about the *"Proposal for a Directive of the European Parliament and of the council* amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services », [COM (2016) 128 final — 2016/0070 (COD)]. p. 22.

3.3. The application of host State terms and conditions

As we have seen, for the application of the host country's working conditions, laid down in article 3.1 of the revised Directive 96/71/EC, these must be contained in laws, regulations or administrative provisions, or in collective agreements or arbitration awards declared universally applicable or otherwise apply in accordance with paragraph 8.Well,the second subparagraph of this paragraph has been amended and states that"In the absence of, or in addition to, a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on: – collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or; – collective agreements which have been concluded by the most representative employers' and labor organizations at national level and which are applied throughout national territory".

The most significant element of this revision is that the expression "or in addition to" has been added to the expression "in the absence". This alteration of the original text is relevant as it will allow the application of the working conditions of *de facto* collective agreements (universally applicable or those signed by the organisations of the most representative partners at national level), even if a universal declaration system exists in the host Member State but has not been used.

It can be said that we are faced with the legislative response to the interpretation and pronouncement of the CJEU in the controversial *Rüffert* case. In it, as we have seen, the Court concluded that the minimum wage sought to be imposed on the service provider did not derive from a legal provision and that the collective agreement required to be applied was not generally effective and had no binding effect on undertakings in the sector, and was therefore not binding for the purposes of article 3.1. c) of Directive 96/71/EC or article 3.8.It therefore concluded that an agreement which is not declared to be of universal application it is applicable only where there is no system for declaring collective agreements to be of universal application in the country in question[25].

4. Final reflexion and conclusions.

The revision of Directive 96/71/EC is good news. Some of the modified elements have been noted in this text, in particular regarding the working conditions to be guaranteed to posted workers and their application. In this sense, we have seen that the minimalist concept guaranteed by the original rule in article 3.1 has been expanded, adding or modifying certain conditions to result in greater protection connected with the principles of equal treatment and remuneration, but obviously without achieving the parity offered to permanent workers.

The unavailable core of working conditions, reinforced by the new Directive (EU) 2018/957,is going to affect the business networks that resort to the transnational contracting of certain services, and that involve the mobility of workers for its execution.

[25] *Cfs.,* CJEU case of April 3, 2008 (Rüffert, C-346/06); paragraphs 25 to 29.

What is certain is that the replacement of the term minimum rates of pay by remuneration is indispensable as a mechanism for the search of equal pay conditions, as well as for ensuring a framework of fair competition among companies. Inevitably, this will have practical consequences: posted workers should receive equal wage treatment with local workers and posting companies should bear higher wage costs and burdens.

However, for the application of working conditions, these must be laid down by law or by collective agreements universally applicable to the place of supply of services. Circumstance which, even with the amendments made to articles 3.1 and 3.8, which have extended the scope of application, do not really guarantee the absolute application of working conditions to posted workers, for example, in countries that do not have a system of universal application of agreements[26].

In any case, this regulatory intervention, together with Directive2014/67/EU[27] already incorporated into internal legislation and the future creation of the European Labour Authority[28],can be significant in the overall objective of advancing the social dimension in the EU. However, it must be recognised that practical effectiveness in the short term is likely to be limited and, on the other hand, subject to future interpretation by the CJEU on certain modified aspects which are likely to generate application difficulties. Until then, we will remain alert to the corresponding national transpositions that will allow us to confirm or reject our previous conclusions.

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[26]Among others, Denmark, Italy, United Kingdom and Sweden. *Cfs*., EUROFOUND, *Posted workers in the European Union*, *op. cit*. pp. 16-18.

[27] Directive 2014/67/EU of the European Parliament an of the council of 15 may 2014, *on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation').*

[28]*Vid.,* Proposal for Regulation of the European Parliament and of the Council *establishing a European Labor Authority,* Strasbourg, 13-03-2018 COM (2018) 131 final, 2018/0064 (COD).

CONSIDERATIONS ON THE ANNULMENT OF THE RESOLUTION ISSUED BY THE GENERAL MEETING OF SHAREHOLDERS

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Abstract: *As regards the means by which the resolutions of the General Meetings of Shareholders may be verified by courts of law, the companies' law provides for the procedural means by which this verification may be conducted. Thus, Article 132(2) of Law No 31/1990 provides that the resolutions of the General Meetings contradicting the law or the Articles of Incorporation may be appealed against in court within 15 days as of the date of their publication in the Official Gazette of Romania, Part IV, by any of the shareholders which have not attended the General Meeting or have voted against and requested that their position should be mentioned in the minutes.*

Keywords*: companies, annulment, resolution of the General Meeting*

1. Introductory considerations

As regards the means by which the resolutions of the General Meetings of Shareholders may be verified by courts of law, the companies' law provides for the procedural means by which this verification may be conducted. Thus, Article 132(2)[1]

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[1] The constitutionality of the provisions of Article 132(2) of Law No 31/1990 was examined by the Constitutional Court, which handed down Judgment No 178/2005: *"Further to the examination of the objection of unconstitutionality raised, the Court finds, on the one hand, that the criticized legal provisions ensure the fulfilment of the constitutional requirement concerning the compliance with the laws [Article 1(5) of the Fundamental Law], and the right of free access to justice, provided for by Article 21 of the Constitution. From this perspective, the regulation of the right of the shareholders which have not attended the General Meeting or have voted against and requested that their position should be mentioned in the minutes to appeal against the resolutions of the General Meetings contradicting the law or the Articles of Incorporation has constitutional legitimacy. On the other hand, the Court notes that paragraph (1) of Article 132 of Law No 31/1990 provides that the resolutions made by the General Meeting within the limits of the law or Articles of Incorporation are mandatory even for the shareholders which have not attended the meeting or have voted against. Furthermore, pursuant to Article 133 of Law No 31/1990, the application for annulment does not suspend the enforcement of the appealed resolution, as enforcement is suspended by means of an injunction, which triggers a possible obligation by the claimant to pay a guarantee. These legal provisions are procedural guarantees intended to avoid the bad-faith filing of applications for annulment of the resolutions of the General Meetings of companies. The Court also finds that, if the claimant files an application which will be dismissed by the court as unfounded, it will be liable for the procedural consequences of its action. Therefore, the Court finds that the criticized legal provisions do not contradict the provisions of Article 135(2)(a) of the Constitution, pursuant to which the State must ensure the freedom of trade and the protection of fair competition and create a framework that is beneficial to all production factors. Furthermore, the provisions of Article 132(2) of Law No 31/1990 express the constitutional principles of equality and free access to justice*".

of Law No 31/1990 provides that the resolutions of the General Meetings contradicting the law or the Articles of Incorporation may be appealed against in court within 15 days as of the date of their publication in the Official Gazette of Romania, Part IV, by any of the shareholders which have not attended the General Meeting or have voted against and requested that their position should be mentioned in the minutes[2].

[2] According to the case-law – Iaşi Court of Appeal, Commercial Section, Judgment No 1474/28.02.2002 in *Legea societăților comerciale nr. 31/1990. Practică judiciară [Companies' Law No 31/1990. Judicial Practice]*, Hamangiu Publishing House, Bucharest, 2009 p. 297 – the filing of an application for annulment before a resolution is published in the Official Gazette of Romania and mentioned in the Trade Registry results in the dismissal of the application as prematurely filed. We consider that the above solution was required as per the former wording of the companies' law, before its amendment, when the resolutions of the General Meetings of Shareholders were not enforceable and acquired enforceability only after the fulfilment of the publication procedures, which was also the argument of the court. However, pursuant to the current regulations, which provide that the resolutions of the General Meeting are enforceable even if the publication procedures provided for by the companies' law have not been fulfilled, the dismissal of an application for annulment of the resolution of the General Meeting of Shareholders as premature is no longer required as it will be effective and the shareholder's right becomes current. As regards the dismissal of an application as premature, please also see Supreme Court of Justice, Commercial Section, Judgment No 1474/ 28.02.2002: "*The application for annulment of these resolutions may be filed, pursuant to Article 131(2) of the same law by the shareholders «which have not attended the General Meeting or have voted against and requested that their position should be mentioned in the minutes» «within 15 days as of the date of their publication in the Official Gazette of Romania...». The enforceability against third parties provided for by Article 130(4) and the conditions subject to which an application for annulment may be filed are different even if they share an element – the publication of the resolution of the General Meeting of Shareholders in the Official Gazette. However, the resolution of the General Meeting of Shareholders cannot be enforced if it has not been mentioned in the Trade Registry and published in the Official Gazette [Article 130(5)], and, thus, the interest of an application for annulment is absent before the fulfilment of these formalities. The suspension of its enforcement may be requested only if the application for annulment has been filed in compliance with the requirement in Article 131(2) of Law No 31/1990, as republished (after the publication of the resolution in the Official Gazette of Romania) pursuant to Article 132 of the same law. Thus, under these circumstances, the provisions of Articles 130 to 132 of the law become effective and applicable by reference to the subject and purpose of this regulation. If the directors fail or refuse to meet their obligations provided for under Articles 130 and 131 of Law No 31/1990, shareholders may summon the general meeting, which may decide (pursuant to Article 150) whether to take actions to engage their liability or other measures with a view to enforcing the applicable provisions*". As regards the finding that an application for annulment of the resolutions of General Meetings may be also filed pot before the fulfilment of the publication formalities, please also see Bucharest Tribunal, Commercial Section, Commercial Judgment No 7311/2004 in C. Cucu, C. Bădoiu, C. Haraga, *Dicționar de Drept comercial* [*Dictionary of Commercial Law*], C.H. Beck Publishing House, Bucharest, 2011 (quoted hereinafter *Dictionary*), p. 265: *"The resolution of the General Meeting may be also appealed against prior to its publication in the Official Gazette of Romania since the law only provided for the maximum period during which resolutions may be appealed against*"; Cluj Court of Appeal, Commercial and Administrative Section, Judgment No 18/2005 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 265; Bucharest Tribunal, Commercial Section, Commercial Judgment No 1063/2005 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 265; Bucharest Court of Appeal, Commercial Section, Judgment No 8315/2000 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 265: "*There is no regulation prohibiting the filing of an application for annulment of a resolution of the General Meeting with the court before the fulfilment of the publication formalities. They are only a condition meant to ensure the enforceability of the resolution against third parties*"; Bucharest Court of Appeal, Commercial Section, Judgment No 3486/2000 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 265; Braşov Court of Appeal, Judgment No 89/Ap/C/2000 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 265 and the following: *"The law only provides for the maximum period during which the resolutions of the General Meeting may be appealed against, depending on the date of publication in the Official Gazette of Romania, assuming that, through publication, all shareholders may be informed of the resolution; thus, a shareholder which considers that a resolution contradicts the law or the Articles of Incorporation does not have to wait for its*

2. Annulment of the resolution issued by the General Meeting of Shareholders

Thus, the application for annulment of the resolutions of the General Meeting is an application for annulment or for absolute nullity of the resolutions of the General Meeting of Shareholders contradicting the law[3] for causes of relative or absolute nullity[4], which the courts will examine subject to the grounds for nullity raised by the parties which have resorted to such procedural means or ex officio[5].

As provided for by law, only the resolutions of the General Meeting of Shareholders may be appealed against in court, while the other decision-making documents of other company bodies cannot be subject to a review by a court of law[6]. Thus, an appeal by means of an application for annulment of any company documents, except for the resolutions of the General Meetings, is inadmissible and Article 132(2) mentions the precise object of this procedural means.

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publication in the Official Gazette of Romania to take legal action against it"; Timişoara Court of Appeal, Civil Judgment No 46/2000 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 266: "*The specification of the period during which a resolution of the General Meeting may be appealed against, which starts running from the date of publication, does not aim at preventing those which are aware of the resolution from the date of its adoption or at any other time prior to publication from appealing against the resolution and at determining them to wait for and monitor the publication of the resolution they consider unlawful in the Official Gazette of Romania, to later, within 15 days, appeal against it. The lawmaker has sought to establish a limit beyond which, in the interest of consolidating business stability, they can no longer appeal against the resolution*"; Supreme Court of Justice, Commercial Section, Judgment No 4086/2002 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 266: "*The legal provision lays down a deadline by which the application for annulment may be filed, but nothing prevents an interested party from filing such application before the publication in the Official Gazette of Romania. That is because the role of the publication of the resolutions of the General Meeting in the Official Gazette of Romania is to enlarge the number of persons who may become aware of the contents of these resolutions and not to limit the access of the interested parties to appeal against the resolutions of the General Meetings of Shareholders in court even before their publication. The allegation that such application may be filed only between the moment of publication of the resolutions of the General Meeting of Shareholders in the Official Gazette of Romania and the expiry of the term of 15 days cannot be noted as, to the extent to which the interested person is aware of the contents of the resolution of the General Meeting of Shareholders, nothing prevents it from filing the application for annulment, its publication in the Official Gazette becoming, for that person, devoid of consequences".*

[3] Also see Constanța Court of Appeal, Judgment No 330/COM/2004 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 272.

[4] Nullity may be full or partial and the resolution of the General Meeting may be partially annulled if the court finds that only some of the decisions have been made in breach of the lawfulness requirements – Ploieşti Court of Appeal, Judgment No 1014/2001 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 273.

[5] High Court of Cassation and Justice, Commercial Section, Judgment No 4043/23.11.2010: "*the mere finding that a resolution of the General Meeting of Shareholders has been taken in breach of a legal provision cannot result in the annulment or absolute nullity of that resolution, if that breach is not a cause for annulment or nullity and there is another legal punishment for such breach*".

[6] High Court of Cassation and Justice, Commercial Section, Judgment No 542/11.02.2010: "*Pursuant to Article 132(1) of Law No 31/1990, only the resolutions of the General Meeting contradicting the law or the Articles of Incorporation may be appealed against in court and not the decisions of the Board of Directors; pursuant to Article 132(4), the members of the Board of Directors cannot appeal against a resolution of the General Meeting concerning their dismissal*".

Although Article 132(2) is included in the part of the law which deals with joint-stock companies, these provisions will also apply to limited liability companies, in consideration of the provisions of Article 196 of Law No 31/1990, since the legal text stipulates that the provisions related to joint-stock companies as regards the right of appeal against the resolutions of the General Meeting also apply to limited liability companies, with the terms of 15 days provided for in Article 132(2) running from the date from which the shareholder has become aware of the appealed resolution of the General Meeting. In the case of limited liability companies, the moment when the term of 15 days – the period during which the resolutions of the General Meeting may be appealed against – starts running is different, namely from the date when the shareholder has become aware of the appealed resolution. The fact that the shareholder in question has become aware of the resolution of the General Meeting may be proved, under the law, by any means of evidence.

To the same extent, it is considered that these provisions also apply to the resolutions of the General Meetings of general partnerships and limited partnerships[7].

The subject of the application must strictly come within the provisions of Article 132(2) of Law No 31/1990, namely it must challenge the resolution of the General Meeting of Shareholders due to its non-compliance with the law or provisions of the company's Articles of Incorporation[8]. Thus, the court of law will be able to examine only issues related to the lawfulness of the resolution and not other issues, such as its advisability[9].

The doctrine mentions[10] that it is a different matter if resolutions of the General Meeting of Shareholders which comply with the law and the Articles of Incorporation

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[7] St.D. Cărpenaru, *Tratat de drept comercial român [Treaty of Romanian Commercial Law]*, *second revised and supplemented edition*, Universul Juridic Publishing House, Bucharest, 2011 (quoted hereinafter as *Treaty 2011*), p. 257.

[8] The non-compliance with the provisions of the companies' law as regards the summoning of the General Meeting may result in the annulment of the resolution – Cluj Court of Appeal, Commercial Section, Judgment No 231/1999: "*Pursuant to Article 117 of Law No 31/1990, the term for the summoning of the General Meeting by the directors cannot be below 15 days from the publication of the summons. The summons will be published in the Official Gazette of Romania, Part IV, and in one of the widely distributed newspapers in the town where the company's registered office is located or closest town, while, pursuant to Article 131 of the law, the resolutions of General Meetings contradicting the law or the Articles of Incorporation may be appealed against in court within 15 days as of the date of publication in the Official Gazette of Romania by any of the shareholders which have not attended the General Meeting or have voted against and requested that their position should be mentioned in the minutes. The respondent has not proved that it has complied with the provisions of Article 117 of Law No 31/1990, while the summoning of the General Meeting has not been carried out in accordance with the law ... The resolution must be annulled also if the resolutions taken in the General Meeting of Shareholders were lawful and statutory for the only reason that the General Meeting of 10 February 1997 did not comply with the provisions of Article 117 of Law No 31/1990*".

[9] Supreme Court of Justice, Commercial Section, Judgment No 6200/2001; Supreme Court of Justice, Commercial Section, Decision No 3391/2002 in St.D. Cărpenaru, *Treaty 2011*, p. 257; Constanța Court of Appeal, Commercial Section, Civil Judgment No 330/COM/17.11.2004 in S. Gavrilă, *op. cit.*, p. 291; High Court of Cassation and Justice, Commercial Section, Judgment No 4476/05.10.2005: "*Article 132(2) of Law No 31/1990 does not allow the court to examine the resolutions of the General Meeting of Shareholders as regards the advisability or profitability of the measure in question, but only in terms of the breach of law or Articles of Incorporation and by reference to their provisions*"; Bucharest Tribunal, Commercial Section, Commercial Judgment No 7365/2003 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 271.

[10] St.D. Cărpenaru, *Treaty 2011*, p. 257.

do not represent the company's interests. The proposed solution which the court could issue would be to dismiss the application for annulment as unfounded as this ground is close to the examination of the advisability of the resolutions of the General Meetings of Shareholders, prohibited by the law. However, if the provisions of Article 136[1] of Law No 31/1990 applied[11], the court would have to nuance its judgment, if the appropriate evidence is provided.

Moreover, the court cannot examine the resolution of the General Meeting of Shareholders in terms of its profitability if, further to its adoption, there has been an advancement of the company, profits have increased or the company has had certain benefits[12].

However, the legal nature of the period of 15 days during which an application for annulment may be filed is worth discussing[13]. Two theories on this matter have been seen in practice. One is that the period in question is a period related to forfeiture, while its inobservance is sanctioned by means of the loss of the right to appeal against such resolution, pursuant to the provisions of Article 103(2) of the Code of Civil Procedure of 1865 and Articles 185 and 186 of the Code of Civil Procedure[14]. On the other hand, the period of 15 days is qualified as a limitation period[15].

The sanction of forfeiture is defined as that procedural sanction consisting in the loss of exercising a means of appeal or carrying out any other procedural act if the term provided for by law has not been observed[16]. On the other hand, the New Civil Code regulates the general legal treatment of the terms of forfeiture; Article 2545(2) lays down that the non-exercise of the subjective right within the established period shall result in its loss, while, for unilateral acts, the prevention of that act, under the law.

The definition of the limitation period pursuant to the provisions of Article 2500 and the following of the Civil Code reveals that time-barring is the sanction that applies to the subject of the legal relation which remains passive and does not resort to the coercive power of the state to force the debtor to perform its obligation, to comply with a certain legal circumstance or incur any other sanction, which results in the loss of its substantive right of action.

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[11] Shareholders must exercise their rights in good faith, observing the rights and legitimate interests of the company and the other shareholders.

[12] High Court of Cassation and Justice, Commercial Section, Judgment No 4476/05.10.2005.

[13] Also see C. Leaua, *Natura juridică şi aplicabilitatea termenului de 15 zile prevăzut de art. 131 alin. (2) din Legea nr. 31/1990, republicată, pentru acțiunea în anularea hotărârii adunării generale a acționarilor* [*Legal nature and applicability of the period of 15 days provided for in Article 131(2) of Law No 31/1990, as republished, for the application for annulment of the resolution of the General Meeting of Shareholders*], in Revista Dreptul No 8/2001, p. 64 and the following

[14] Bucharest Court of Appeal, Commercial Section, Judgment No 3486/2000 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 266 and the following

[15] C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 267 and 276. Also see Bucharest Court of Appeal, Commercial Section, Judgment No 1979/2000 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 266; Cluj Court of Appeal, Commercial and Administrative Section, Judgment No 18/2005 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 266.

[16] V.M. Ciobanu, G. Boroi, T.C. Briciu, *Drept procesual civil. Curs selectiv. Teste grilă* [*Civil Procedural Law. Selective Course. Multiple-Choice Tests*], 5th edition, C.H. Beck Publishing House, Bucharest, 2011, p. 190; M. Tăbârcă, *Drept procesual civil* [*Civil Procedural Law*], second revised and supplemented edition, Universul Juridic Publishing House, Bucharest, 2008, p. 352 and the following.

As regards the current legal relation between the two sanctions, time-barring and forfeiture, Article 2547 of the Civil Code indicates that if the law or the agreement between the parties does not undisputedly provides that there is a certain period of forfeiture the statute of limitations will apply.

As it can be noted, if time-barring affects only the substantive right of action, the sanction of forfeiture will apply the actual subjective right, which is lost through its non-exercise within the established period. As regards time-barring, the non-exercise does not affect the subjective right, the obligation of the passive subject becoming a natural obligation.

As regards the limitation period, the issue in question is, in practice,[17] whether the general limitation period or a special limitation period will apply. One must correctly decide whether, in this matter, a special limitation period applies, which is expressly regulated by the companies' law, namely 15 days as of the date of publication in the Official Gazette of Romania, Part IV and not the general limitation period.

The companies' law, as shown above, restricts the possibility of the shareholders to appeal against the resolutions of the General Meeting to two hypotheses: breach of the law or the Articles of Incorporation. However, the law imposes additional conditions for an application for annulment to be filed. Thus, an application for annulment may be filed only by shareholders which have not attended the General Meetings or those which have attended them, but have voted against and requested their vote to be mentioned in the minutes. On the other hand, it is found that, to the extent to which the shareholder is present and votes against the resolution of the General Meeting, it should ask that the minutes should mention, apart from its vote, the possible objections, as their lack would determine the inadmissibility of the application for annulment of the resolution of the General Meeting[18]. We believe that this requirement is excessive, given the requirements in the companies' law, which only provide, as a condition to be met, for the obligation of the shareholder to request the mention of its vote against this resolution in the minutes. Any other additional

[17] Supreme Court of Justice, Commercial Section, Judgment No 249/04.02.1997: "*Pursuant to the provisions* of Article 90(2) of Law No 31/1990, resolutions of the General Meetings contradicting the Articles of Association, the Articles of Incorporation, Bylaws or the law may be appealed against in court within 15 days as of their date of publication in the Official Gazette; however, the application for annulment has not been filed within the above-mentioned term, which is why the court has correctly determined that the application has been filed out of time. *The claimant's allegation that the general limitation period provided for by* Decree No 167/1958 cannot be noted as this case does not concern the enforcement of pecuniary claims related to a null legal document for which the right of action arises on the date when the decision finding the nullity of that act remains final, but the annulment of a resolution taken by the General Meeting".

[18] High Court of Cassation and Justice, Commercial Section, Judgment No 2155/26.03.2002: "*Pursuant to Article 131(1) of Law No 31/1990, as republished, the resolutions of the General Meeting adopted within the limits of the law or of the Articles of Incorporation are mandatory even for the shareholders which have not attended the General Meeting or have voted against, while their possible objections concerning the vote must be included in the minutes of the meeting so that the conditions for admissibility of the application for annulment of the resolution of the General Meeting to be fulfilled, as provided for by Article 131(2) of the above-mentioned law*"; Bucharest Court of Appeal, Fifth Commercial Section, Judgment No 1609/2002 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 268.

condition would do nothing but add to the law, which is not possible in accordance with the principle *ubi lex non distinguit, nec nos distinguere debemus*.

Judicial practice has shown[19] that the shareholders which have abstained cannot file an application for annulment of the resolution of the General Meeting as the law lays down expressly and restrictively the persons which may file this type of application: the shareholders which have not attended the General Meetings or those which have attended them, but have voted against and requested their vote to be mentioned in the minutes. The shareholders which have attended the General Meeting in question and have voted for the resolution or have abstained cannot resort to the means of appeal provided for by the law for companies and interested third parties as they are not third parties in relation to the company.

The shareholders may prove their vote during the General Meeting of Shareholders to justify their procedural status to file an application for annulment only by means of the minutes[20]. The case-law[21] has accepted that the procedural status may be also proved by a document other than the minutes, but which is an integral part of the minutes, since the shareholder has submitted it during the General Meeting and it has been mentioned in the minutes.

As regards the active procedural status[22], the companies' law clearly specifies the persons which may file an application for annulment of the resolutions of the General Meeting: the shareholders which have not attended the General Meetings, the shareholders which have attended them, but have voted against and requested their vote to be mentioned in the minutes[23], members of the Board of Directors or Supervisory Board, members of the Managing Board and interested third-parties. Thus, in light of the above, it results that the company itself does not have the required status to appeal

[19] Ploieşti Court of Appeal, Judgment No 1101/1997 in St.D. Cărpenaru, *Treaty 2011*, p. 258; Bucharest Court of Appeal, Sixth Commercial Section, Judgment No 1290/2003 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 267.

[20] Supreme Court of Justice, Commercial Section, Judgment No 688/2001 in St.D. Cărpenaru, *Treaty 2011*, p. 257.

[21] High Court of Cassation and Justice, Commercial Section, Judgment No 476/29.01.2002: "*The examination of the case has revealed that the claimant has submitted a memorandum, which is an integral part of the minutes of the Extraordinary General Meeting of Shareholders, which proves that the claimant has an active procedural status, but that the previous courts of law have judged the case on the merits since this issue has not been considered. Pursuant to the provisions of Article 131(2) of Law No 31/1990: «the resolutions of the General Meetings contradicting the law or the Articles of Incorporation may be appealed against in court within 15 days as of the date of their publication in the Official Gazette of Romania by any of the shareholders which have not attended the General Meeting or have voted against and requested that their position should be mentioned in the minutes.»"*

[22] The status of shareholder must be proved before the court of law – Bucharest Court of Appeal, Commercial Section, Judgment No 1803/2000 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 268.

[23] High Court of Cassation and Justice, Commercial Section, Judgment No 3402/20.10.2010: "*The interpretation of the provisions of Article 132(3), in conjunction with the provisions of paragraph (2), reveals the categories of persons to whom the lawmaker has given procedural legitimacy to file applications for the annulment of the resolution of the General Meeting. Thus, apart from the shareholders which have voted in person or by proxy against the resolution and have requested that their vote should be mentioned in the minutes and the shareholders which have not attended the meeting, there are also other persons who, although they are not shareholders, may justify a legitimate, personal, existing and current interest when the absolute nullity of a resolution is raised*".

against the resolutions of the General Meetings as this would be against the principles governing corporate will[24].

Pursuant to the provisions of Article 132(3) of Law No 31/1990[25], interested third parties may file an application for annulment of the resolution of the General Meeting only if their application relies on grounds of absolute nullity[26]. *Per a contrario,* third parties cannot appeal against the resolution on grounds of relative nullity; it is only the shareholders which may request the annulment of the resolution on grounds of relative nullity as they are the injured parties[27]. Interested third party may also include the company's internal and external auditors which could justify an interest in filing the application for annulment of the unlawful resolutions of the General Meetings.

It should be stated that the shareholders, in order to justify their active procedural status as regards the filing of the application for annulment of the resolution of the General Meeting, must be shareholders on the reference date, which is established

[24] Supreme Court of Justice, Commercial Section, Judgment No 2142/08.04.2003: "*The status of party to proceedings must correspond to the status of holder of the right forming the content of the legal relation of substantive law referred to the court... The holders of the right to file this type of application for annulment are, pursuant to Article 131(2) of Law No 31/1990, only the company's shareholders, namely those which have not attended or have voted against. The company, whose legal will has formed in the General Meeting subject to the appeal, has the procedural status of respondent, so that the court's judgment may be enforceable against it and so that it may fulfil that judgment. This passive procedural status of the company results from Article 131(3) of Law No 31/1990. It is the assumption under which all directors appeal against the resolution of the General Meeting of Shareholders, a case in which they have an active procedural status, while, for the company which is the respondent, the law provides that the presiding judge will appoint, from among the shareholders, the person representing it. It is contrary to any principles governing the forming of the company's legal will that it should file an application for the annulment of the documents issued by the General Meeting against a part of the shareholders*"; High Court of Cassation and Justice, Commercial Section, Judgment No 3402/20.10.2010: "*Pursuant to the provisions of Article 132(3) of Law No 31/1990, the resolutions of the General Meetings may be appealed against by any interested person on grounds of public order; pursuant to paragraph (5) of the same Article, the application will be filed against the company, represented by the Board of Directors or by the Managing Board. Thus, by using the term* "*any other interested person" , the lawmaker does not confer on the company the legitimacy of filing applications for nullity as regards the resolutions of the General Meetings"*.

[25] The constitutionality of these provisions has been examined by the Constitutional Court and the objection dismissed by Judgment No 370/2006: *"The provisions of Article 132(3) of Law No 31/1990, pursuant to which the absolute nullity of the resolutions adopted by a company's General Meeting of Shareholders may be raised by any party which proves an interest, the right of action being indefeasible, represent the legal enshrinement of the legal treatment of absolute nullity. The court finds that these provisions do not contradict the provisions of Article 21(3) of the Constitution concerning the right to a fair trial; on the contrary, they are fully compliant with Article 21(1) of the Fundamental Law, ensuring the possibility for any interested person to take legal action when the imperative provisions of the law have been breached*".

[26] High Court of Cassation and Justice, Commercial Section, Judgment No 3241/08.12.2009: "*In principle, the regulation concerning the summoning of the General Meeting of Shareholders and its publicity has an imperative nature, in the sense that they must exist in accordance with the legal provisions, namely the provisions of Article 117 of the Companies' Law. However, not all the provisions of this article structured in nine paragraphs are imperative; a part of them are operative and allow for the shareholders' possibility to derogate from them by means of the Articles of Incorporation or resolutions of the General Meetings*".

[27] Bucharest Court of Appeal, Sixth Commercial Section, Judgment No 604/2002 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 268.

pursuant to Article 123(2) of Law No 31/1990[28]. The shareholder which has acquired this status after the appealed resolution has been adopted cannot file an application for annulment[29].

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Stanciu D. Cărpenaru, Tratat de drept comercial român [Treaty of Romanian Commercial Law], second revised and supplemented edition, Universul Juridic Publishing House, Bucharest, 2011.

[28] Supreme Court of Justice, Commercial Section, Judgment No 2046/03.04.2003: "*Pursuant to Article 131(2) of Law No 31/1990, as republished, the resolutions of the General Meetings contradicting the law or the Articles of Incorporation may be appealed against in court within 15 days as of the date of their publication in the Official Gazette of Romania by any of the shareholders which have not attended the General Meeting or have voted against and requested that their position should be mentioned in the minutes. Thus, since, on the reference date, 29 September 1999, F.P.S. no longer held any share in I. SA Sibiu, it results that it no longer had any voting rights and, consequently, that, without any legal basis, it requested in the application the annulment of the resolutions adopted on 15 October 1999, by the Extraordinary General Meeting and Ordinary General Meeting of I. SA Sibiu as contradicting the law; even in this case, although the evidence refutes this finding, the claimant no longer being a shareholder, this means implicitly that, in light of the above-mentioned legal provision, it could no longer resort to an application for annulment of the above-mentioned resolutions. Consequently, since the application for annulment has been filed by a person without active procedural status, it is found that, in a questionable manner, although the dismissal of the application is correct on the merits, the court of appeal has considered with a view to handing down its judgment the substantive issues of the dispute instead of noting, in its grounds for the judgment, the exception referred to above, namely the lack of the claimant's active procedural status*".

[29] Piteşti Court of Appeal, Judgment No 128/R-C/2002 in C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, *op. cit.*, p. 268.

CONSIDERATIONS UPON THE REGULATION OF THE DERIVATIVE ACTION IN THE ROMANIAN CIVIL CODE AND FRENCH CIVIL CODE

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Abstract: *The derivative action arises from the joint security of creditors over the debtor's estate. It entitles the unsecured creditor to exercise the rights and actions of the debtor, as if it were in its place, thus preserving its estate. The effects of the action, once admitted, are identical to the effects obtained by the debtor if it had acted itself. By exercising the derivative action, the creditor does not acquire any own right. It intends to capitalize a property right belonging to its debtor, therefore enriching the latter.The Creditor only acts instead of its debtor, in order to achieve a right of the former and to preserve or return an economic value in the joint security of creditors, a value which, due to negligence or even to the bad faith of the debtor, is going to be lost. The court order to admit the derivative action produces collective effects, in the sense that it is advantageous to all creditors, without any preference in favor of the plaintiff creditor. The French right regulates the scope, the exercising conditions and the effects of the derivative action in a similar manner. The regime of the derivative action was not confused by the reform adopted in the matter of obligations, as the new legal text realized only a summary of the clarifications brought by the case-law upon the provisions of the former article 1166 of the French civil code, which was more than defective.*

Keywords: *unsecured creditor; property rights, subrogation action; passive or negligent debtor; certain and payable receivable*

1. Introductory considerations

The civil code introduces the derivative action among the precautionary measures[1] at the disposal of the unsecured creditor (art. 1558), given the effect of substance of this action, of preservation of the property asset of the debtor and of indirect increase of the creditor's possibilities to enforce it[2].

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[1] Article 1516 of the Civil Code regarding the creditor's alternatives for the recovery of its interests in the case in which the debtor does not perform its obligation, finally indicates that a creditor dissatisfied with the attitude of its debtor will be able to use also "any other mean provided for by law" for fulfilling the right which it claims. These "other means" specifically refer to the so-called precautionary measures, that is those measures intended for the preservation of the creditor's rights and which are recognized by law in its person, when necessary and useful for the protection of its interests.

[2] See Vasilescu Paul, *Drept civil. Obligații (en: Civil Law. Obligations)*, 2nd revised edition, Hamangiu Publishing House, Bucharest, 2017, p. 108.

According to certain authors, the derivative action is more than a precautionary measure, it "is an act which tends to reach prosecution, in other words, a preparatory act for the debtor's prosecution", as the creditor, after it has exercised the debtor's rights and led the assets to enter its estate, perform their pursuit. For this purpose, see Plastara George, *Curs de drept civil român (en: Course of Romanian Civil Law)*, Tome IV, Cartea Românească Publishing House, Bucharest, 1925, p. 416.

Being known in the literature also under the names of *subrogation action*[3] or even *indirect action*[4], the derivative action represents that legal action exercised by the creditor, in the name of its debtor, for exercising a right belonging to the debtor, when the latter neglects to exercise its rights, and this negligence results in the decrease of its solvency and implicitly, the harm of the creditor's interests[5].

Therefore, according to the provisions of art. 1560 paragraph (1) of the Civil Code, "the creditor whose receivable is certain and payable may exercise the rights and actions of the debtor when the latter, to the prejudice of the creditor, refuses or neglects to exercise them".

This legal text assumes that a debtor neglects the exercise of its rights against another debtor or other debtors and thus, undermines the joint security of its creditors. For example, the debtor has at its disposal an action of claim against a person who is going to have adverse possession of an asset and neglects to initiate the action, the tenant does not pay the rent, and the debtor, by negligence, does not claim it or the debtor sold an asset and, even if the payment obligation of the price becomes due, and the purchaser has not made the payment, it neglects to request the payment of the price. Consequently, these creditors benefit from a legal authorization to be able to substitute themselves for the debtor and, thus, exercise its rights and actions, which allows them to avoid the risk of the debtor's insolvency and, therefore, ensure the possibility of satisfying the claims in full or partially[6].

Therefore, the creditor substitutes itself for the debtor in order to act for the benefit of the latter. It acts indirectly for itself "using a deviously judicial way", which, however, shall be directly advantageous for the debtor, to which the action and the benefit arising therefrom belong as of right[7].

The derivative action does not represent an action with special features, specific to the creditor[8]. The legal regime of the derivative action is the regime of the action accompanying the recovery of the passive or negligent debtor's right[9]. For example, the creditor may file for: the action for annulment of a legal act, the action for rescinding an agreement for failure to pay its price, the action for performance or the action for rescinding a maintenance agreement, the action for restitution of the payment not due,

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[3] "An action belonging to the debtor, when it is exercised by the creditor, is referred to as derivative action" – Dobrev Dumitru, *Mijloace juridice de conservare a patrimoniului debitorului (en: Legal means for the preservation of the debtor's estate)*, Hamangiu Publishing House, Bucharest, 2018, p. 157.

[4] Boroi Gabriel, Pivniceru Mona-Maria (coordinators), *Fişe de drept civil (en: Civil law sheets)*, the 2nd revised and enlarged edition, Hamangiu Publishing House, Bucharest, 2017, p. 483.
„(...) instead of being directly exercised by the debtor, it is exercised by the creditor (indirectly)" – Scurtu Ştefan, *Drept civil. Regimul juridic general al obligaţiilor. Garantarea obligaţiilor (en: Civil Law. Legal regime of the obligations. Guaranteeing obligations)*, C.H. Beck Publishing House, Bucharest, 2014, p. 121.

[5] Dogaru Ion, Drăghici Pompil, *Drept civil. Teoria generală a obligaţiilor (en: Civil Law. General theory of obligations)*, the 3rd edition, C.H. Beck Publishing House, Bucharest, 2019, p. 615.
„(...) the derivative action shall form itself in a preventive defense mean against the debtor's insolvency and aims at its estate preservation" – Jugastru Călina, *Drept civil. Teoria generală a obligaţiilor (en: Civil Law. General theory of obligations)*, Universul Juridic Publishing House, Bucharest, 2017, p. 266.

[6] Dobrev Dumitru, *op. cit.*, p. 156.

[7] Vasilescu Paul, *op. cit.*, p. 107.

[8] Oglindă Bazil, Drept civil. Teoria generală a obligaţiilor (en: Civil law. General theory of obligations), 2nd edition, Universul Juridic Publishing House, Bucharest, 2017, p. 426.

[9] Boroi Gabriel, Pivniceru Mona-Maria, *op. cit.*, p. 482.

the action for compensation for the damage suffered by its debtor due to a tort (only damage to property; the right to request the repair of a non-material damage rests solely with the victim)[10], the action for payment of a claim, the action by which the report of donations is requested, the partition action.

2. Scope

Considering that the derivative action represents a corollary of the joint security of the creditors, we consider that the rights and actions referred to by the Civil Code in art. 1560 paragraph (1) represent, in fact, the exercise of the property rights of the debtor[11].

In this respect, the legislator indicates: "The creditor will not be able to exercise the rights and actions closely related to the debtor" [art. 1560 paragraph (2) of the Civil Code].

The literature[12] inventoried the cases in which the creditor cannot use the derivative action: the creditor cannot initiate any actions of exclusively personal nature, such as: personal actions by which the personal non-property rights are defended, the civil status actions, the actions for establishing parentage, patrimonial actions, however, which require a subjective appreciation of the debtor (action for revocation of the donation due to ingratitude, action for revocation of a donation between spouses, waiver of inheritance), patrimonial actions having as object uncatchable assets[13] (child support, the right to receive a scholarship, the right to receive the child allowance, the right of use or the habitation right)[14].

As frequently shown in the doctrine, the creditor may act for the purpose of realizing the debtor's asset, however, it cannot force the latter to manage itself its estate. For example, it could not force its debtor to lease or sell an asset, in consideration of the fact that such legal operations would make its debtor more solvent by the time the claim becomes payable[15].

Furthermore, the doctrine[16] admits that the derivative action may initiate not only the legal proceedings relating to the rights already existing in the debtor's estate, which are going to be lost because of its passive legal capacity, but also the means of appeal may be exercised in the legal proceedings initiated by the respective debtor or the enforcement may be requested.

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[10] In the same line, the right to bring a civil action in the civil proceedings, in a derivative manner, when damage was caused to the debtor by committing of an offence, may be exercised by the victim's creditors depending on the fact whether the loss is pecuniary or non-pecuniary. See Dobrev Dumitru, *op. cit.*, p. 168.

[11] Urs Iosif Robi, Ispas Petruța-Elena, *Drept civil. Teoria obligațiilor (en: Civil Law. Theory of obligations)*, Hamangiu Publishing House, Bucharest, 2015, p. 443.

[12] Urs Iosif Robi, Ispas Petruța-Elena, *op. cit.*, p. 443-444; Scurtu Ştefan, *op. cit.*, p. 122; Dogaru Ion, Drăghici Pompil, *op. cit.*, p. 616.

[13] In these cases, the object of rights is not prosecutable, and therefore, the derivative action is of no interest for the creditor. See Pop Liviu, Harosa Liviu-Marius, *Drept civil. Drepturile reale principale (en: Civil law. Main Real Rights)*, Universul Juridic Publishing House, Bucharest, 2006, p. 765-766.

[14] Among the rights and actions which creditors may exercise through the agency of the derivative action, we include: the confessory pleading, of recognition of a right of usufruct, of easement or of superficies; the action for satisfying the claim; the partition action.

[15] Romoşan Ioan Dorel, *Drept civil. Obligații (en: Civil Law. Obligations)*, Hamangiu Hamangiu Publishing House, Bucharest, 2018, p. 387; Jugastru Călina, *op. cit.*, p. 267.

[16] Boroi Gabriel, Pivniceru Mona-Maria, *op. cit.*, p. 483.

3. Conditions for exercising the derivative action

In order to exercise the derivative action, both the procedural conditions needed for the exercise of any civil action, as well as certain material conditions (of substantive law) must be cumulatively met[17].

From the procedural point of view, these conditions are:

- the filing of a claim

The subject matter of the derivative action shall be represented by the *claim of the plaintiff's debtor,* the satisfaction of which shall be requested against the defendant third party.

- legal standing

The standing to bring proceedings arises from the legal capacity as creditor of the plaintiff. The nature and origin of the claim on which the creditor builds its interference in the businesses of its debtor are of no relevance and the nature of the subject matter of the claim is of no importance either[18].

The passive capacity to stand trial belongs to the person in relation to whim it is requested the exercise of the debtor's right, as it is not necessary for the debtor to be introduced in the legal proceedings.

- legal standing of the plaintiff

The creditor must have a legal standing upon filing the introductory claim.

- existence of the interest

The creditor must prove that its debtor is insolvent, otherwise, the claim will be rejected as lacking interest[19].

As regards the material conditions, the legal provisions set forth:

- the debtor should be inactive, negligent or acts in bad faith; not to act itself against its own debtor. The debtor's inactivity may be materialized either in its (express or implied) refusal to act, or in the debtor's negligence (for example, it allows the elapse of the limitation period during which it could act against its debtor)[20]. Only the unusual and continuous passive capacity to stand trial of the debtor may legitimate the creditor's intervention to act on its behalf[21].
- that there should be a risk of insolvency of the debtor or of aggravating its condition of insolvency, due to the loss of the non-exercised right. If the debtor is solvent, the action shall be deemed as lacking interest[22].
- the claim should be certain (it has a certain and undisputed existence) and payable (the obligation is due and the creditor may request the payment from the debtor)

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[17] *Ibidem*, p. 483-484.
[18] Dobrev Dumitru, *op. cit.*, p. 172.
[19] Boroi Gabriel, Pivniceru Mona-Maria, *op. cit.*, p. 484.
[20] Tița-Nicolescu Gabriel, *Civil Law. General theory of contractual obligations,* Universul Juridic Publishing House, Bucharest, 2016, p. 241.
[21] Dobrev Dumitru, *op. cit.*, p. 175.
[22] See Jugastru Călina, *op. cit.*, p. 267; The Supreme Court, Civil Section, decision no. 2185/1976, in Repository III, p. 84.

The defendant against which the derivative action is exercised may oppose to the creditor all means of defense which it could have opposed to the debtor, as the former exercises a debtor's right [art. 1560 paragraph (3) of the Civil Code]. Pleas raised by the defendant may have their legal basis in legal acts previous or subsequent to the filing of the derivative action. For example, the defendant may rely on the compensation of its claim by a claim which it has against the debtor, arising before or after filing the derivative action or my rely on a transaction concluded with the debtor after this date, which shall lead to the cessation of the derivative action[23].

For the admissibility of the derivative action it is necessary that both the right of claim of the creditor against the debtor (for which the limitation period is of three years), and the debtor's right which is exercised by the creditor (for which the limitation period depends on the legal nature of the respective right) should not be extinguished by limitation as a result of the fact that they have not been exercised within the deadline provided for by law[24].

4. Effects of the derivative action

The derivative action shall not involve the attachment of the debtor's assets. The debtor may use them even after filing the derivative action. Its acts shall be binding upon the creditor, if they are not concluded in fraud of its interest[25].

In compliance with the provisions of art. 1561 of the Civil Code, "the court order to admit the derivative action is advantageous to all creditors, without any preference in favor of the creditor which filed the action". For these grounds, over time, the doctrine emphasized that a direct action (similar to that governed by law for the works contractor or for the mandate contract) would be of greater interest for the creditor than the derivative action[26].

If the passive debtor was introduced in the case, the final court order has authority over it, as it is binding on it.

[23] Pop Liviu, *Civil Law Treaty. Obligations, tome I. General legal regime*, C.H. Beck Publishing House, Bucharest, 2006, p. 370.

[24] Zamşa Cristina, in the collective paper *New Civil Code. Comment by articles*, Baias Flavius-Antoniu, Chelaru Eugen, Constantinovici Rodica, Macovei Ioan (coord.), C.H. Beck Publishing House, Bucharest, 2012, p. 1657; Romoşan Ioan Dorel, *op. cit.*, p. 389.

[25] Jugastru Călina, *op. cit.*, p. 268.

[26] Stătescu Constantin, Bîrsan Corneliu, *Drept civil. Teoria generală a obligațiilor contractuale (en: Civil law. General theory of obligations),* 9th revised and enlarged edition, Hamangiu Publishing House, Bucharest, 2008, p. 354. "(...) the filing of a direct action would be more advantageous for the creditor, however, such a possibility exists only in the cases expressly provided for by law" – Boroi Gabriel, Pivniceru Mona-Maria, *op. cit.*, p. 484. "(...) the indirect action shall be completely differentiated from the direct actions, which produce direct effects in favor of and in the estate of the plaintiff creditor, which is not liable anymore to stand for the concurrence of the other unsecured creditors not having participated in the action" – Vasilescu Paul, *op. cit.*, p. 111.

5. Derivative action in the French law

According to the doctrine[27], following the extinction of the civil bankruptcy, the derivative action emerged in the former French law as a substitute, in the absence of a collective proceeding which should allow a creditor to defend the debtor's estate, as it represents its general pledge. For these considerations, creditors were authorized by law to exercise, on behalf of the debtor, the rights and actions which he neglected or refused to exercise[28].

At present, the reformed French Civil Code governs the derivative action in the body of art. 1341-1 as follows: "In the case in which the default of the debtor in the exercise of its patrimonial rights and actions compromises the rights of its creditor, the latter may exercise them, on behalf of its debtor, except those which are exclusively attached to the person".

We note the striking similarity of these two regulations. Similarly, the French Civil Code institutes the possibility for the creditors to exercise all rights and actions of their debtor, except those exclusively attached to the person, when debtor's failure to act is likely to compromise the chances for the satisfaction of the claim. Therefore, the derivative action aims at restoring or defending the debtor's estate.

The previous regulation (the former article 1166 of the French Civil Code) had a principle value[29], we did not find any reference to its scope, exercising conditions and effects of the derivative action. In the absence of any legal provisions, the specialized doctrine and the judicial practice have been responsible for establishing the background in which the derivative action could be exercised.

As regards the scope of the derivative action, the French doctrine, just like the Romanian civil doctrine, unanimously considered that only rights and actions being recorded in the debtor's estate could be exercised by means of derivative action (patrimonial rights the holder of which is the debtor[30]).

In the Frech case-law, as an example, the following shall be exempted from their exercise by means of derivative action: the right to revoke the donation which the debtor spouse made to the other spouse; the right of a spouse to request separation of assets against the prodigal spouse; the action for revocation of the donation due to ingratitude; the debtor's opposition to the ordinance of the bankruptcy judge by which the liquidator was allowed to compulsorily sell a donated real estate (by the debtor's parents) with a temporary inalienability clause; the revocation of a stipulation for a third party by the policyholder's creditors; the action for abolition or decrease of the child support, which the debtor owes to a person; bring a civil action in the criminal proceedings etc.[31] To

[27] Dobrev Dumitru, *op. cit.*, p. 154.
[28] Mazeaud Henri et Léon, Mazeaud Jean, Chabas François, *Leçons de droit civil. Obligations*, 9th edition, tome II, Montchrestien, Paris, 1998, p. 1040.
[29] Mihăilă Cosmin-Răzvan, *Mijloacele de protecție a drepturilor creditorului (en: Protection means of the creditor's rights)*, Universul Juridic Publishing House, Bucharest, 2017, p. 381.
[30] Starck Boris, Henri Roland, Boyer Laurent, *Obligations. 3. Régime général*, Litec, Paris, 1992, p. 303.
[31] Dobrev Dumitru, *op. cit.*, p. 167-168.

summarize, the doctrine[32] acknowledged the same three categories of actions, similar to the actions present in the Romanian law, of an exclusively personal nature for a debtor and which, consequently, could not be filed by means of derivative action: the actions defending non-patrimonial personal rights; the actions regarding patrimonial rights, but the exercise of which supposes a subjective appreciation on the debtor's part; the actions regarding patrimonial rights whose object is not prosecutable.

There were no differences as compared to the Romanian law as regards their exercising conditions, either: the debtor should be inactive; the creditor should have a serious and legitimate interest in filing the action; the claim should be certain and payable.

Furthermore, just like in the Romanian law, the derivative action conferred, by itself, to the respective creditor, no lien and no exclusive right over the amount reintegrated in the debtor's estate[33]. In the concurrence between creditors, the effects of the derivative action were similar to the effects provided for in the Romanian civil law.

Considering that this classical solution leads to a greater extent to the ineffectiveness of the derivative action, thus discouraging creditors to file it, the Preliminary draft of the new French Civil Code proposed a radical change, so that the creditor which filed the derivative action should be paid in preference out of the amounts which were recorded in the debtor's estate as a result of the admission of the action ("art. 1167-1. Creditors exercising the action filed provided for in article 1166 shall be paid out of the amounts which, through the effect of their use, return to the estate of the negligent debtor"). It must have been considered as an audacious reform by the French legislature, as it was not acknowledged, remaining in draft stage[34].

Therefore, the regime of the derivative action was not confused by the reform adopted in the matter of obligations, as the new legal text realized only a summary of the clarifications brought by the case-law upon the provisions of the former article 1166 of the French civil code, which was more than defective[35].

The new article 1341-1 of the French civil code enshrines the essential nature of its praetorian regime reminding the scope, the exercising conditions and the effects of the derivative action[36].

6. Conclusions

It was not intended to distract from tradition[37]. The derivative action, as initially designed by the editors of the two codes, has remained so far an individual action, by its exercise, and joint, by its effects[38].

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[32] Starck Boris, Henri Roland, Boyer Laurent, *op. cit.*, p. 306-308.

[33] The plaintiff creditor has no preference, it "lets the cat out of the bag for others" – Malaurie Philippe, Aynes Laurent, *Cours de droit civil*, tome VI (Les obligations), 5th edition, Cujas Publishing House, Paris, 1994, p. 597.

[34] Dobrev Dumitru, *op. cit.*, p. 185-186.

[35] Chantepie Gaël, Latina Mathias, *La réforme du droit des obligations*, Dalloz, Paris, 2016, p. 785.

[36] Chénedé François, *Le nouveau droit des obligations et des contrats*, Dalloz, Paris, 2016, p. 312.

[37] Dobrev Dumitru, *op. cit.*, p. 155.

[38] Larroument Christian, *Les obligations. Régime general*, Economica, Paris, 2000, p. 247.

The text of art. 1561 of the Civil Code "render efficient the rules in the doctrine and case-law built according to art. 974 of the former Civil Code" – Romoşan Ioan Dorel, *op. cit.*, p. 389.

The filing of the derivative action shall not result in the satisfaction of the creditor's claim, as it is not regulated as an enforcement measure, and does not generate any preference only in favor of the plaintiff creditor, "a matter which is considered by any unsecured creditor, which is not willing to work for his colleagues, as well"[39].

The derivative action is always used against third parties, usually against the debtor's debtors, for the purpose of restoring an amount which it refrains from recover into the debtor's estate, so that the respective amount may not be prosecuted by its creditors[40].

Therefore, the creditor us authorized *ex law* to substitute for and to represent its debtor, thus, it being the legal and forced representative of the debtor[41]. Its intervention is determined, beyond reasonable doubt, by its interest in ensuring the satisfaction of the claim.

However, there are Romanian authors[42] who appreciate that the legislator regulated the derivative action also for the need to protect the safety of the civil-law circuit, in consideration of the public order.

The derivative action is seldom used in practice, as usually, the subject matter of the obligation consists of an amount of money, and in this case the creditor's alternative to the derivative action is the attachment, which is preferable as it is more efficient[43], expedient and simpler. Thus, when the creditor holds a writ of execution against the debtor, by this mechanism of the attachment governed by art. 781 et seq. of the Code of civil procedure, the amount of money is preserved to the attached third party, which is a debtor of its debtor, within five days from the communication of the attachment letter. If only this debtor of the debtor has any objection against the attachment letter and, implicitly, against the writ of execution, it is not compliant with the attachment and, in this case, the enforcement is initiated, being called the validation of the attachment[44].

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[39] Vasilescu Paul, *op. cit.*, p. 112.
[40] Starck Boris, Henri Roland, Boyer Laurent, *op. cit.*, p. 298.
[41] *Ibidem*.
[42] Romoşan Ioan Dorel, *op. cit.*, p. 386.
[43] Scurtu Ştefan, *op. cit.*, p. 125.
[44] Dobrev Dumitru, *op. cit.*, p. 187.

Malaurie Philippe, Aynes Laurent, *Cours de droit civil*, tome VI (Les obligations), 5th edition, Cujas Publishing House, Paris, 1994;
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PARTICULARITIES OF CIVIL TRIAL IN LABOUR LAW

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Abstract: *Labour disputes are settled based on the Romanian Code of civil procedure, but also by applying derogatory provisions, particularly the Labour code and the Law no. 62/2011 of social dialogue, the last two acts leading to the emergence of new legal rules on the labour disputes settlement.*

In this study, the author aims to analyze the specific legal rules in terms of procedural labour law and how these specific rules could be combined into a so-called „procedural labour law''.

Keywords*: Romanian Code of civil procedure, the Labour code, the Law on social dialogue, labour jurisdiction, specific procedural issues*

I. Introductory

Labour disputes are accomplished by judge panels specially constituted in county courts and courts of appeal, sometimes in a separate labour law section, sometimes the judge panels operate in the civil sections of the court, in other cases in sections of mixed specialization: labour disputes and administrative and fiscal disputes.

Part of the doctrine[1] noted the autonomy of labour law as a branch of law, in relation to the quality of legal issues, the nature of sanctions, social interest, so that labour law, through all specific legal institutions in labour legislation, was formed and has been in existence since the XXth century in Romania, as a branch of law, together with civil law, being autonomous in private law.

We aimed to analyze, starting from the administrative perspective and from these considerations of substantive law, whether the provisions of the Labour code[2] and the Law. no. 62/2001 on social dialogue[3] establish, in reality, a genuine special procedure on labour disputes or we are just talking about some features of the lawsuit, adapted to the specific labour disputes.

In the doctrine[4] there were deducted some *procedural principles of labour jurisdiction*, in addition to the principles already enshrined in the Romanian Code of civil procedure[5]. Thus, there were mentioned the principle of referral to labour court or

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[1] Ion Traian Stefanescu, *Theoretical and practical treaty of labour law. Fourth edition, revised and added*, Ed. Universul Juridic, Bucharest, 2017, pp. 49-55.

[2] Law no. 53/2003 on the Labour code, republished in the Official Gazette no. 345 of May 18, 2011, as amended and supplemented.

[3] Republished in the Official Gazette no. 625 of August 31, 2012, as amended and supplemented.

[4] Ion Traian Stefanescu, *Treaty*.., p. 1010.

[5] Law no. 134/2010 on the Code of civil procedure, republished in the Official Gazette no. 247 of April 10, 2015, as amended and supplemented.

tribunal, in principle, only by the interested party, not *ex officio*; the principle of accessibility by removing or reducing the costs involved in labour disputes; the composition of panels at first instance court trial, involving judicial assistants; the celerity of case settlement and implementation of decisions regarding labour disputes.

We believe that, in reality, only the composition of judge panels is one principle specific for labour disputes, as only in this type of litigation, the law provides for the participation of judicial assistants[6]. Other principles the referred author cited are not specific for labour disputes, as the first principle, for example, is the materialization on litigation cases of the principle of availability required by Article 9 of the Code of civil procedure.

II. Specific procedural issues

Starting from the mentioned principles, we consider that the principle of accessibility, notably by *exemption for the parts of judicial stamp duty* is not specific for labour disputes[7], since the Article 29 of Government Emergency Ordinance no. 80/2013 on judicial stamp duties[8] provides for other cases of exemption from court fees, given the nature of the dispute.

Exemption from stamp duty applies regardless of the holder and the nature of the case. It expresses the protective nature of labour law regulations, especially in the respect of employees, who usually are the plaintiffs in labour disputes.[9]

This exception does not cover, however, the specific costs of the case, such as payment of expert fees. Also, there are not exempt any applications which are related with resolving individual labour conflicts, but not in itself a labour dispute.[10] However, the provisions on exemption for actions and claims apply to disputes regarding labour assimilated relations of in the field of administrative courts as provided by Article 29 para. (4) of Government Emergency Ordinance no. 80/2013.

Celerity in judicial procedures should characterize any procedure for settling a case, not just those for which the law expressly provides as an urgent procedure. The notion of celerity means that the judge is required to avoid the trial to drag on before the court, following the compliance to legal and judicial terms, applying appropriate sanctions in cases of non-compliance by the parties, while, if proceedings are settled urgently, the law itself imposes a greater celerity in the settlement in relation to other causes.[11]

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[6] Article 55 of Law no. 304/2004 on judicial organization, republished in the Official Gazette no. 827 of September 13, 2005, as amended and supplemented.

[7] According to Article 270 of Labour code, causes subject of labor jurisdiction are exempted from judiciary stamp and judicial stamp".

[8] Published in the Official Gazette no. 392 of June 29, 2013.

[9] Alexandru Țiclea, *Labour code commented and annotated with related legislation and jurisprudence*, Ed. Universul Juridic, Bucharest, 2017, p. 526.

[10] Adrian Gabriel Uluitu, Ion Traian Stefanescu (coordinator), *Labour code and Law on social dialogue. Comments and explanations*, Ed. Universul Juridic, Bucharest, 2017, p. 507.

[11] Gabriel Boroi, Mirela Stancu, *Civil procedural law. Third Edition revised and added*, Ed. Hamangiu, Bucharest, 2016, pp. 11-12.

In fact, without this constituting a specific limited to labour disputes, we point out that, indeed, labour disputes are judged in an ,,urgent procedure'' as also required by Article 271 of Labour code, respectively ,, prompt'', according to the Article 212 of Law no. 62/2011 on social dialogue.

The legislator also provided, in the Article 273 of Labour code, the ensuring of the celerity principle in terms of evidence, meaning that it will be done ,,in compliance with the emergency regime'', under the penalty of right loss regarding the evidence, for the party that delays its administration, without justification.

According to Article 212 of Law no. 62/2011, the time distance between hearings cannot be more than 10 days, and Article 213 of the same law states that the parties are legally summoned if the summons has been served with at least five days before the trial, this also being the common law term for handing summons, according to Article 159 of the Romanian Code of civil procedure.[12]

However, the institution of presidential ordinance, governed by the common law of Articles 997 and following of the Code of civil procedure, is inadmissible in labour disputes. Since the procedure for settling labour disputes is regulated by special labour legislation, which establish the imperative urgency, the common law special procedure, which also covers urgent measures, is excluded. Thus, suspending a dismissal decision cannot be disposed by presidential ordinance.[13]

Regarding the *composition of judgment panels* of in employment litigation and social security, Article 55 of Law no. 304/2004 provides that, in the first instance, it is formed by a judge and two judicial assistants.[14]

This applies only to hearings in first instance, so that in the phase of appeal, common law provisions apply regarding judge panels, namely Article 54 para. (2) of Law no. 304/2004, repectively a two judge panel without the participation of judicial assistants.

Judicial assistants ,,participate during the deliberations with consultative vote[15] and sign judgments'', and their opinion is recorded in the judgment. In addition, the separate opinion is motivated, which will include arguments exposure, the proposed solution and judicial assistant's signature. However, only judicial assistants can

[12] The text of Law no. 62/2011 on social dialogue amends the provisions of Article 271 of the Labour code, the latter regulation providing that the time distance between hearings can not be more than 15 days, and the summoning procedure must be performed at least 24 hours prior to court appearances. There will be applicable, however, the provisions of Law no. 62/2011, with precedence over the provisions of the Labour code, given that the legislation of 2011 represents a new vision of the legislature against the rule the Labour code of 2003 and, also, the Law on social dialogue is specific in matters of individual labour conflicts, compared with the general provisions of the Labour code – see also Alexandru Țiclea, *op. cit.*, p. 527.

[13] Alexandru Țiclea, *New regulations and solutions on labor jurisdiction*, Romanian Journal of Labor Law No. 4/2013, Bucharest, 2013, pp. 24-46.

[14] Before the enforcement of Law no. 202/2010 on measures to accelerate the trial settlement, published in Official Gazette no. 714 of October 26, 2010, the judge panel was composed of two judges and two judicial assistants.

[15] In doctrine, there were proposals about the increasing role of judicial assistants, even by allowing deliberative vote for the judicial assistants, given that the social partners – employers and employees, are primarily interested in maintaining a favorable climate at work – see Alexandru Țiclea, *New regulations on labour jurisdiction and solution*s, Romanian Journal of labor law No. 4/2013, Bucharest, 2013, pp. 24-26.

formulate separate opinion, but not the judge appointed for the case, since the vote is only consultative for judicial assistants.[16]

From the interpretation of Article 55 of the Law no. 304/2004, results that judicial assistants must also sign the solution, because only in this way it can be established if they participated in the deliberations. As such, any separate opinion of judicial assistants will be recorded in the solution.

Also, according to Article 426 of the Code of civil procedure, ,,when in the judgement panel judicial assistants participate, the president of the panel may appoint one of them to write the judgment''.

Regarding the *conditions for the exercise of civil action*, we note a specific feature about the procedural capacity of the minor who has reached 16 years old and, exceptionally, even over 15 years, aspect that can be inferred by correlating the provisions of Article 42 of the Romanian Civil code and Article 13 of the Labour code.[17]

Thus, the minor may conclude legal acts on labour, artistic and sporting pursuits or on his profession, according to the law, in which case only the minor exercises such rights and performs all obligations arising from these provisions, including procedural aspects.

Therefore, if a minor over 14 years is assisted in disputes under common law, in cases concerning employment only the minor, in person, will be summoned, and only the minor will perform the procedural acts.[18]

We notice also notice a particular in terms of *locus standi* in labour disputes, regarding trade unions that ,,defend the rights of their members, resulting from labour laws, statutes of civil servants, collective agreements and individual employment contracts and also agreements regarding the employement relations of civil servants, in front of any court or tribunal, other institutions and authorities of the State, by their defenders or elected'', Article 28 of Law no. 62/2011 giving trade unions ,,the right to take any action provided for by the law, to formulate legal action in behalf of their members on the basis of a written mandate from them''.

According to Article 249 of the Romanian Code of civil procedure, ,,unless the law expressly provides otherwise, the one who makes a support during the process must prove it'', according to the adagio *onus probandi incumbit actori*. Therefore, as a rule, *the burden of proof* of an assertion is up to the person who makes the statement before the court.

However, the burden of proof is reversed in labour disputes, where the employer is the defendant. According to Article 272 of the Labour code, the burden of proof in labour disputes is up to the employer, who is obliged to submit evidence in his defense until the first day of the trial.[19]

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[16] Gabriel Boroi, Mirela Stancu, *op. cit.*, p. 572; Ion Traian Stefanescu, *Treaty*…, p. 1020.

[17] Law No. 287/2009 on the Civil code, published in the Official Gazette no. 511 of July 24, 2009, as amended and supplemented.

[18] Gabriel Boroi, Mirela Stancu, *op. cit.*, p. 39.

[19] In the current civil procedural regulations, the procedural time of ,,the first day of the trial'' was replaced by the first hearing at which the parties are legally summoned, as is clear from Article 204 par. (1) of the Code of civil procedure.

In the doctrine[20], there is provided a edifying example, in the situation of a litigation regarding a dismissal decision, in which case the burden of proof doesn't belong to the one which claims that the measure is unlawful or ungrounded, but for the employer, the one against whom it the complaint is filed or the person who has procedural position of the defendant.

The employer is obliged to submit the documents which it holds relevant in the case. After the right loss for the employer from admissible evidence in defense, the task for the administration doesn't belong to the employee, applying further the special provisions on the burden of proof. However, reversal of the burden of proof does not exonerate the employee of the obligation to propose his evidence so that there are applicable the common law provisions of Article 254 par. (1) of the Code of civil procedure, regarding the deadlines to submit evidence, under the sanction of right loss from evidence administration.[21] The court will apply the penalty of right loss depending on the case, depending on its assessment of the notion of delay, relative to the complexity of the dispute, the available possibilities for the parties for their acquirement and administration.[22]

There are, however, cases where the exceptional provision is not applicable. Thus, in the case under Article 253 par. (1) Labour code, for an employee who seeks an order for the unit to repair material injury for suffered moral fault occured during service obligations or in connection with the service, the derogation provided in Article 272 of the Labour code would equate to obliging employers to make evidence of negative facts, even in the absence of evidence offered by the applicant.[23] However, even in labour law, it is known that negative facts can be established and determined, but only through the opposite positive fact.[24]

The burden of proof is also reversed and returns to the rule of common law in labour disputes which concern the duties arising from performing extra work at night or in other conditions, in the sense that probation of performing overtime is the responsibility of the applicant, than the employer is to prove that it compensated overtime by providing paid time off or paid the employee a wage, afferent overtime worked properly.[25]

The provisions of Article 272 Labour code are applicable not only where the employer is the applicant but also when it is the defendant, even if there are formulated claims for intervention in the trial.[26] However, if the employer is the plaintiff, there are

[20] Gabriel Boroi, Mirela Stancu, *op. cit.*, p. 423.
[21] Alexandru Athanasiu, Ana-Maria Vlăsceanu, *Labour law. Lecture Notes*, Ed. CH Beck, 2017, Bucharest, p. 211.
[22] Alexandru Țiclea, *New regulations…,* p. 43.
[23] Ion Traian Stefanescu (coordinator), *Labour code…,* p. 508.
[24] Decision no. 2373 of May 11, 2016 by the Court of Appeal – Section VII Civil and labour conflicts and social insurances in Alexandru Țiclea, *Labour code…*, pp. 528-529.
[25] Marius Catalin Preda, *Labour Code commented. Personal data protection, teleworking, virtual labour and other labour. Second edition, revised and supplemented*, Ed. Universul Juridic, Bucharest, 2019, p. 503;
[26] Ioan Ciochină-Barbu, Agata Mihaela Popescu, *Labour law. Second edition*, Ed. CH Beck, 2016, Bucharest, p. 523; Costel Gâlcă, *Labour code commented and annotated*, Ed. Rosetti, Bucharest, 2015, p. 806.

again applicable the common law provisions, so that the burden belongs to the plaintiff.[27]

On the other hand, the provisions for burden of proof reversal are attenuated by the establishment in the charge of the employee of the obligation to submit the evidence it holds, especially in the case of employee sued defendant[28], also by Article 22 of the Code of civil procedure, enshrining the active role of the court, and according to Article 254 par. (5) of the Code of civil procedure, the court ,,can call into question *ex officio* the need to administer any other evidence, which it can order *ex officio*, even if the parties oppose''.

Also, in practice, the proposed evidence may be accepted after the first hearing, the provisions of Article 254 par. (2) of the Code of civil procedure, on approval of evidence requested after the first hearing, being fully applicable.

In the field of labour disputes, we can also notice the existence of derogating situations from general law in terms of the *parties or the trial limits*. These situations are not expressly provided by the legal rules of the Code of civil procedure or labour laws, but they are deducted by interpretation, being given the specific labour relations.

There are not significant differences to the common law on the possibility of formulating counterclaim in labour disputes, which is admissible in individual or collective labour conflicts, but under the condition of a strong connection with the applicant's request, according to Article 209 par. (1) Code of civil procedure.

The claim for accessory intervention, provided by Article 63 Code of civil procedure, is admissible under the common law conditions, in the situations where another employee's interest is to join the employer or employee in the main proceedings, seeking proper settlement of certain aspects of the case concerning him and the intervener.[29] For example, in case of disputed dismissal decision, intervener may be the one who took this measure; in litigation relating to the compensation can intervene the employee who facilitated the damage; when a payment has been made illegal, intervener may be the person who ordered the payment; situations where the union intervenes to protect the rights of union members.[30]

However, regarding the main intervention claim, different opinions were expressed under the aspect of its admissibility.

Thus, in a first opinion,[31] it was considered the main intervention claim to be inadmissible, because another employee can not request to establish personal rights arising from the labour report of the employee in the main proceedings, because the personal nature of the employment relationship impose such a solution.

In another opinion,[32] it was shown that the solution needs to be nuanced in the meaning that inadmissibility concerns only individual labour disputes. For collective litigation, it was considered that a third party may claim compensation for damages that were caused by the strike or in disputes over collective agreement, for example the

[27] Costel Gâlcă, *op.cit.*, p. 804.
[28] Ion Traian Stefanescu, *Treaty..,* p. 1027.
[29] *Idem*, p. 1029.
[30] Gabriel Boroi, Mirela Stancu, *op. cit.*, p. 111.
[31] Ion Traian Stefanescu, *Treaty....,* p. 1029.
[32] Gabriel Boroi, Mirela Stancu, *op. cit.*, pp. 98; Costel Gâlcă, *op. cit.*, p. 806.

claim submitted by employees who are not members of the union that is a party in trial, through representatives chosen by them.

We appreciate the second opinion as founded, considering the complex nature of collective litigation, the exposed practical situations being enlightening because, by definition, principal intervention aims the exact litigation subject before the court or closely related right, within the meaning of Article 61 para. (2) Code of civil procedure.

Regarding the *warranty claim*, provided by Article 72 Code of civil procedure, in doctrine[33] it was expressed the opinion that this claim is not admissible in labour disputes as between the employed person, party to the dispute, and the third party called under warranty, there are no legal labour relations. It was also argued that no employer can not summon a third party under guarantee, whereas in the case where that person is liable for material damage, the employer recovers its loss by imputation decision or payment commitment.

As far as we are concerned, we consider that, in the matter of labour disputes, in some circumstances, the warranty claim may be admissible. Thus, in employee liability cases, the employer is not obliged to proceed to compensation by imputation decision or payment commitment towards the regulation of Article 254 par. (3) Labour code which provides that „the employer may require the employee, through a note of damage assessment and evaluation, to recover its equivalent''.[34] Moreover, the provisions of Article 254 par. (3) Labour code relating to mutual agreement damage recovery become inapplicable when their value is greater than the equivalent of 5 minimum gross salary per economy.

The expressed opinion in the sense of general inadmissibility application for the warranty claim ignores, however, the particular situations that may arise, for example, if employment is terminated instead of ordering the transfer for persons paid from public funds, in which case the employer who, with negligence, ceased the employment has obvious interest to summon the new employer which din not perform the transfer formalities on time, although it had previously been approved.[35]

For reasons of predictability, observing the divergent opinions in doctrine or in judicial practice solutions, *de lege ferenda* we propose the express regulation of the possibility or rather the ban of formulating additional claims in labour disputes.

In terms of *remedies*, we note that, according to Articles 214 and 215 of Law no. 62/2011 of social dialogue, first instance decisions are only subject to appeal[36] within

[33] Mihaela Tabarca, in Viorel Mihai Ciobanu, Marian Nicolae, *New Code of civil procedure commented and annotated. Second edition. Vol I. – Art. 1-526*, Ed. Universul Juridic, 2016, Bucharest, p. 269; This opinion is based on the Decision of Guidance no. 34 of November 30, 1963 of the Plenum of the Supreme Court, but the laws at that time instituted a mandatory procedure for the recovery of damage caused by the employee, respectively the imputation decision.

[34] In the sense of warranty claim inadmissibility, in the matter of patrimonial liability of the employee, whereas the liability is one jointly and not solidary, as to the provisions of Article 255 Labour code, see Alexandru Athanasiu, Ana-Maria Vlăsceanu, *op.cit*, p. 211; Agreeing in principle with the rule of warranty claim inadmissibility, we consider that, where the warranty claim concerns patrimonial responsibility of a single employee, the solution proposed principle can not be based on Article 255 Labour code.

[35] Civil Sentence no. 63 of February 6, 2019, Teleorman County court, Department of labour disputes, social security and administrative and fiscal disputes, unpublished.

[36] Article 214 of Law no. 62/2011 of social dialogue, as a *lex specialia,* amends the common provisions of Article 274 of the Labour code, the latter article providing that substantive judgments are final.

10 days from the judgment communication, thus derogating from common law term of 30 days, provided for by Article 468 Code of civil procedure.

In doctrine,[37] was noted that the legislature relinquished the enforceability character of judgments on the merits, considering that thereby greater stability of legal employement relationships is ensured, pending the final settlement of the case. Even in these conditions, Article 448 par. (1) points 2 and 3 of the Code of civil procedure provide that decisions of first instance are enforceable by law when the object is ,,payment of wages or other rights arising from legal labour relationships, and the amounts due to unemployed, according to the law'', and in situations of compensation for accidents at work. In these cases, enforcement is provisional by law, to which is added the situation provided by Article 449 of the Code of civil procedure, on provisional enforcement under judicial order.

Finally, the first instance judgment is enforceable in the situation provided by Article 56 para. (1) letter d) of the Labour code, namely when the individual employment contract shall automatically be terminated following the ascertainment of nullity of the individual labour contract, from the date on which the invalidity has been established by final judgment.

Retaining the full enforceable effect on above listed cases, we consider that, in the absence of any contrary rules or repeal by the Law on social dialogue or other legislation, the provisions of Article 274 of the Labour code remain applicable only in terms of enforceability of first instance judgments, so that all decisions issued by a first instance in solving individual labour disputes are enforceable, regardless of the claim. Along with other authors[38], we consider that the two laws are binomial, are both the general labour laws and the Law on social dialogue, being subsequent to the Labour code, further modifies it, but only to the extent that the Labour code provides contrary.

Another argument in support of this view is the legal provision in paragraph 10 of Article 448 par. (1) of the Code of civil procedure, in the sense that the judgment is enforceable ,,in any other cases in which the law provides that the judgment is enforceable''.[39]

This solution would be able to provide satisfaction to the nature of protection for employee as provided for in labour legislation.[40]

However, we feel as helpful the intervention of the legislature, *de lege ferenda*, for the purposes of clarifying the legal enforceability of first instance judgments, in relation to the interpretation difficulties, also pictured by doctrine.

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[37] Emilian Lipcanu, *Discussion on some recent doctrinal controversies, with practical implications, in the field of labour law*, ,,Dreptul'' magazine no. 4/2012, Bucharest, 2012, pp. 121-131; Radu Razvan Popescu, *The issue of judgments enforcement in labour disputes*, available online at http://revista.universuljuridic.ro/problematica-punerii-in-executare-a-hotararilor-judecatoresti-in-litigiile-de-munca/ last accessed at 13th of May 2019; Ion Traian Stefanescu, *Treaty..,* pp. 1029; Alexandru Țiclea, *op. cit.*, pp. 531 – the last of the authors emphasize, however, the applicability of the provisions of the Labour Code, because the text is not repealed.

[38] Serban Beligrădeanu, Oliviu Puie, *Discussions on some issues linked to the settlement of labor disputes in the light of recent legal regulations*, ,,Dreptul'' Journal no. 6/2013, Bucharest, 2013, pp. 194-203.

[39] In the same sense, see Aurelian Gabriel, Uluitu Ion Traian Stefanescu (coordinator), *Labour Code*..., pp. 509; Costel Gâlcă, *op. cit.*, p. 811;

[40] Emilian Lipcanu, *op. cit*, p. 127.

By exception from the enforceability of the judgment of first instance, Article 169 par. (2) of the Labour code provides that ,,the retention as damages caused to the employer can not be carried out unless the employee's debt is due, liquid and demandable and has been stated as such by a final judgment''.

In all cases, the other party may invoke the provisions of Article 450 of the Code of civil procedure, requesting suspension of provisional enforcement, through an appeal or distinct throughout the judgment on appeal.

III. Conclusions

On matters other than those mentioned above, both Article no. 275 of the Labour code and Article 216 of Law no. 62/2011 on social dialogue provide that special provisions mentioned in these laws complement the Code of civil procedure, as common law.

Thus, the provisions governing the sue petition, contestation, counterclaim, procedural exceptions, trial incidents, taking of evidence, hearing conduct, judgments, appeals, enforcement or opposition to enforcement are governed by the Code of civil procedure, also being applicable the provisions of Law no. 192/2006 on mediation and mediator profession,[41] in terms of amicably individual labour conflict resolution.[42]

Given the procedural peculiarities that we have previously detailed, in doctrine,[43] the existence of a labour procedural law was upholded, which, due to its complexity, could be viewed as a sub-branch of labour law. This ,,special labour disputes procedure'', would lie on the border between civil procedural law and labour law, not a separate branch of law.

It is important to also note that in any special procedure, beyond the particularity degree of the established rules, relevant is that special rules are supplemented by common law, so that the so-called ,,procedural labour law'' is completed by civil legal rules.

In conclusion, we consider that the existance of a ,,special procedure'' could be retained in relation to the specific of labour disputes, and this should be highlighted *de lege ferenda*, by unifying procedural rules of labour jurisdiction, of the Labour code and the Law on social dialogue, aspect that will lead to increasing predictability guarantees, *de lege lata* affected by conflicting provisions of the two regulations,[44] given that labour law desideratum is to provide protection for employees as weaker part in labour legal relations.

[41] Published in Official Gazette no. 441 of May 22, 2006.
[42] Alexandru Țiclea, *op. cit.*, p. 533.
[43] Dan Țop, *Treaty of Labour law*, Bibliotheca Publishing House, Targoviste, 2015, p. 535; Ion Traian Stefanescu *Treaty…*, p. 1010.
[44] Alexandru Țiclea, *Differences and inconsistencies between the provisions of the Labour code and the social dialogue Law No. 62/2011 on labour jurisdiction*, Romanian Journal of Labour Law no. 4/2011, Bucharest, 2011, pp. 11-16.

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CONSIDERATIONS REGARDING THE LEGISLATOR'S CHALLENGES WHEN IT COMES TO DEFINING THE THREATS TO NATIONAL SECURITY

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Abstract: *The interpretation of the national security concept represents a challenge for the institutions involved in ensuring the national security and removing the threats to the latter, and also for the doctrine and the case law. The challenge is all the more apparent as through the specific activities of intelligence, allowed by the legislator, in the case of the identification of threats to the national security, a restriction of human rights and fundamental freedoms is carry out. In the following, we aim to analyze the interpretation that the Constitutional Court and the European Court of Human Rights have granted the concept of national security. Given the diversity and the complexity of the threats which can affect the national security, and also their dynamic, it has been noted that a definition of the national security notion by a exhaustive indication of the actions which are able to constitute threats to the national security cannot be realized. Such a definition would prove to be inadequate and would put the legislator in the situation in which he must operate permanent amendments, according to the changes in the criminal environment and the innovations in the modus operandi of the persons who aim to commit offences which can affect the national security. However, the recent case-law of the Constitutional Court proves that it is necessary that the legislator finds a balance between the use of open provisions and the ensurance of clear and predictable provisions.*

Keywords*: national security, case law, threats, concept, interpretation.*

I. Introduction

The Constitutional Court has recently had on its role the non-constitutionality of some provisions of the Law no. 51/1991[1], situation that gave us the possibility to notice the legislator's difficulty in settling the threats which can affect the national security. On the one hand, he must use a non-exhaustive language, which allows the interpretation, on a case-by-case basis, by the Judge authorizing the national security warrant, for actions that can affect the national security. On the other hand, the method of formulating legal provisions must be clear and predictable, so as to enable the subjects of law to understand what facts represent a risk to national security and what facts do not pose a threat to national security, in this respect determining a line of demarcation between them.

We thus notice that we have two opposing parties: The legislator – whose interest is to have a general legislation in national security domain and which aims that, by the formulation used, to cover range as wider as possible of threats, taking into account the continuous evolution, the diversity and the complexity of the threats that can affect the

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[1] Law no. 51/1991, The National Security Act.

national security – and the subjects of law whose interest is to guarantee the respect of their fundamental rights and freedoms, by stating, using a clear language, the facts that can represent threats to the national security and that can generate the possibility of national authorities with powers in this domain to restrict the exercising of the fundamental rights and liberties. Can a balance between the opposing interests of these two parties be establish? Who can establish such a balance? In the course of the article we are aiming to find answers to these questions, based on the reasoning used by the Romanian Constitutional Court in Decision no. 91/2018 and Decision no. 802/2018.

II. Criminal code or special law?

Internal legal provisions. Both the doctrine and jurisprudence of the Constitutional Court believe that "national security" is a pluralist term that, while in the past only concerned the state's military security, in the present involves the economic, social, financial security and other aspects that, in view of technical progress, by their seriousness or extent, could affect the good functioning of the state or even its existence.

On the one hand, in the Criminal Code the legislator met within the framework of *Title X – Offenses against national security* the criminal offenses which are capable of affecting national security, aiming to bring back within this title the actions of the legal subjects which will form the basis for the commitment of criminal liability of those who committed the crimes. Thus, for the offenses provided in this title, the procedure of obtaining the means of proof is governed by the provisions of the Criminal Procedure Code.

On the other hand, the legislator adopted a special law by which it regulated the procedure of knowledge, prevention and elimination of threats, in order to achieve national security, in terms of the information gathering activities. Given the fact that the provisions of the Law no. 51/1991 were the object of the exception of unconstitutionality examined in the Decision no. 802/2018, the research will refer to this law, in which it was provided that the concept of *national security* means "the state of legality, balance and social, economic and political stability necessary to the existence and development of the Romanian national state as a sovereign, unitary, independent and indivisible state, the maintenance of the order of law, as well as the climate of unrestricted exercise of the citizens' fundamental rights, freedoms and duties, according to the democratic principles and norms stated in the Constitution."[2]

Subsequently, in article 3 of Law No 51/1991 we find those actions that constitute threats to the national security without being realized, through their drafting, an exhaustive definition of these threats. In this regard, we notice that the legislator has left opened the possibility of analyzing the actual deeds committed by the subjects of the law and the classification of these facts, by the judge, in the moment of the solicitation of the national security warrant, taking into account the main fields considered to be national security threat.

[2] Art. 1, Law no. 51/1991, The National Security Act.

The nature of the activities which can be authorized by the national security warrant, namely article 14(2) of Law no. 51/1991[3], are, by their manner of implementation, restrictions on the exercise of human rights. However, by the way in which the legislator regulated the procedure for obtaining the national security warrant, we consider that the Romanian Constitution has been respected and it provides for the possibility of restricting certain rights or freedoms as an exception. Thus, we explicitly find in the Constitution text that "the exercise of certain rights or freedoms can be limited only by law and only if it is necessary, depending on the case, to defend the national security, order, health or public morals, the citizens' rights and freedoms; conducting a criminal investigation; to prevent the consequences of a natural calamity, disaster or a very grave disaster"[4]. We notice that within the constitutional provisions was granted the possibility of restricting certain rights or freedoms in duly justified and specific cases, such as the ones regarding the defense of the national security was foreseen.

International legal provisions. The restrictions stipulated in constitutional rules must be correlated with those of the European Convention on Human Rights, which specify that as far as the right to privacy and family rights is concerned, "the interference of a public authority in the exercise of this right is not accepted, unless it is provided for by the law and constitutes, in a democratic society, a necessary measure for national security (...) protection of health, morality, rights and freedoms of others"[5]. Similarly, the state authorities intrusion is granted, for the purpose of restricting the exercise of certain rights or freedoms, as regards the freedom of expression, so "the exercise of these liberties (...) may be subject to formalities, conditions, restrictions or penalties provided for by law which, in a democratic society, constitute necessary measures for the national security (...) the protection of health, moral, reputation or others' rights[6] and the freedom of assembly and association when "the exercise of these rights cannot be the subject of restrictions other than those provided for by law which, in a democratic society, constitute necessary measures for the national security (...) the protection of health, moral, reputation or others' rights and freedoms" . [7]

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[3] „The specific activities referred to in alin. (1) can consist in:
a) the interception and recording of electronic communications in whatever form are made;
b) the search for information, acts of documents for which obtaining the access in a place, to an object or to the opening of an object is needed;
c) the pick-up and re-setting of an object or document, its examination, the extraction of the information contained therein, as well as the recording, copying or obtaining of extracts by any means;
d) the installation, maintenance and lifting of objects from the places where they were put, surveillance by photographing, filming or other technical means, or personal findings, made systematically in public places or anywhere in private places;
e) the localization, tracking and obtaining information by GPS or other private surveillance techniques;
f) the interception of postal items, their initiation and re-establishment, their examination, the retrieval of the information they contain, as well as the recording, copying or obtaining extracts by any means;
g) the obtaining of information regarding a person's financial transactions or financial data, in accordance with the law."

[4] Art. 53, alin. (1), the Romanian Constitution.

[5] Art. 8, paragraph (2), the European Convention on Human Rights.

[6] Art. 10, paragraph (2), the European Convention on Human Rights.

[7] Art. 11, paragraph (2), the European Convention on Human Rights.

We notice that all the above mentioned provisions refer to the "national security" as a situation in which the rights and freedoms may be restricted, as well as in the case of the protection of "the rights and freedoms of others", the expression which is left open because it is not exactly specified which rights and liberties shall be protected, by listing them, but in reference to the provisions of the European Convention of Human Rights. By this way of wording of legal provisions, the formal requirements of the law are met, thus it does not represent a loophole of the legislator.

By using a comparative method, we can identify a similarity in the definition of the concept of national security at both national and European level, so, from the analysis of the mentioned texts it results that national regulations concerning the restriction of rights are in full accord with the European ones. We can also notice that, although the concept of "national security" is presently invoked in three articles, a definition of this concept has not been elaborated within the text of the European Convention on Human Rights. Moreover, within its judgments, the European Court for Human Rights admitted the right of the States to assess the significance of this concept, which "does not necessarily require a comprehensive definition of the concept of "national security interests". Many laws, which through their object must be flexible, are inevitably included among those that use terms which are to a greater or lesser extent vague, and whose interpretation and application represent practical matters"[8]. By these "practical matters" which are the task of court trials, the principle of separation of powers in the state is not violated in the view of defining the concept of national security, since the courts do not create a definition of threats to national security, but only a verification of the requirements imposed by the law in order to meet the necessary elements that constitute threats to national security.

At the same time, we can say that the deeds that can constitute threats to national security have been left to the free appreciation of the states, according to the specific nature and national values of each country. Within the same reasoning we find the Commission of Venice's opinion who believes there is a need for a distinction between criminal deeds threatening national security and information gathering activities aimed at documenting facts that can affect the state's security, but which are not obligatory to end by committing a crime. Therefore, the Commission of Venice specified that "where the offenses against state security are regulated in a manner that requires a tangible and evident act (which should be in the case of a democratic state respecting human rights), then a potentially harmful action for the security of the state might not reach the necessary threshold in order to be considered an offense or not even a preparatory act or an unconsumed offense. However, in all cases, there must be a concrete forpresent basis indicating a serious threat to the

[8] „do not necessarily require a comprehensive definition of the notion of "the interests of national security". Many laws, which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice", the European Court of Human Rights, the Decision from April 2nd 1993 in the Cause *Esbester against the United Kingdom of Great Britain, request no.* 18601/91, the document can be found at URL address: http://echr.ketse.com/doc/18601.91-en-19930402/view/, accessed on 20.05.2018.

state"[9]. It follows that, in the case of the activities carried out by the competent institutions under Law no. 51/1991, their conditioning on the existence of a reasonable suspicion "would mean, in fact, that such bodies cannot exercise their powers granted by the law in force".[10]

We can thus notice that, in regards of the documentation of the actions covered by article 3 of Law no. 51/1991, in both the case law of the Constitutional Court of Romania and that of the European Court of Human Rights, or the Venice Commission's opinion, it is recognized that it is impossible to define them in an exact manner, as well as the procedural difference to be followed by the criminal investigation authorities investigating the commission of these activities and the procedure regarding the documentation of these activities, which is specific to the intelligence, carried out by the authorized entities. We consider that precisely defining these activities, by eliminating the open definition that is currently being used, would correspond to a reality existing at the time of the defining, but which is no longer reflecting the reality after this moment, given the mutability of the threats against the national security.

III. Considerations regarding Decision no. 91/2018 and Decision no. 802/2018

Without dismissing the Decision no. 91/2018 of Romanian Constitutional Court, we want to draw attention to the expression of which unconstitutionality is invoked, respectively, "Any other actions which deeply affect fundamental rights and freedoms of Romanian citizens"[11]. Therefore, from the economy of considerations used by the Constitutional Court, from the first part of the argument, results that it is not necessary to stipulate precisely the rights and freedoms which are affected by the threats to national security. Otherwise, the doctrine which analyzed the case law of the Constitutional Court appreciated that "the constitutional judge accepts even restrains by principle of fundamental rights, without presenting each of them".

Therefore, it becomes difficult to understand the cleavage made by the Constitutional Court which, after it has seemed that it has understood the impossibility of defining exhaustively the threats to national security, changes the argument that it has used at the beginning, and it follows the argument of the initiator of the unconstitutionality exception. Thereby, the Constitutional Court renounces to the logico-systematic interpretation of provisions of the art. 3 from Law no. 51/1991 and it resumes to analyze the collocation of which unconstitutionality was ruled over by the Constitutional Court, thinking that "from the regulation's manner of the analyzed

[9] „if offences against the security of the state are framed in a way which requires some tangible, overt act (as should be the case in a democratic state respecting human rights), then activity potentially damaging to the security of the state may not have reached the threshold of a criminal offence, even a preparatory or other inchoate offence. However, in all cases there must be a concrete factual basis indicating a serious threat to the state", The Venice Commission, Opinion no. 756/2014, paragraph 24, the document can be found at the URL address: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)009-e, accessed on 20.05.2018.

[10] Decision No, 91/2018 of the Romanian Constitutional Court, published in the Official Gazette of Romania, Part I, no. 348 from 20.04.2018, paragraph 58.

[11] Art. 3, lit. f), Law no. 51/1991.

collocation, it results that any fact or act with or without criminal connotation which affect a fundamental right or freedom could be seen as a threat to national security. Otherwise, the scope of the criticized provision is so large, that any individual could be the subject of an act or fact that could be a threat to national security[12]. If it were to analyze only that collocation, then the argument would be appreciate as right, but giving consideration only to that expression and removing the entire procedure, through which the fundamental rights and freedoms are granted, would not let the Constitutional Court provisions without any content? As well, does not the legislator do such delimitation through the scope, *in concreto*, within *Title X Crimes against national security*, from Criminal Law, to offences which are crimes?

The final argument of the Constitutional Court, in which is sustained the unconstitutionality of the collocation that is the object of the examination, creates a dangerous precedent in the Constitutional Court case law, which can not consider constitutional an expression of which purpose has been to allow that framing of some offences, which could be seen as threats to national security, to be correlated with the evolution of threats' types. Although, we find that in the case law of the European Court of Human Rights the legality of such collocation has not been disputed yet, but, on the contrary, „the European Disputed Claims Court has not wanted to sanction the definitions of national security or the ones regarding threats to national security, these things were being let to the appreciation of member states, in spite the exhaustive character of these definitions"[13].

Afterward, through Decision no. 802/2018, the collocation „others interests of the state"[14] has been declared unconstitutional, the Constitutional Court assessing that „the legislator has chosen to determine the limits of a generic notion by using another notion which is also characterized by generality"[15]. In the case of collocation mentioned above, the Constitutional Court tries to identify its content and the limits and it states that because of its generic use, the collocation allows „the possibility of introductions or exclusion of these elements in this category, action which has an impact even over the criticized arrangement. This way, the limits of scoping the arrangement could not be known by the recipient of the law, which could not correct their behavior and could not be able to foresee, into a reasonable time, the consequences that could appear from a specific action"[16]. This time, the Constitutional Court tends to minimize the aspect provided by the case law and, also, the role of the judge in the appreciation of meeting the conditions that the facts which are drawn to his attention, to be appreciated if they could be seen as threats to national security.

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[12] E. S., Tănăsescu, „Article 53. Constrains on the exercising of rights and freedoms", în I. ,Moraru, E. S., Tănăsescu (coord.), *Romanian Constitution: comments on the articles*, Ed. C. H. Beck, Bucharest, 2008, p. 546.

[13] Separated opinion of judge Livia Doina Stanciu from the Decisions no.91/2018 of Romanian Constitutional Court, published in Official Gazette of Romania, part I, no. 348 from 20.04.2018, paragraph 8.

[14] Expression used in the enunciation of threat from lit. f), art.3, Law no. 51/1991.

[15] The Decision of the Constitutional Court no. 802/2018, published in Official Gazette of Romania, Part I, no. 218 din 20.03.2019, paragraph 73.

[16] The Decision of the Constitutional Court no. 802/2018, published in the Official Gazette of Romania, Part I, no. 218 din 20.03.2019, paragraph 80.

In fact, the argument that the Constitutional Court has chosen, it lets open the possibility to invoke exception of unconstitutionality for the similar collocations used in the art. 3 of Law no. 51/1991 as „any other violent actions"[17], „in any other unauthorized purpose"[18] or „any other nature"[19]. Are these collocations clear and precise or do they have a larger scope? We appreciate that, it is obvious that, if it were not to think of the manner in which were defined the threats to national security used by the legislator and if it were to analyze each of them, we would be found that all the collocations cited above contain, from the grammatical point of view, an indefinite pronoun which reflects an uncertainty into judicial system and from a legal point of view, their limits would be difficult to be determined by the subjects of law.

So, if the Constitutional Court remains attached to the perspective presented above and if it respects the obligation of the considerations mentioned, when an individual will raise an exception of unconstitutionality regarding the collocations cited, the Constitutional Court would have to declare them unconstitutional. This way, the Constitutional Court risks to empty the content of the legislator's intention to make a difference between criminal acts that submit under Criminal Procedure and threats to national security which are the object of the intelligence activity provided by the Law no. 51/1991, which aim was to avoid continuous changes of special law, in order to be updated to the threats to national security.

IV. Guarantees regarding human rights imposed by the legislator in order to be respected

A very important aspect of which the Constitutional Court does not seem to care about is one of the guarantees that the legislator impose in order to eliminate any kind of abuse committed by the authorities, which have powers in national security domain, respectively, the role that the judge has in releasing the national security warrant, a document which confers legitimacy to actions taken by these institutions. In this case, we find two filters in the procedure of warrant's releasing: Prosecutor's Office attached to the High Court of Cassation and Justice and High Court of Cassation and Justice. We think that the representatives of these two institutions are able to appreciate, in each case, if there are met the conditions needed by some actions to be considered threats to national security. Therefore, at the level of each institution is analyzed the legality, solidity and justification of national security warrant's solicitation, every representative of those two institutions having the possibility to ask for more arguments or to reject it if he appreciates that there are not met the legal conditions[20].

We consider convenient to emphasize the fact that in order to prevent any abuses, because we are in the situation of constraining some rights and freedoms, the legislator has not empowered any court with the possibility to authorize these kind of documents, but this possibility returns to the authority that has the highest rank among the

[17] Expression used in the enunciation of threat from lit. d), art.3, Law no. 51/1991.
[18] Expression used in the enunciation of threat from lit. e), art.3, Law no. 51/1991
[19] Expression used in the enunciation of threat from lit. h), art.3, Law no. 51/1991.
[20] Art. 15 of Law no. 51/1991.

prosecutor's office of the court, respectively the Prosecutor's Office attached to the High Court of Cassation and Justice and the High Court of Cassation and Justice. We believe that through this procedure the legislator wanted to assure himself that the judges with a high rank of grounding, will watch over legalism, because they have the judicial training needed in order to distinguish between what is or what is not threat to national security.

In this context, we agree with the separate opinion which emphasize the role of the judge that "has to interpret the legal norm and he has to determine if, in that particular case, are met the conditions regarding threats to national security, if the violation of the fundamental rights and freedoms is able to be considered, in concrete circumstances, such a threat, if the seriousness character of a violation, which is asked by the regulations, it is reached, as well as the subjects whom it applies, regarding the matter in which the authorization of the measures which constitutes interferences into private life of someone and regarding the methods that keep evaluating and can affect national security"[21].

This opinion is more entitled, because the conditions that have to be respected if it were to exist constrains of some rights or freedoms, which they were long discussed in the doctrine[22], they are the same with those provided by the Constitutional Court case law which appreciated that in order to deprive someone of his rights or freedoms, "the measure has to meet these conditions: to be provided by the law, its constrain to be needed, to be circumscribed reasons provided by the constitutional law, to be necessary into a democratic society, to be proportionate with the situation which it determined, to be applied without any discrimination, to not affect the existence of the right or freedom"[23].

If the legislator stipulated, as shown earlier, a procedure which allows the evaluation from case to case of those concepts by a judge of the High Court of Cassation and Justice, then we consider that it should be noticed, in the case of Decision no. 91/2018, the interference of the Constitutional Court in settling of the aspects subjected to judgment. So a question is naturally raised, whether if with the decision it issued, the Constitutional Court exceeded its powers, interpreting the factual situation of the cause subjected to judgment and surrogating herself into the role of the High Court of Cassation and Justice Judge.

This tendency of the Constitutional Court to exceed its powers can be observed also in the defining of the notion of national security, which is not in the competence of the Court, "those being the exclusive competence of the legislator and not even if, in a certain case, there is a threat to the national security, aspect which is established by the authorities prescribed by the law, utilizing when necessary the filter of the judicial authorities called upon to make sure that the civil rights and liberties are being

[21] Opinion of judge Livia Doina Stanciu from the Decisions no.91/2018 of Romanian Constitutional Court, published in Official Gazette of Romania, Part I, no. 348 from 20.04.2018, paragraph 13.

[22] D. C., Dănişor, „Consideration regarding constitutional regulations of constraining the exercise of the rights and freedoms", published in *Human Rights New Magazine*, no. 2, Ed. C. H. Beck, Bucharest, 2008, pp. 3-22.

[23] The decision of Romanian Constitutional Court no. 874/2010, published in Official Gazette of Romania, Part I, no. 433 from 28.06.2010.

respected"[24]. The legislator did not give the Constitutional Court the power to define legal provisions, this having the competence to "decide upon the exceptions raised in front of courts or arbitration courts regarding the unconstitutionality of a law or ordinance or of a provision from a law or ordinance in force, which is linked to the settling of the case in any stage of the lawsuit and whichever its object"[25]. According to the constitutional provisions, the High Court of Cassation and Justice "shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence"[26]. Considering the aspects presented, we consider that we may find ourselves in the situation of a legal constitutional conflict, whose subject is the Constitutional Court herself, which arrogated herself powers specific to the High Court of Cassation and Justice.

V. Challenges for the legislator

Therefore, the difficulty the legislator had to overcome regarding the regulation of threats that may affect the national security and which used an open provision which also allows the framing of threats correlated to their evolution, will be increased by the Decision no. 91/2018, in which the phrase "any actions that seriously prejudice the fundamental rights and freedoms of the Romanian citizens"[27] has been declared unconstitutional, and the Decision no. 802/2018, in which the phrase "other such interests of the state"[28] has been declared unconstitutional.

By this way of approaching the analysis of the concept of national security we wanted to highlight that when the examination of the constitutionality of a phrase is being made, it is erroneous to ignore the content of other legal provision, especially within the same law. In other words, we claim that the examination of the constitutionality of a phrase subjected to court judgment should have been made also by reference to the content of the law regarding the national security, since we find legal provisions which ensure the establishment of warranties in order to eliminate abuse in the field of national security. Therefore, limiting itself only to the analysis of the phrases subjected to judgment, The Court placed itself on a perspective that supports its decision, but taking into account the other warranties imposed by the legislator, the decisions become questionable.

Having also in mind the binding effect of decision of the Constitutional Court and their considerations, the analyzed decisions introduce legal precedents in the Court's case law, which, as shown before, open the path for raising unconstitutionality exceptions for most of the threats to the national security stipulated in art. 3 of Law no. 51/1991. Why did the Constitutional Court not used an interpretation of the entire law, in the utilized

[24] Separated opinion of Judge Livia Doina Stanciu from the Decisions no.91/2018 of Romanian Constitutional Court, published in Official Gazette of Romania, part I, no. 348 from 20.04.2018, paragraph 7.
[25] Art.29, alin. (1), Law no. 47/1992.
[26] Art. 126, alin. (3), Romanian Constitution.
[27] Art. 3, lit. f), Law no. 51/1991.
[28] Expression used in the enunciation of threat from lit. f), art.3, Law no. 51/1991.

reasoning, and made abstraction of the procedural measures established by the legislator, within the law, remains an open question. From the aspects presented results that the Decision no. 91/2018 and Decision no. 802/2018 are discordant to the jurisprudence of the European Court of Human Rights, the provisions of the European Convention on Human Rights and the opinions of the Venice Commission. For the arguments invoked we consider the phrase in cause as being constitutional, according to the provisions of the Law no. 51/1991 as a whole, and the Court analysis, reduced only to this phrase, without considering the rest of the legal provisions, will have consequences upon the Romanian legal system and the national security which cannot be estimated at the moment of drafting the current article, which will be highlighted by future jurisprudence.

Nevertheless, we cannot ignore the passivity of the legislator in correlating with the Constitution the provisions declared unconstitutional, even more so when we find ourselves in the legislation regarding the national security. Even if we do not support the reasoning of the Constitutional Court, which ignores the procedural warranties, we consider that it would be desirable a legislator's intervention in order to modify the phrases already subjected to the unconstitutionality exception, but also in the cases where we estimated the possibility of raising this exception, in the sense of diminishing the degree of inaccuracy. Thus finding a balance between an open language, which will not generate the need for permanent changes, on the one hand, and the use of phrases which "although not expressly defined, are determinable, being possible to determine their coverage sphere"[29], will represent a challenge for the legislator.

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[29] The decision of the Constitutional Court no. 802/2018, published in Official Gazette of Romania, Part I, no. 218 din 20.03.2019, paragraph 70.

SOVEREIGNTY OF STATE

Beatrice Florina DRĂGHICIU*

Abstract: *The concept of sovereignty has a complex dimension, encompassing a multitude of distinct features and concepts. Although in everyday language it may be associated with "independence" or even the idea of "supremacy", we will notice that its limits do not stop here. Sovereignty, along with population and territory, is one of the constituent elements of the state.*

State sovereignty identifies with prerogative of manifesting itself freely and unrestrained and deciding on its affairs, both internal and external, being thus supreme and independent.

Just as our freedom stops where the freedom of another begins, mutatis mutandis, the sovereignty of a state stops where the sovereignty of another begins.

Keywords: *sovereignity, state, independence, supremacy, concepts*

I. General considerations about the state

As a complex social phenomenon, the state is studied from different perspectives by political science, sociology, philosophy, legal sciences, etc. The state's problem is complex, interferes with legal issues, the two social phenomena – state and law – are inextricably linked (consubstantial). In this context, M. Djuvara stated that "the reality, of course, the most powerful and the most interesting in law, the most passionate about to study, is the state."[1]

The state is today, the normal form of organizing political society[2]. The state term has several meanings[3]:

a) The state is first the central power in opposition to local communities (regions, departments, cities, etc.);

b) The state also designates the governors to differentiate them from the governors, it evokes the public powers as a whole, as in the "State is responsible for maintaining order". In this sense, the state is distinguished from civil society – a term reserved for individuals and private groups;

c) The State designates an organized political society (eg the French, Spanish, etc.).

In a narrow sense, the state can be defined as an organized power over a population on a given territory. All these three constituents of the state (power, population, territory) are essential; But the most characteristic element is the state power, sometimes called more or less improper political power or public power.

Power is a phenomenon related to authority, which is characterized by the ability to command, give orders, and oblige those who receive them to obey this command.

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[1] M. Djuvara, *Preface to Lessons of Legal Philosophy*, Trad. J.C. Dragan, Ed. Europa Nova, 1992, p.12.

[2] Ph. Ardant, *Institutions Politiques et Droit Constitutionnel*, Paris, 1990, p. 16.

[3] Ion Craiovan, *Treaty of General Theory of Law, Third Edition – revised and added*, The Universul Juridic Publishing House, 2015 Bucharest, p. 208.

This authority has existed since the earliest times, at first being personified in the head of the respective human collectivity (genius, tribe, etc.) that imposed its authority through its qualities. In time, however, the authority emerged as a reality distinct from the person who held the power or exerted it, and thus constituted a complex apparatus / system of organization. In this way, the authority has organized itself as an institution of its own, becoming what we call the state today. The state term appeared much later (16th century), which is why the Western state (for example, the French one) uses the state name only for the states after the sec. XVI, for the states of antiquity using terms such as citadel, Roman Republic, Oriental Despots[4].

II. Definition of state

Constitutionally, the state represents the power of the people. Its creation is subject to the electoral process, by virtue of which the supreme representative authorities are elected, the President of the Republic and the Parliament, and at local level the local and county authorities or mayors[5].

Elections at all levels give legitimacy to the elected. This is how the people empowers their representatives to fulfill a representative mandate, namely to fulfill their wishes expressed in the electoral programs with which political parties and independent candidates have been elected. In essence, the mandate of the elected representatives of the citizens has as a consequence the direct or indirect determination of the component of the other state authorities.

By virtue of obtaining a parliamentary majority, the party or parties that make up this majority may decide on the composition of the Government. This, in turn, is omnipotent in determining the inferior structures of public administration. It is also involved in structuring the judicial authority or, at least, in setting up the minister of justice, a basic lever of the Government that defines and implements the state's criminal policy[6].

The Romanian judiciary has three main pillars. One of the cases is the judicial power, made up of the High Court of Cassation and Justice and the other courts, the Public Ministry and the Superior Council of Magistracy. In the distribution of the attributions of these components of the political system, a determinant role belongs to the law that assembles the competences of all the constituent institutions and favors their action under the constraining effect of the observance of the constitutional norms[7].

Thus, we can say that the state can traditionally be defined as a way of organizing a population from a certain territory for the purpose of exercising political power. The essential characteristic of the state lies in the fact that he is the holder of sovereignty. During the period of the absolutist state, sovereignty gained absolute characteristics, Louis XVI proclaiming expressly that ”*L'etat c'est moi”*. Against this absolutism, the

[4] Ion Craiovan, *op. cit.,* p. 109.
[5] Ioan Vida, Ioana Cristina Vida, *The General Theory of Law*, University Course, Universul Juridic, 2016, Bucharest, p. 26.
[6] *Idem.*
[7] *Ibidem*, pp. 6-7.

great pains of the past that led to the separation of powers in the state, to finding a solution of functional mediation in the exercise of the unique power of the people.

III. State – as a collective subject of law

The State participates as a subject of law both in internal legal relations and in legal relations of international law. In national law, the state emerges as a subject of law, first in constitutional law. [8]For example, the state appears as a constitutional law issue in citizenship relations. In its relations with persons with Romanian citizenship, the state has a number of rights and obligations. The state also grants citizenship, approves renunciation of citizenship, withdraws citizenship, approves the establishment of residence in Romania for citizens of other states. The state also appears as a subject in the constitutional law relations through which the federation is made, as well as in the relations of the state as a whole and the administrative-territorial units[9].

At the same time, the state acts as a subject of law in the legal relations of power, relations specific to public law, by virtue of which are defined the relations between the people and the state, between the state and the citizens, between the state and the political parties or the civil society. The vast majority of these relations are subject to the norms of constitutional law, where the state is the holder of the right to regulate social relations, in accordance with the mandate entrusted by the electoral body, to ensure the realization of the public services, to grant the Romanian citizenship, to withdraw it and to approve giving up, ensuring legal status for foreigners, stateless persons, asylum seekers, etc. Also, in constitutional law relations, the state appears as a holder of rights and obligations in relations with the administrative-territorial units, with the local public administration authorities. The quality of the constitutional state law results from the rights and obligations conferred by the law.

A special situation presents the participation of the state in the legal relations of international law, because according to the present conception, the doctrine of international law conceives the state as a subject of international law, irrespective of its territorial dimension, population number, stage of economic, social and political development. States are, in this respect, universal and original subjects of international law[10].

The quality of the subject of the rule of law in the relations of international law is based on its sovereignty, which exists regardless of recognition or non-recognition by other states.

Thus, in the legal relations of international law, the state is a matter of self-standing under the national sovereignty it enjoys. Regardless of geographical, economic, cultural or political particularities, in the field of international relations, the state enjoys the recognition of equal sovereignty, which gives it the opportunity to participate in solving international problems on equal footing with other states[11].

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[8] See: T. Draganu, *Constitutional Law*, pp. 12-15; N. Prisca, *Constitutional Law*, 1974, p. 13; I. Muraru, E.S. Tanasescu, *Constitutional Law and Political Institutions*, p. 29.
[9] Nicolae Popa, *The General Theory of Law*, Edition 3, C.H. Beck, 2008, Bucharest, p. 223.
[10] Nicolae Popa, *op.cit.*, p. 224
[11] Ioan Vida, Ioana Cristina Vida, *op.cit.*, p 158.

An exception to this rule is participation in international integrative organizations, such as the European Union, where the representation of Member States is based on certain criteria regarding their size, which attracts their proportionate representation in the governing bodies of the Union[12].

At the same time, the position of the state in the domestic and international legal order is determined by the principle of sovereignty, sovereignty being the essential attribute of the state, which consists in the supremacy of state power internally and its independence at international level. [13]The internal aspect of the sovereignty of the state expresses the emphasis on the elaboration of the norms of law and the pursuit of their application and republication in the internal order, the external aspect concerns the behavior of this entity in the international society, concretized in its relations with the other subjects of international law.[14]

Sovereignty provides a firm stand for the state both internally and externally, and the fact that the principle of international responsibility derives from the theory of sovereignty does not in any way affect the position of the state in the international legal order[15].

IV. Sovereignty – a defining element of the international legal personality of the state

In the speciality literature it is mentioned that "international law is from the public and the starting point is the state"[16]. An independent state is created only on the principle of equality of peoples' rights and their right to dispose of themselves. Breach of this right and non-observance of the principle of non-interference in the internal affairs of states are illegal acts and may be challenged and sanctioned under international law. Since the time of its appearance, the new states have enjoyed the status of a subject of international law from the moment of their appearance, the other states have to respect their sovereign rights. The quality of the state as a subject of international law is expressed by the ability to acquire and assume all the international rights and obligations and the voluntary obligation to respect them. States are not just subjects of international law, but also creative ones. The status of the international legal personality of the state is characterized by: sovereignty over its territory and those who are in the territory[17].

The state, an organized, sovereign and independent community located on a given space, has the status of a subject of law both in relation to the internal and international order[18], the

[12] *Idem*.
[13] D. Popescu, A. Năstase, *Public International Law*, Revised and Added Edition, Publishing House and Press "Şansa", S.R.L., Bucharest, 1997., p.90.
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[18] Popescu, D., *Public International Law*, ed. Titu Maiorescu University, Bucharest, 2005, p. 54; Carreau, D. *Droit international*. – Paris: A. Pedone, 7th edition, 2001, p. 17.

dual quality conferred by the sovereign character of the state power. The state has, based on this power, the right to govern society (inside) and to establish relations with other states (on the outside)[19]. Therefore, sovereignty is the political and legal basis of the international legal personality of the state, determining at the same time the manifestation of this quality.

A complete definition of the notion of state was given by the Montevideo Convention (1933) on the rights and obligations of States in Article 1. According to this convention, "The State as an international personality must fulfill the following conditions: – a determined territory; – permanent population; – the government; – the ability to enter into relations with other states. "

The meeting of the three elements: population, territory and government does not directly lead to the recognition of the given entity as a state nor does it explain this quality in the sense of international law, which characterizes the state from a political and social point of view. It is stated in the doctrine that as a criterion of the state's existence a legal element should be taken – sovereignty, thus, sovereignty being the defining element of state existence (an essential feature of state power) that manifests itself with its appearance, being as old as the state itself and inseparable from it.

Sovereignty has been defined in the literature as "the unique, full and indivisible supremacy of state power within territorial boundaries and its independence from any other power."[20]

At the same time, sovereignty can be defined as absolute power, as the power of a state to lead and constrain, or even more broadly, the supremacy of state power internally and state independence externally to any other power. Internally, sovereignty means the exclusive and legitimate right of the state to regulate the life of society as a whole by issuing laws and other legal rules and to impose sanctions on behalf of the general interest. Outwardly, sovereignty implies the ability to enter into relations with other states on legitimate grounds, in accordance with international law[21].

Thus, on the basis of their sovereignty, states have the right to freely choose and promote their political, economic, social and cultural system, to organize their political, economic and social life in accordance with the will and interests of the people, without blending from outside, and choosing its own internal and external policy, to speak in all areas with the power of the last word.[22]

With the changes in the contemporary world, characterized by processes of integration, regionalization, globalization, the content of the concept of sovereignty has changed[23]. The unanimously recognized principles of international law, such as prohibiting a state from imposing its will on the territory of another state, except in special situations (protection of its own citizens) or starting a war, the responsibility of States for acts committed on its territory which can harm to another state, the equitable use of water resources on which other states depend, as well as the obligations taken by the state as a member of international organizations, supra-state, regional

[19] Naeess. *Community and lifestyle* – England : Cambridge, 1984, p. 397.
[20] D. Popescu, *Public International Law*, ed. Titu Maiorescu University, Bucharest, 2005, p. 54;
[21] RM Beşteliu, *International Law: Introduction to Public International Law* – Bucharest: ALL Publishing House, 2003, pp. 84-85.
[22] Dupuy, P. M. *Droit international public. 5-em édition.* – Paris: Dalloz, 2000. p. 91.
[23] Popescu, D., *op. cit.*, p. 57.

organizations, etc. all this limits sovereignty, internationally. At present, sovereignty can not be considered either absolute or relative, since it is subject to complex limitations of a different nature from the point of view of its exercise (recourse to the European Court of Human Rights, the mechanism of EU integration)[24].

In the case of external sovereignty, the issue of recognition, which is not treated as a precondition for state sovereignty, is being interrupted, while the internal sovereignty of the state is limited by the obligation to respect human and citizen's rights in the way they are enshrined in international law and enshrined in the Constitution[25].

As a socially-political, objective and viable phenomenon, sovereignty is characterized by exclusivity – the territory of a state can only be subjected to a single sovereignty; indivisibility – can not be fragmented, its attributes can not belong to a state of several titles; inalienability – sovereignty can not be abandoned or surrendered to other states or international organizations; having an original and plenary character, determined by the fact that sovereignty belongs to the state and is not attributed to it from the outside, and the prerogatives of the state power encompass all the fields of activity – political, economic, social, cultural etc. It should be noted that in the relations between states the sine qua non condition of viable normal relations, a climate of peace and understanding between nations is the mutual respect of national sovereignty and independence.

Concluding, we can say that the concept of sovereignty is not a concept to be used to explain what the state does or may choose to do, but is a principle that states that there must be a supreme authority within the political community if this community exists.

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[24] N. Chirtoacă, *op.cit.*, p. 249.
[25] *Ibidem*, p. 250.

FEW CONSIDERATIONS ABOUT THE LAW APPLICABLE TO MATRIMONIAL REGIMES FOR INTERNATIONAL COUPLES MARRIED ACCORDING TO THE REGULATION (EU) 2016/1103

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Abstract: *Multiplying and diversifying family relationships with an externality element is a reality nowadays. In this context, the issue of matrimonial regimes remains a sensitive one, given the different foundations of the existing normative solutions in this field in different states.*

For the uniformization of the conflictual norms in this area, at the level of the European Union was adopted the Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, applicable since 29 January 2009 in Member States participating in the enhanced cooperation. This Regulation aimed to be a legislative instrument allowing the elimination of the difficulties faced by international couple with regard to the administration or division of their assets.

Keywords: *Regulation (EU) 2016/1103, matrimonial regime, element of extraneity, applicable law, enhanced cooperation.*

1. Introduction.

In a society in which individuals enjoy free movement, the number of international couples is constantly growing. Thus, throughout the EU there are almost 16 million international couples, as showed by a recent study[1]. Regarding our country, it has been showed that in 2017 a quarter million Romanian have migrated to other states for the purpose of satisfying a financial, professional or familial need. Almost 85% of the total number of Romanian emigrants are persons aged between 15 to 64 years, economically active persons and at the right age to start a family[2].

Given all these facts, it is important to clarify the aspects related to the law applicable for the effects of a marriage. During the current study we shall stop upon the law applicable for the matrimonial regimes of international married couples from the perspective of the Regulation (EU) 2016/1103.

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[1] See also: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/family-law/overview-family-matters_en.

[2] Ciprian Iftimoaei, Ionuț Cristian Baciu, „Analiza statistică a migrației externe după aderarea României la Uniunea Europeană", *Revista Română de Statistică – Supliment* No 12/2018, p. 166.

2. The history of the adoption of the Regulation (EU) 2016/1103, its aimed objectives and application

The free movement of persons throughout the European Union, the possibility for spouses to organize the patrimonial relations between them and third parties during the existence of the couple and at the moment of its dissolution, a higher predictability and legal security[3] in this area are just a few of the purposes aimed by the adoption of the Regulation (EU) 2016/1103 and enlisted in its preamble. This legislative act reflects the growing mobility of the couples during their marriage and has as main purpose the judicial cooperation in civil matters in the context of matrimonial regimes with a cross border feature. It states norms aiming to insure the compatibility of the norms applicable within the Member States in case of conflictual laws and competences.

The drafting of this regulation[4] was a long-time process, initiated in 2010 and was not without difficulties.

Thus, the "Report on the EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights" adopted on 27 October 2010, the Commission has announced its intention to adopt a proposal for a normative act in the area of the law applicable for matrimonial regimes.

In 2011 the Commission has adopted a proposal for a regulation of the Council regarding the competence, applicable law, recognition and enforcement of judicial decisions in the area of matrimonial regimes of registered partnerships. But, during its meeting on 3 December 2015, the Council concluded that a unanimous agreement could not be reached for the adoption of regulations on the matrimonial regimes and the patrimonial effects of registered partnerships. Therefore, the objectives of the cooperation in this area cannot be reached within a reasonable time by the Union, in its ensemble[5].

This has come to the adoption of a Regulation that is not applicable in all Member States but only in those Member States which have chosen to participate in enhanced cooperation in the area of competence, applicable law, recognition and enforcement of judgments on property regimes for international couples that include both matrimonial regimes and the patrimonial effects of registered partnerships. On 9 June 2016, the Council has adopted the Decision (EU) 2016/954 authorizing such enhanced cooperation.

Thus, only Belgium, Bulgaria, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden are the states which have manifested their will to be part of the

[3] Bogdan Dumitrescu, Aida Diana Dumitrescu, "Studiu asupra profesiei de avocat raportat la conceptul de "securitate juridică"", *Revista Studii de Securitate Publică*, Bucureşti, volum 3, nr. 3(11), iulie-septembrie, 2014, p. 20-22.

[4] Aida Diana Dumitrescu, "Subsidiarity principle in the context of harmonizing national legislation with european law of securities", Conferința internațională „Uniformizarea dreptului. Efecte juridice şi implicaţii sociale, politice şi administrative", Iaşi, 2014, p. 594-596.

[5] Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, published in the Official Journal of the European Union L 183 of 8 June 2016.

enhanced cooperation and which starting with 29 January 2019, the regulation enjoys a direct applicability. In exchange, this shall not be applied for the states which do not participate in the enhanced cooperation. Within these states, their own system of private international law will be used[6]. Therefore, as stated by "The two sets of legal norms (the normative and the national ones) are parallel in the temporal plan. European rules have prevalence when applied only to states participating in enhanced cooperation"[7].

For Romania, to the extent to which there are no international covenants in this area, the provisions of Romanian international private law shall be applied the, stated by the Civil Code until our state shall decide whether will join the enhanced cooperation in this area.

Nevertheless, Chapter 2 (Applicable law) has universal applicability, as mentioned by Art 20 of the Regulation. Thus, the law stated as applicable by the Regulation shall be applied regardless if it is or not the law of a Member State. In this meaning, the legal literature mentioned that "subject to the requirements of the international jurisdiction of the courts or authorities of the Member States where the Regulation is applicable, the conflict rules established will be taken into account irrespective of the nationality or habitual residence of the spouses"[8].

Thereupon, from this perspective, the solutions of the Regulation also concern the couples in which at least one of the spouses is Romanian or resides in Romania and whose matrimonial regime is susceptible of being analyzed in a Member State where the Regulation is being applied. To the same extent these provisions are of interest also for Romanian public notaries who will draft matrimonial conventions, as well as for the lawyers who shall provide legal consultancy for such couples[9].

3. The notion of matrimonial regime from the perspective of the Regulation (EU) 2016/1103 and its area of application

According to Art 1 of the Regulation, its area of application shall cover the matrimonial property regimes, excluding: the legal capacity of spouses; the existence, validity or recognition of a marriage; maintenance obligations; the succession to the estate of a deceased spouse; social security; the entitlement to transfer or adjustment between spouses, in the case of divorce, legal separation or marriage annulment, of rights to retirement or disability pension accrued during marriage and which have not generated pension income during the marriage; the nature of rights in rem relating to a property; and any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

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[6] Silviu-Dorin Şchiopu, „Legea aplicabilă succesiunii şi cea aplicabilă regimului matrimonial: unele delimitări şi interferențe", in *Universul Juridic Magazine* No 1/2019, pp. 40-41.

[7] Călina Jugastru, „Legea aplicabilă regimului matrimonial: două reglementări paralele", in *Universul Juridic Magazine* No 12/2018, pp. 7-8.

[8] Alina Oprea, „Aspecte de drept european privind alegerea legii aplicabile regimului matrimonial", *SUBB Iurisprudentia* No 3/2017, p. 127.

[9] Alina Oprea, *op. cit*., p. 127.

In order to avoid the emergence of conflicts between qualifications, the Regulation expressly defines the concept of matrimonial regime. Thus, according to Art 3 Para 1 Point a) the matrimonial property regime means "a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution".

4. The law applicable for matrimonial patrimony regimes according to the Regulation (EU) 2016/1103. Brief presentation

Art 22 of the Regulation applies the principle of autonomy of will, expressly stating the possibility the spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following: the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only.

Thus, from the above-mentioned provisions it results that the Regulation allows the spouses to choose the law applicable for their matrimonial patrimony regime, regardless of the nature or location of the property for a better management. The choice can be made among the laws which have a strong connection with the spouses, in the virtue of their habitual residence or their citizenship. This choice can be expressed at any moment, prior to the marriage, at the conclusion of the marriage or during it.

The convention mentioning the law applicable shall cumulatively meet the following conditions stated by Art 23 of the Regulation: the agreement shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

Regarding the matrimonial convention, it is being defined by Art 3 Para 1 Point b) of the Regulation as being any agreement between spouses or future spouses by which they organize their matrimonial property regime. Its admissibility and acceptation vary among the Member States. For the patrimonial rights acquired as effect of a matrimonial convention to be easily accepted by the Member States, the Regulation states the formal requirements for such convention. The minimal requirements are for that convention to be concluded in writing, dated and signed by both parties. But, if the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply. Also, if the spouses are habitually resident in different Member States at the time the agreement is concluded, and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

In the absence of a choice-of-law agreement, the law applicable to the matrimonial property regime shall be the law of the State, as mentioned by Art 26 Para 1: (a) of the spouses' first common habitual residence after the conclusion of the marriage; or,

failing that (b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

If the spouses have more than one common nationality at the time of the conclusion of the marriage, only points (a) and (c) of Para 1 shall apply. By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of Para 1 shall govern the matrimonial property regime if the applicant demonstrates that: the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of Para 1 and both spouses had relied on the law of that other State in arranging or planning their property relations. The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State. The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of Para 1. Art 26 Para 3 shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.

According to Art 27 of the Regulation, the law applicable for the matrimonial patrimony regime states among others, that: the classification of property of either or both spouses into different categories during and after marriage; the transfer of property from one category to the other one; the responsibility of one spouse for liabilities and debts of the other spouse; the powers, rights and obligations of either or both spouses with regard to property; the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property; the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; the material validity of a matrimonial property agreement.

Not least, the chapter dedicated to the applicable law states aspects related to the opposability to third parties (Art 28), the adaptation of rights in rem (Art 29), the overriding mandatory provisions (Art 30), the public policy (Art 31), the exclusion of renvoi (Art 32), the states with more than one legal system — territorial conflicts of laws (Art 33), the states with more than one legal system — inter-personal conflicts of laws (Art 34), non-application of this Regulation to internal conflicts of laws (Art 35)[10].

As a conclusion, the Regulation promotes the principle *lex voluntatis*. The subjective determination of the law occupies the first position, being the first way of establishing the applicable law, while the objective determination acts in secondary, when the parties have been unable or unwilling to choose the applicable law, and in principle have as their primary link the law of the State of residence[11].

[10] Alina Oprea, *op.cit.*, pp.130-137.

[11] Oana Ispas, *Considerații privind aplicarea Regulamentelor UE în materia regimurilor matrimoniale reglementate în dreptul românesc*, în vol. Sesiunii anuale de comunicări ştiinţifice a Institutului de Cercetări Juridice „Acad. Andrei Rădulescu" al Academiei Române, "10 ani de la aderarea României la Uniunea Europeană. Impactul asupra evoluției dreptului românesc", Bucharest, 2017, p. 96.

5. The current position of Romania towards the Regulation (EU) 2016/1103

Nowadays, Romania is not part of the group of 18 EU Member States which manifested their will in the meaning of participating in the enhanced cooperation.

Initially, the Romanian state has supported the proposal for the Regulation COM (2011) 125. In the document submitted by the Chamber of Deputies to the President of the European Parliament on 1 June 2011, it is stated that "for the Regulation COM (2011) 125 has prepared the arguments to support the legislative initiatives"[12]. Also, it has been stated that "the Chamber of Deputies confirms the validity of the action initiated by the European Commission, recognizing the fairness of the effort to reduce "cross-border inconveniences" in a Europe without borders. In the same time, the Chamber of Deputies considers the capacity of the provisions stated by the current opinion of bringing to the EU citizens the benefits emphasized the authors of this project"[13].

Regarding the participation of Romania in the enhanced cooperation, the Romanian state has adopted the Decision No 75/9 May 2016[14], which states that the Regulation draft does not violate the principles of subsidiary and proportionality pointing out the importance of introducing guarantees for the protection of national traditions in the area and the correct choice of the legal ground and legislative instrument. However, there is a reservation in the application of the European legislative act on the territory of Romania.

Specifically, Romania has opposed the Regulation (EU) 2016/1103 because the European Union has imposed the condition that it needs to be applied together with the Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, without leaving the possibility for the States to apply only the regulation on the matrimonial patrimony regime.

This fact also results from Art 1 of the Council Decision (EU) 2016/954 of 9 June 2016 authorizing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships[15]. But, the reserve of our state is justified by the fact that in our legal system, does not recognize the institution of registered partnership. Moreover, Art 277 Para 3 of the Civil Code states that "civil partnerships between persons of the opposite or same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in Romania".

[12] Opinion of the Chamber of Deputies 1/946/RA din 1.06.2011, p. 3.
[13] Opinion of the Chamber of Deputies 1/946/RA din 1.06.2011, p. 6-7.
[14] Official Gazette of Romania, Part 1, No 359 of 11 May 2016.
[15] Published in the Official Journal of the European Union L 159/16 of 16 June 2016.

6. The current law applicable for matrimonial patrimony regimes in the Romanian private international law

During the period in which Romania is not part of the enhanced cooperation, in the relations with the Member States participating in the enhanced cooperation, with the European states not included in the enhanced cooperation and in relation with third party states shall be applied the provisions of the Romanian international private law stated by Book 7 of the Civil Code, and to the extent to which there are international conventions, they shall have priority against the provisions of the Romanian international private law.

Thus, in the Romanian private international law, the conflict rules concerning the laws applicable to matrimonial regimes are found in Art 2590-2596 of the Civil Code.

According to the norms stated b the Civil Code, the spouses have the possibility to choose between the regimes of legal communion, of the separation of patrimonies or the conventional communion. If the spouses choose a different regime than the one of the legal communion, the choice shall be mentioned in a matrimonial convention. The subjective selection of the law applicable for the matrimonial patrimony regime is stated by Art 2590 Para 2 of the Civil Code, according to which "the law applicable for the matrimonial regime shall be the law chosen by the spouses. They can choose between: a) the law of the state on which territory one of them has the habitual residence at the time of choice; b) the law of the state whose citizenship is owned by one of the spouses at the time of choice; c) the law of the state in which the spouses establish their first habitual residence after concluding the marriage". Thus, the freedom of choice of the spouses of the law applicable to their matrimonial regime is possible, but within certain boundaries[16].

Regarding the convention for the choice of the law applicable to matrimonial regime, according to Art 2591 of the Civil Code, it can be concluded either before the marriage is celebrated either at the time of marriage or during marriage the formal requirements of the convention establishing the law applicable are the ones mentioned either by the chosen law to govern the matrimonial regime, or by the law where the convention is concluded. For all cases, the choice of the law applicable shall be clear and ascertained by a writing signed and dated by the spouses or it must clearly result from the clauses of a matrimonial convention. When the Romanian law is applicable, the formal requirements stated by it shall be applied for the validity of the matrimonial convention. The spouses have the freedom to choose at every moment another law applicable for their matrimonial regime, in compliance with the above-mentioned conditions. The new law shall generate effects only for the future, if the spouses did not decide otherwise, and cannot prejudice the rights of third-parties.

If the spouses did not choose for the law applicable to their matrimonial patrimony regime, it shall be subjected to the general effects of marriage.

[16] For the same point of view, see: Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ion Macovei, *Noul Cod civil. Comentariu pe articole*, ed. 2, C.H. Beck Publ.-house, Bucharest, 2014, pp. 2752-2576.

Regarding the matrimonial convention, the formal requirements to be fulfilled are stated by the law applicable to the matrimonial regime or by the law of the place in which the agreement is concluded, as mentioned by Art 2594 of the Civil Code.

From the area of the law applicable to the matrimonial regime are part the following elements expressly mentioned by Art 2593 Para 1 of the Civil Code: a) the requirements of validity for the convention stating the choice of the law applicable, except the capacity; b) the admissibility and requirements of validity for the matrimonial convention, except the capacity; c) the limits of choice for the matrimonial regime; d) the possibility of changing the matrimonial regime and the effects of this change; e) the patrimonial content of each spouse, the rights of the spouses on the assets, as well as the regime of debts of the spouses; f) the cessation and dissolution of the matrimonial regime, as well as the rules on the separation of joint patrimony.

If one of the spouses changes the habitual residence or citizenship, we are in the presence of a mobile conflict of laws. The effects of marriage shall be stated by the law of the habitual common residence or by the law of the common citizenship of the spouses. Therefore, the accepted conflictual solution offers priority to the old law. By applying the previous law, fraud law is avoided in the matter of the effects of marriage[17]. If both spouses change their habitual residence or citizenship, the common law of the new habitual residence or of the new citizenship shall be applied for the matrimonial regime, but only for the future, if the spouses did not decide otherwise, and it cannot prejudice the rights of third-parties. As exception, if the spouses have opted for the law applicable for their matrimonial regime, it remains the same even if they change their habitual residence or citizenship, as stated by Art 2596 Para 3 of the Civil Code.

7. Conclusions

The brief presentation of the norms stated by the Regulation (EU) 2016/1103 and of those existing in the Romanian international private law allows us to conclude that there are important similarities between the conflictual norms stated by the two documents, fact representing a ground for an easy reception by the Romanian legislator of the conflictual norms of the Regulation.

A first common element for the two regulations is represented by the way in which they determine the law applicable for the matrimonial regime, the will of the parties having priority, both in the national law, as well as in the communitarian regulation. Thus, both for the Civil Code, as well as for the Regulation (EU) 2016/1103, the subjective choice of the law has the first position, being the main mean of choosing the applicable law, while the objective choice acts only as secondary and with the support of tracking means. Also, the legal options between which the parties may choose are determined in relation to the same points of contact. Hence, both the Regulation and the Civil Code consider the habitual residence and citizenship.

[17] *Ibidem.*

Another common element is represented by the agreement stating the choice of the law applicable, which has some common particularities stated by both regulations. The agreement stating the choice of the law applicable to the matrimonial patrimony regime can be concluded before the marriage, at the moment of the marriage or during the marriage.

Therefore, there are some obvious similarities between the conflictual norms stated by Chapter 3 of the Regulation (EU) 2016/1103 and those stated by the Romanian Civil Code, but there are also differences. In this meaning, the doctrine has stated that "it is noted the existence of 8 major differences: in the area of the law applicable for the family residence, regarding the law which the spouses may choose to govern their matrimonial regime, regarding the law applicable for the formal requirements, namely the substantive requirements for the agreement stating the law applicable, regarding the law applicable to the form of the matrimonial convention, in determining the law applicable, in determining the law applicable to the matrimonial regime of the spouses in the absence of an applicable law mentioned by the spouses, in the area of application of the law of the matrimonial regime and in the area of the law applicable to the opposability and publicity of the matrimonial regime[18].

Absolutely, given the fact that all these considerations, the unification of the conflictual norms in the area of the matrimonial regimes at the level of the European Union still remains a desiderate. Though it is an uncontestable reality the fact that currently the number of couples not having the same citizenship or who have multiple different citizenships, with habitual residence, common or not, on the territory of another state than the one of citizenship is in constant increase and that they face serious administrative or legislative difficulties in the management of the assets from the matrimonial patrimony regime, the legislative harmonization throughout the Union proves difficult to reach. The legislative traditions of each people, its own culture and legal and religious values characterizing the family relations are as many factors making extremely slow.

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SOCIO-ECONOMIC EFFECTS OF MIGRATION OF LABOR FORCE ON SPANIA AND ROMANIA

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Abstract: *European Union economies are pressed by (i) a demographic change that induces population ageing and a decline of the workforce, and (ii) a split labour market that is characterized by high levels of unemployment for low-skilled people and a simultaneous shortage of skilled workers. This lack of flexible high-skilled workers and the aging process has created the image of an immobile labour force and the eurosklerosis phenomenon. In such a situation, an economically motivated immigration policy at the European level can generate welfare improvements. A selective policy that discourages unskilled migrants and attracts skilled foreign workers will vitalize the labour market, foster growth and increase demand for unskilled native workers.*

Keywords: *migracion, labour mobility, demographic change.*

After 1989 and, mainly, after 2007, migration reached the climax in Romania. Our country is a country of net emigration, and this has severe consequences at various levels: economic, social and, in particular, demographic.

Migration statistics only capture ordinary migrants who change permanent residence. Labor migration is hard to quantify, although in recent years it has become the most important component of Romanian migration.

Migration is usually defined as "the movement of a person or group of persons from one geographical unit to another across an administrative or political frontier, and who wishes to settle permanently or temporarily in a place other than the place of origin" . Since the movement between two geographical units must not occur directly, it is possible to distinguish between: place of origin or destination, transit regions, and destination or welcoming region (ILO, 2003, p.8).

Movements within a country are defined as internal migration and, as a result, cross-border movements are called international migration.

Romania is considered as a country of emigration and one of the most important labor force providers for the European market.

The literature on Eastern European countries is affected by the lack of statistical data on labor migration in most countries. For a better understanding of migration and its specificity in Romania it is important to know the trends of permanent migration after 1989.

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Specialist literature[1] is generous in analyzing the correlation between migration and economic growth from the perspective of immigration countries. owever, there is a limited number of empirical studies on the subject. Most of the time, the results of these studies are contradictory.

Some authors[2] believe that there have been five phases of migration in Romania. The significant component of Romanian migration is the temporary migration of the workforce, with both positive and negative implications, both individually and collectively.

The topic of interest in current debates on the issue of migration is the nature of economic effects among countries that receive immigrants. However, neither the causes nor the consequences of migration are well understood. Immigration has become a complex phenomenon, generating controversy in the research effort, especially for the region of reception represented by Europe. In Europe, the free movement agreement within the European Union[3] has opened the door to labor migration across national borders. The most common approach concerns the impact of immigration on the domestic labor market.

Numerous studies have estimated production functions to calculate the elasticity of substitution between immigrants and locals. Most existing studies refer to the effects of the immigrant labor market on the domestic labor market by estimating a reduced form of wage and unemployment, where the share of immigrants in a region or industry is the main explanatory variable of interest. To elucidate possible difficulties in isolating immigration as a cause, most authors rely on variable instrumental estimates.

Migration migration from the perspective of emigration countries has been less in the attention of researchers in recent decades but has captured interest over recent years through the "brain drain" process that it mitigates. This process is often addressed in a demographic context. Europe's societies face an aging process that is rather worrying, leading to the introduction of the pay-as-you-go social security system as a result of considerable demographic pressure. Public perceptions are increasingly aware that future immigration regulation is designed to attract young, economically competitive immigrants, thereby alleviating some of the demographic burden associated with the aging process. In the context of the uncertainties in the country, the alternative to study and even to build a career abroad becomes an increasingly attractive option for young

[1] Barro and Sala-i-Martin (1992), for example, show that in the United States and Japan, migration has a positive, although low, effect on economic growth. However, the empirical results of Blanchard and Katz (1992) and Dolado et al. (1993) are in contradiction with those of Barro and Sala-i-Martin (1992). They conclude that migration is negatively correlated with convergence between regions.

[2] Monica Roman, Cristina Voicu, *Several socio-economic effects of labor migration on emigration countries. Case of Romania*, Theoretical and Applied Economics Magazine Volume XVII (2010), No. 7 (548), Bucharest, pp. 50-65.

[3] The free movement of workers is a fundamental principle enshrined in Article 45 of the Treaty on the Functioning of the European Union. Subsequently, EU secondary legislation and the jurisprudence of the Court of Justice have developed this principle, under which EU citizens have the right: to seek employment in another EU country, to work in that country without the need of a work permit to reside in that country for that purpose, to remain in that country after the end of the period of employment, be treated in the same way as nationals of that country in respect of access to the labor market, working conditions and all other social and tax benefits.

people in Romania, and the number of those who choose this path increases from year to year.

This migration phenomenon of Romanian youth is already popular in the country and began with the end of the communist period. The phenomenon has evolved steadily, and now it is also applied to gymnasium or high school studies, as much as for university ones. Those who choose to study abroad strongly believe in a different lifestyle and a much more developed social culture.

International experience pushes them to expand their horizons and create a better lifestyle. For this reason, more and more parents opt for the future of their children to a foreign country and an internationally recognized educational program.

The interest in analyzing the effects of migration on emigration countries is highlighted in the OECD Report Effects of Migration on Sending Countries: What We Know, by Louka T. Katseli, Robert E.B. Lucas and Theodora Xenogiani (2006). It pays particular attention to the impact of remittances and presents their consequences at macroeconomic as well as microeconomic level.

Temporary migration tends to lead to an increase in remittances, as compared to permanent migration, especially when involving underprivileged migrants waiting to return to their country of origin.

Studies[4] on the effects of migration in Romania show that if Western countries continue to attract labor from our country, economic growth will be greatly affected. Romania, a country with labor market distortions, will have short-term benefits from migration, but in the long run it will become an importing labor force country.

Other effects of migration, targeting human trafficking.

The changes that took place after 1989 in the demographic trends and in the structure of the Romanian population, as a consequence of the economic and political transition, are reflected by the demographic situation of the last decades.

The population of Romania has fallen in recent years and there are still no visible signs of recovery. Decrease in population may be the result of a separate or cumulative outcome of three factors: negative net external migration higher than natural growth; increasing the mortality rate that exceeds the birth rate; birth rate surge below mortality rate.

All these changes have taken place in Romania since 1989. In addition, the 1990s and 1991s are recognized for high emigration that has counterbalanced natural growth, and so moderate. Italy and Spain are the main destinations for Romanians working abroad. Over the past five years, 50% of work abroad went to Italy and 25% to Spain.

People who have worked abroad have a specific attitude profile: they are more critical about the situation in Romania, but at the same time they are more optimistic about the future. They come with higher aspirations, which both favor social criticism of the state of the locality in which they live and criticize the current social state in Romania. Also, people who have not worked abroad but who are going to work outside are the most dissatisfied with the locality and the country. Dynamic optimism –

[4] León-Ledesma and Piracha (2004) analyze the case of eleven Eastern European countries in transition during 1990-1999 and look at the correlation between the level of remittances and the level of investment.

dissatisfaction with the present and trust in the future – is specific to those with the intention of migrating and those in migrant households. On the opposite side, chronic pessimism occurs mainly in households without migration experience.

A new term, defined as defined transnationalism, was born "as the process by which immigrants build social fields linking their country of origin with the country in which they settled."[5] Immigrants building such social fields are called transmigrants. Transmigrants develop and maintain multiple relationships – family, economic, social, organizational, religious and political – that extend beyond the borders. Transmigrants act, make decisions, are concerned and develop identities within social networks that connect them simultaneously to two or more companies. " This is a transnational social field that is shaped by the development of transnational links between origin and destination both on the basis of family or community networks (through which immigrants keep in touch with those left behind) and by the involvement of official institutions (embassies, consulates , immigrant associations, etc. – which can stimulate the involvement of immigrants in activities and events taking place in their country of origin, or encourage regular visits to their country of origin. This new type of migration is characterized by the existence of a set of frequent connections between immigrants and their country of origin, and this is made possible by the type of globalized society in which we live.

Instant communication (much less expensive than in the past) to long-distance people, the increasing ease and accessibility of travel across national borders and, in the case of the European Union, the adoption of a permissive policy on intra- European are just a few of the factors that facilitate the development of the type of transnational migration.

From an identity point of view, transmigrants combine features of both reference companies (destination and origin).

While some migrants identify more with one of the societies than with the other, most of them retain several identities that bind them simultaneously to several nations. " Thus, the situation of transmigration and the simultaneous connection of individuals and groups to at least two national realities implies a certain degree of identity ambiguity and situations in which individuals adjust their identity to the context in which they are (not just ethnic identity, but and self-positioning in the social status hierarchy).

[5] Croitoru, A. *About the Nature of the Relationship between Entrepreneurship and Migration*, Journal "Studies in Socio-Human Sciences", edited by Mihai Anita Liviu Papadima, Daniela Zaharia. Bucharest: University Publishing House of Bucharest.

Immigration by citizenship, 2017

	Total immigrants	Nationals		Non-nationals							
				Total		Citizens of other EU Member States		Citizens of non-member countries		Stateless	
	(thousand)	(thousand)	(%)	(thousand)	(%)	(thousand)	(%)	(thousand)	(%)	(thousand)	(%)
Belgium	126.7	17.5	13.8	108.5	85.6	60.2	47.5	48.3	38.1	0.0	0.0
Bulgaria	25.6	13.1	51.0	12.5	48.9	0.6	2.5	11.8	46.2	0.0	0.2
Czechia	51.8	4.5	8.7	47.3	91.3	16.6	32.0	30.7	59.3	0.0	0.0
Denmark	68.6	19.5	28.5	49.0	71.5	25.6	37.3	23.1	33.6	0.4	0.6
Germany (¹)(²)	917.1	124.4	13.6	788.9	86.0	395.0	43.1	391.5	42.7	2.4	0.3
Estonia	17.6	8.5	48.5	9.1	51.4	4.6	25.9	4.5	25.5	0.0	0.0
Ireland	78.5	26.4	33.7	51.2	65.2	28.5	36.3	22.7	28.9	0.0	0.0
Greece	112.2	31.7	28.3	80.5	71.7	17.2	15.3	63.3	56.4	0.0	0.0
Spain	532.1	78.2	14.7	454.0	85.3	139.4	26.2	314.2	59.1	0.3	0.1
France	370.0	128.0	34.6	242.0	65.4	74.5	20.1	167.5	45.3	0.0	0.0
Croatia	15.6	7.9	50.9	7.6	49.1	2.2	14.1	5.4	35.0	0.0	0.0
Italy	343.4	42.4	12.3	301.1	87.7	61.1	17.8	240.0	69.9	0.0	0.0
Cyprus	21.3	4.0	18.6	17.4	81.4	9.3	43.7	8.0	37.7	0.0	0.0
Latvia	9.9	4.8	48.2	5.1	51.7	0.7	7.5	4.4	44.1	0.0	0.1
Lithuania	20.4	10.2	49.9	10.2	50.1	0.7	3.4	9.5	46.5	0.0	0.2
Luxembourg	24.4	1.2	4.9	23.2	95.0	16.7	68.3	6.5	26.6	0.0	0.0
Hungary	68.1	31.6	46.4	36.4	53.5	11.2	16.4	25.3	37.1	0.0	0.0
Malta	21.7	1.5	6.8	20.2	93.2	11.7	54.2	8.5	39.0	0.0	0.0
Netherlands	189.6	44.6	23.5	143.7	75.8	72.6	38.3	68.6	36.2	2.5	1.3
Austria	111.8	9.7	8.7	102.0	91.2	64.4	57.6	37.4	33.4	0.3	0.3
Poland (²)(³)	209.4	132.8	63.4	76.6	36.6	22.7	10.8	53.8	25.7	0.1	0.0
Portugal (²)	36.6	20.2	55.3	16.4	44.7	7.6	20.8	8.8	24.0	0.0	0.0
Romania (²)	177.4	146.3	82.5	26.8	15.1	9.2	5.2	17.5	9.9	0.1	0.1
Slovenia	18.8	3.3	17.5	15.5	82.5	3.3	17.6	12.2	64.9	0.0	0.0
Slovakia	7.2	4.3	59.5	2.9	40.5	2.3	32.4	0.6	8.1	0.0	0.0
Finland	31.8	8.1	25.4	23.1	72.6	6.5	20.3	16.5	51.8	0.2	0.5
Sweden	144.5	19.5	13.5	124.4	86.1	30.0	20.7	90.0	62.3	4.5	3.1
United Kingdom	644.2	80.9	12.6	563.4	87.4	242.7	37.7	320.7	49.8	0.0	0.0
Iceland	12.1	2.5	20.3	9.7	79.7	8.4	69.3	1.3	10.4	0.0	0.0
Liechtenstein	0.6	0.2	25.9	0.5	74.1	0.2	38.1	0.2	36.0	0.0	0.0
Norway	53.4	6.8	12.7	46.6	87.3	20.0	37.4	26.0	48.8	0.6	1.1
Switzerland	143.4	23.8	16.6	119.5	83.4	82.5	57.6	37.0	25.8	0.0	0.0

Note: The individual values do not add up to the total due to rounding and the exclusion of the 'unknown' citizenship group from the table.

(¹) Break in series.
(²) Estimate.
(³) Provisional.

Source: Eurostat (online data code: migr_imm1ctz)

eurostat

Migration flows: Immigration in the EU from third countries was 2.4 million in 2017 (fig.1)

A total of 4.4 million people emigrated to one of the EU-28 Member States in 2017, while at least 3.1 million emigrants declared they had left an EU Member State. However, these figures do not represent migration flows to / from the EU as a whole, as they also include flows between different EU Member States.

Of these 4.4 million immigrants in 2017, approximately 2.0 million citizens from non-EU countries, 1.3 million citizens of a Member State other than the one they emigrated, approximately 1.0 million people who migrated to a country outside the EU, a Member State where they held their nationality (for example, foreign nationals or nationals) and about 11 thousand stateless persons.

In 2017, the relative share of national immigrants (immigrants with EU citizenship) was the highest in Romania (82% of all immigrants), Poland (63%), Slovakia (60% 55%), Bulgaria (51%) and Croatia (51%). These were the only EU Member States in which national immigration accounted for more than half of all

immigrants – see figure 2. In contrast, in Luxembourg, national immigration did not represent more than 5% of total immigration in 2017[6].

It is noted that demographic change in the last years has been influenced by a complex of factors, among which: the freedom of couples to decide on the number of children desired and the time period for children, the high level of economic costs and socially supported by the transition population, lack of housing and low access of young people to their own homes, changes in the behavior of the population as regards the formation and division of a family, social instability, unemployment. To these factors must be added the external migration, which contributed decisively to the decrease of the Romanian population. Romania subscribes to the phenomenon of global migration, having a history of migration marked by periods of ascension and decline, mainly based on domestic economic, social and political conditions. Human nature asks to try to find better living conditions, naturally the more developed regions attract people from the poorer parts of the world. The migration process involves a subject (immigrant or immigrant), at least two countries (the country of origin and the country of destination but also the transit countries) and the intention to obtain a residence permit or to find a job in the country of destination.

Romania's external migration has two faces: a legal one, statistically recorded as emigration and immigration, and migration for work. There is a high proportion of immigrants with university studies, which is close to 25%, the main destination countries being Germany, Italy, the USA and Canada. Immigration flows have two components: a reversible migration and a moderate number of immigrants from the Republic of Moldova. This is the country of origin for most of the Romanian immigrants; some of them are interested in obtaining Romanian citizenship in order to find opportunities for a better life in the European Union. Several stages can be identified in the history of migration in Romania, so after 1989 we are confronted with the following situation:

– 1990-1993: permanent mass emigration of ethnic minorities (German, Hungarian) and Romanians fleeing from political upheaval and poverty. Many have called for political asylum in the West, reaching a level of 116,000 applications in 1992[7];

– 1994-1996: a low level of Romanian economic migration in Western Europe, mainly for seasonal or illegal work, but also very low levels of ethnic migrants and asylum seekers; – 1996-2001: Developing more parallel trends and increasing emigration, turning the phenomenon into a complex one for analysis: (a) Permanent migration has risen in the US and Canada, more than legal migration has taken place in European countries ; (b) the manifestation, particularly since 1999, of illegal, 'incomplete' or circular migration to European countries for illegal work; c) increased trafficking in migrants, a phenomenon that overlaps with illegal migration but is distinguished by violence and abuse by traffickers / employers. This type of migration is considered to have been encountered especially in the case of women. (d) in 1999, we see a reduction in the number of labor recruitment agreements with different

[6] *Source:* Eurostat (migr_imm2ctz).
[7] Ethnobarometer, 2004 (Barometer of Public Opinion) http://ipp.md/old/lib.php?l=en&idc=156&year=2004.

European countries (Germany, Spain, Portugal, Italy); (e) a small number of Romanian migrants returning from the Republic of Moldova, as well as a strong influx of Romanian migrants between Germany and Romania.

– 2002-2007: The abolition of the Schengen visa requirement promoted a rapid increase in circular migration, even to the extent that the Romanians who were previously "blocked" in the Schengen countries were able to return to Romania to enter the migration system circular. The existence of the possibility of legal stay for a period of three months as a tourist led to the development of a sophisticated circular migration system[8], concentrated primarily on destinations such as Italy and Spain (IOM, 2005). This new strategy has allowed the European labor market to escape, so that migrants were illegally working for three months, dividing jobs with other Romanians.

– 2007 – to date: We are witnessing free access to the European labor market, which is favorable both for the creation of a European market Migration for employment has become the most important component of Romanian migration in recent years. Unfortunately, official statistics do not capture the whole phenomenon of migration and employment, with relevant figures only starting in 2005. According to the Romanian Office for Labor Migration estimates, there are about two million Romanians employed abroad, out of activity which represent more than 10% of the Romanian population.

From the demographic point of view, the consequences of migration, both temporary and definitive, are significant. The tendency to remain definitive in the destination countries is well known and leads to considerable losses among the population. This loss results in a decrease in the economic growth rate or even decline in economic activity. Recent studies show that international mobility is higher among people of the appropriate age for work. Consequently, emigration countries face an accelerated aging process of their own population. The human factor is the most important source of economic growth, growth rates are expected to be lower if left in the native country.

Most emigrants are young and their percentage is steadily rising, thus claiming that emigration affects the age groups with high fertility rates, thus reducing the potential of newborns in Romania. This is all the more worrying as emigration becomes permanent. The structure of gender emigration reveals some changes, so immigrant women are becoming more and more numerous in recent years. The implications of the migration phenomenon at the family level are multiple, these being part of both positive and negative effects. The money sent by emigrants to their families contributes to increasing the quality of their lives with positive implications for family relationships. On the other hand, we face family suffering for the loss of one or more members even temporarily. In fact, the longer the period is, the stronger the effects on the family. The departure of a member determines the reorganization of roles within the family. In this case, family members take over the roles / functions of that migrant, which can lead to family welfare losses and couple's imbalances. All this can easily lead to family breakdown (divorce).

[8] OSF, Ethnobarometru, 2004 http://ipp.md/old/lib.php?l=en&idc=156&year=2004

One of the most important negative effects of labor migration seems to be relative to the children of migrants who remain (in the happiest case) only with one of their parents. There are a lot of cases where both parents migrate for the purpose of finding a job, and therefore grandparents, other relatives or friends take over children's guardianship. Sometimes, migrants abandon their children, who finally end up in the state's care. So children are badly affected (in some cases, by traumatizing situations) by their parents because the caregivers can not successfully fulfill the role of parent. Another social category that could be adversely affected is the elderly, especially in communities with a high level of migration. In situations where children leave the country together with their parents, they have to go through a period of accommodation, learn a new language and learn to live in a different social environment, which in most cases involves a certain degree of stress.

Temporary work abroad has a positive effect on the income that migrants receive when returning to their home country. The most important factor affecting income levels is education. The higher the level of higher education, the higher the income. Income is directly influenced by work experience and computer-related knowledge. The direct impact of international migration can easily be measured by analyzing investments made from money earned outside the country. Investment analysis also allows us to see to what extent households invest these amounts or simply spend those amounts on the purchase of consumer goods.

Migration of workforce and entrepreneurship are two very closely related life components. Work experience gained abroad alongside entrepreneurship is correlated when a person wants to develop a business. As the migrant accumulates financial, human and relational capital and meets its basic needs, it will tend to invest in productive activities, becoming an entrepreneur.

For a significant part of the Romanian migrants, cross-border work is an intermediary strategy for entrepreneurship strategy, which is related to the strong link between the experience gained on foreign territory and the entrepreneurial orientation, both at the behavioral and intention level.

In the context of the globalization and internationalization of the economy of the national rebirth of the impact of new technologies on the familiar environment (see social networks) and the cost of migration, the factors that generate migration are: demographic pressure, low level of economic development, lack of institutional development, aging population, environmental degradation, less pleasant climatic factors, but also a socially hostile[9] climate. That is why the development of attractiveness factors to other countries has increased in particular employment opportunities, better living conditions (see social and health services here), permissive legal conditions (eg recognition of qualifications in the home country), proximity geographical affinity and cultural affinities (language, gastronomy, etc.).

A feature of the Spanish economy and society today is the phenomenon of immigration. Over the past decade, and especially in recent years, there has been a

[9] Miryam de la Concepción González Rabana, *El control de las migraciones y la globalización de las economías:¿ Fenómenos compatibles?*, Revista del Ministerio de Trabajo e Inmigración,, nr.51, Madrid, 2004, p.112.

steady influx of people from other countries, both from the European Union and from outside the EU[10].

On 4 December 2018, the Commission published a progress report on the implementation of the European Migration Agenda[11], examining progress and weaknesses in its implementation. Focusing on how climate change, demographics and economic factors create new reasons for pushing people to move, it has confirmed that "the factors that have triggered migratory pressure on Europe have been structural, making the approach more important efficient and uniform problem ".

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THE ANALYSIS OF THE REGULATIONS ON THE MEASURES OF REFORMATION OF THE JUDICIARY

Florina MITROFAN*

Abstract: *The achievement of a modern judicial system is necessary for the guarantee of independence of magistrates, depending not only on a coherent legislative framework, but also on the necessary resources placed at its disposal.*

Keywords: *judiciary, independence, reformation measures, guarantees, principles*

1. Brief considerations

The main condition for the insurance of the supremacy of law and the principles of the rule of law is represented by an independent and impartial judiciary, using different legal mechanisms created to contribute to the consolidation of these principles.

Through the legislative amendments, the intervention aimed to improve the quality of the act of justice, by ensuring transparency, by creating a legislative framework that would create the legal predictability of the justice seekers, by unifying the judicial practices, the full specialization in certain matters and the professional training of the magistrates, helping to increase public confidence in the judiciary.

The legislative changes have aimed not only the Law No 303/2004, Law No 304/2004 or the Law No 317/2004, but also the adoption of the new codes, their purpose being that of simplifying the judicial procedures, of solving the litigations within an optimal and predictable term, relieving the courts by reducing the number of appeals for certain categories of cases.

The performance of justice belongs to the state, but the bodies through which it is exercised do not each have a part of it, determined according to certain criteria[1].

The existence of specialized litigations, with a prominent technical feature, as well as the need to relieve the courts of very simple cases impose the establishment of certain jurisdictional bodies, which means that the judicial authority does not have the monopoly of trial, certain cases being sent, by law, to other jurisdictions.

It is ascertained that the legislative trend is to give the possibility for the courts to solve in solving civil litigations, by reducing the number of civil cases attributed in the competence of other jurisdictional organs[2].

In a state of law (as defined by Art 1 Para 3 of the Romanian Constitution) the judge has a decisive role, because the state of such a type cannot really function only under the control of a judge, which implies that he can impose his controlling power

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[1] Boroi Gabriel and Stancu Mirela, *Drept procesual civil*, 4th Edition revised and amended, Hamangiu Publ.-house, Bucharest, 2017, p.176.

[2] Boroi Gabriel and Stancu Mirela, *op. cit.*, p.181.

not only with the citizens, but also with legislative and executive powers. The paradox of the judge refers to the fact that the judge depends on the state, on the other powers, but must also control them, representing both power and counterpower, embodying the duality of law/force. … Precisely because of the specificity of the activity of the judge, he must enjoy certain guarantees towards other powers, which can resume to the independence and impartiality of the judge. In other words, the independence and impartiality of the judiciary represent the legal guarantee of the constitutional order[3].

2. The efficiency of the judiciary has represented one of the strategies of reformation of this system, meaning in which were adopted legislative modifications limiting the reasons for delay of trialing the cases, reducing the number of appeals for certain cases.

The personal independence of the judge refers to the statute which must be insured by the law, by establishing certain criteria of appreciation such as the recruitment of judges, immovability, continuous training, random assignment of case files, reasoning the judicial decisions, liability for judges and other criteria established by legal provisions.

The random assignment of case files insures impartiality and transparency in the performance of justice, for this measure being relevant Art 107 Para 1 of the Rules of internal order of the courts approved by the Decision of the Superior Council of Magistracy No 1375/17 December 2015[4], thus removing the possibility of "choosing" the panel of judges to solve the case.

According to Art 101 Para 3 of the Rules of internal order of the courts, the random assignment in the computerized system (which is the rule) is carried out only once, and in cases where procedural incidents occur in the course of the process, the rules laid down in the Regulation shall apply.

The principle of continuity of the panel of judges in solving cases, as well as the criteria established regarding the consistency of the panel and the reassignment of the files using the method of cycling repartition for objective reasons such as the dissolution of the panel (Art 104 Para 3 of the Rules of internal order of the courts) or taking over the panel by another judge (Art 111 Para 13 of the same Rules) are connected to the insurance of independence and elimination of the interference in justice.

All modifications brought to the composition of the panel of judges or to the repartition shall be emphasized by the informatic programs for random assignment.

As a guarantee of compliance with the principle of continuity of the panel of judges, the Rules of interior order of the courts state in Art 104 that "in case of division, the new formed file shall be assigned to the same panel in compliance with the principle of continuity", while Para 5-6 of the same article establish rules regarding the solving of the cases after being returned to court for resuming the trial, for

[3] Ciobanu Viorel-Mihai in *Constituția României. Comentariu pe articole*, coord.: Muraru Ioan and Tănăsescu Elena-Simina, C. H. Beck Publ.-house, Bucharest, 2008, p.1222.
[4] Published in the Official Gazette of Romania, Part 1, No 970 of 28 December 2015

obsolescence or for decision as effect of a mediation, of a request to correct the clerical errors, errors of content or clarification of the decisions.

Also, Art 111 Para 8 of the above-mentioned document refers to the assignment of the cases sent for retrial to the initial panel assigned, with the appropriate application of Art 110 in case of incompatibility.

Another significant aspect to be underlined is concerning the express regulation of the means of assignment of cases having as object the suspension of the decisions subjected to the means of appeal in relation to the moment in which the court is notified with such request (either simultaneously with the appeal, or before its registration) – Art 111 Para 10 or of the causes having as object the temporary suspension of forced execution in relation to the applicable procedural provisions – Art 111 Para 11-12.

In order to ensure the transparency of the act of justice, the Code of Civil Procedure provides for the parties to be informed of the contents of the case file (Art 13 Para 2) and to receive an electronic copy of the court hearing about their case file (Art 231 Para 5).

The Court underlines that the civil procedural regulations must insure a permanent balance between the public interest and the individual interest. This is why the access to case files, as well as to their information shall maintain a fair balance between the public's need to be informed and the protection owed by the state to each individual under the aspect of his/her intimate, family and private life[5].

For the insurance of transparency in communication and to ease the access to public information were established the Bureaus of public information and relations within the courts and prosecutor's offices.

For the purpose of streamlining the judiciary, regulations have been adopted which establish the obligation of the judge having the capacity of a plaintiff in a request for the jurisdiction of the court in which he carries out his activity to refer one of the same courts in the jurisdiction of any of the courts of appeal adjacent to the court of appeal in whose jurisdiction the court in which it operates is located.

The court has ascertained that Art 127 Para 1 of the Code of Civil Procedure procedural means at the hands of justice seekers at the outset of the civil trial, which seeks to remove any suspicions of biased settlement of the cause due to the quality of the party, being alternatives to the institution of displacement, assuming its application is not necessary to refer the court of appeal or the Supreme Court, as the case may be, to rule on the request for displacement of the civil proceeding on grounds of legitimate suspicion of the lack of impartiality of the judges due to the quality of the parties[6].

The purpose aimed by the legislator was that of protecting the prestige and impartiality of justice through the insurance of the effective feature of the impartiality of judges.

[5] Decision No 45/30 January 2018, published in the Official Gazette of Romania, Part 1, No 199 of 23 March 2018

[6] Decision No 290/26 April 2018, published in the Official Gazette of Romania, Part 1, No 638 of 23 July 2018.

3. The accountability of the judiciary.

Ensuring the possibility of improving the professional training of magistrates contributes to the accountability of the judiciary and at the same time to increase the trust of justice seekers in the act of justice, the latter being an essential requirement in a democratic society.

The continuous professional training of judges and prosecutors represent the guarantee of independence and impartiality in the performance of the position, representing, together with initial professional training, both a right as well as a duty for magistrates.

According to Art 35 Para 2 of the Law No 303/2004, the continuous professional training shall take into consideration the dynamics of the legislative procedure and consists of, mainly, the knowledge and deepening the domestic legislation, the European and international documents to which Romania is part, the jurisprudence of the courts Constitutional Courts of the European Court of Human Rights and the Court of Justice of the European Union, of compared law, of the deontological norms in the multidisciplinary approach of the courts with a novelty feature, as well as the knowledge and deepening of a foreign language and computer skills.

In the above-mentioned meaning, Art 38 of the Law No 303/2004 states that within each court of appeal and within each prosecutor's office attached to a court of appeal there are periodical activities of continuous professional training, consisting in consultations, debates, seminaries, round tables or open forums, with the participation of the National Institute of Magistracy. The subjects shall be approved by the Superior Council of Magistracy.

In order to verify the fulfillment of the professional competence and performance criteria, judges and prosecutors are subject to a regular assessment of the quality of the work, efficiency, integrity and the obligation of continuous professional training and, in the case of judges and prosecutors appointed to management positions, the management procedure, the evaluation procedure and the criteria according to which they are carried out are stated by the Regulation on the evaluation of judges and prosecutors, approved by the Decision of the Superior Council of Magistracy no. 676/4 October 2007[7].

The evaluation of the professional activity of judges has as main objective the establishment of the level of their professional competence and aims the improvement of the professional performances, the incrementation of the efficiency of the courts and public trust in the judiciary, maintaining and consolidating it.

According to Art 39 of the Law No 303/2004, "(2) In relation to the seniority in the position as judge, namely as prosecutor, the evaluation shall be made according:

a) Every 2 years, for judges and prosecutors with a seniority between 1 and 5 years;
b) Every 3 years, for judges and prosecutors with a seniority between 5 and 10 years;
c) Every 4 years, for judges and prosecutors with a seniority between 10 and 15 years;
d) Every 5 years, for judges and prosecutors with a seniority of more than 15 years;

[7] Published in the Official Gazette of Romania, Part 1, No 814 and 814bis of 29 October 2007, republished in the Official Gazette of Romania, Part 1, No 858 of 18 November 2015.

(3) The evaluation stated by Para 1 shall be performed by commissions separately established for judges and prosecutors, consisting of the president of the court, namely the chief prosecutor, as well as by 2 or more judges or prosecutors from the hierarchal superior court or prosecutor's office, appointed by the leading college of this court or prosecutor's office, having the same specialization as the evaluated judge or prosecutor. The evaluation of the president or vice-president of the court shall be performed by a commission consisting of the president of the hierarchical superior court, the president of the section corresponding with the specialization of the evaluated judge, as well as a judge from the superior court, appointed by the leading college. The evaluation of the chief prosecutor, of his deputy and of the prosecutor chief of section shall be made by a commission from the hierarchical superior prosecutor's office, consisting of its leader, a prosecutor in a management position corresponding with the specialization of the evaluated prosecutor and another prosecutor appointed by the leading college. The evaluation of the presidents, vice-presidents and presidents of sections from the courts of appeal or from the Military Court of Appeal shall be made by a commission consisting of judges from the High Court of Cassation and Justice, appointed by the leading college of this court, while the evaluation of the general prosecutors, their deputies or chief of sections from the prosecutor's offices attached to the courts of appeal or from the Prosecutor's Office attached to the High Court of Cassation and Justice, appointed by the leading college of the office. The evaluation of the president and vice-presidents of the High Court of Cassation and Justice shall be made by a commission consisting of judges, appointed members of the section for judges from the Superior Council of Magistracy, holding a professional degree of at least court of appeal, appointed by the section for judges of the Superior Council of Magistracy. The evaluation of the general prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice and of the chief-prosecutors from the specialized sections shall me made by a commission consisting of prosecutors, appointed members of the section for prosecutors within the Superior Council of Magistracy, with professional degree of at least tribunal, appointed by the section for prosecutors of the Superior Council of Magistracy".

Through its Decision No 45/30 January 2018, the Constitutional Court ascertained that "The implicit constitutional exigency resulting from Art 1 Para 4 and Art 124 Para 3 of the Constitution is that the separation of state powers and the independence of the judge imposes that this evaluation be performed by state clerks who are members of the judiciary, namely the judges. Therefore, it is unacceptable that clerks from the executive authority or prosecutors/assistant magistrates/ legal professional staff assimilated to them to assess the work of judges. … The organic legislator has improved this minimal constitutional requirement, in the meaning that it has given prevalence to a certain hierarchical criterion, so that the evaluation of judges be performed as much as possible by judges with a superior professional degree, which means that the evaluator does not function within the same court as the evaluated person. However, to the constitutional requirement are added these two legally justified requirements, on the one hand the experience and professional maturity and, on the other hand, the impartiality and objectivity which must characterize the evaluation process.

These requirements are found in their purest form regarding the evaluation of judges from courts of first instance, tribunals and courts of appeal. In exchange, regarding the judges from the High Court of Cassation and Justice, the application of these two principles simultaneously cannot be achieved given that this quality is the maximum degree in a judge's career and that the supreme court, by its nature, is unique within the judicial organization. Therefore, without abandoning the above-mentioned legal principles, the legislator has stated and identified a perfectly constitutional solution, namely that of establishing a commission for evaluation consisting of judges who do not act within the High Court of Cassation and Justice, thus, for the insurance of impartiality of the evaluation, but who can have a professional degree equal to them. Or, the two judges with a professional degree equal to those from the High Court of Cassation and Justice and who do not perform their activity within the supreme court are the ones appointed by the General Assembly of judges from the High Court of Cassation and Justice as members of the Superior Council of Magistracy (Art 8 Para 1 of the Law No 317/2004). Given that according to Art 133 Para 1 of the Constitution, the Superior Council of Magistracy is the guarantor of the independence of justice, the legislator has considered that the judges appointed to be part of it may perform the above-mentioned evaluation. The members of the Superior Council of Magistracy, even if throughout their mandate they are dignitaries and do not perform activities specific to this position, they do not lose their quality as judges and their professional degree, after the cessation of the mandate having the possibility of returning within their court.

It must be noted that the section for judges of the Superior Council of Magistracy consists of: 2 judges from the High Court of Cassation and Justice; 3 judges from the courts of appeal; 2 judges from the tribunals and 2 judges from the courts of first instance (Art 4 of the Law No 317/2004), reason for which the coopting in the commission of evaluation of the judges from the H.C.C.J of at least one judge with degree of court of appeal from the Superior Council of Magistracy considered the fact that such commission must have an odd number of members to decide upon the evaluation. Hence, it can be noted that the legislator chose for a commission consisting of 3 members thus insuring the participation of 2 judges from the H.C.C.J and of one with degree of court of appeal; nothing shall hamper the appointment of a commission consisting of 2 or even 3 judges with degree of court of appeal, because the text does not state that the commission shall mandatory consist of judges with professional degree corresponding to the H.C.C.J or to the court of appeal, but "with a degree corresponding at least with a court of appeal".

In view of the above, it is found that there is no violation of Art 124 Para 3 of the Constitution, the evaluation of the judges of the High Court of Cassation and Justice, regardless of the fact that they hold positions of leadership or execution, being also carried out by the judges, and the particular procedure of setting up the evaluation commission by reference to the court of first instance, tribunals and courts of appeal is justified by the position they hold in terms of professional status (maximum professional level) and which the High Court of Cassation and Justice has in the system of the hierarchy of courts of law [its supreme and unique character], right which cannot be said that the judges of the High Court of Cassation and Justice are in the same legal

situation as court of first instance, courts or courts of appeal. Therefore, in different legal situations, the legal treatment can only be different[8].

A qualitative act of justice shall depend upon the quality of the reasoning of a judicial decision, while the reasoning shall express the compliance by the judge with the principles enlisted by the European Court of Human Rights, by the decisions of the Constitutional Court and of the H.C.C.J regarding the appeals in the interest of the law and the solving of certain matters of law.

The non-unitary judicial practice and the non-uniform application of the legislation in force represent shortcomings facing the judiciary.

The principle of the specialization of the judge has incidence over the quality of the act of justice, for insuring the professional training of judges within the specialized sections and panel of judges, the National Institute of Magistracy creates annual programs of continuous professional training.

At the same time, access to legislation and jurisprudence is ensured through the publication of relevant case law on their websites.

The principles governing the performance of justice shall be interpreted in correlation with the legal provisions stating the role and competences of the other powers, in compliance with the principles of the rule of law, mentioned by Art 1 of the Constitution.

A legislative framework that would allow the courts to ignore, circumvent or censure the decisions that the High Court of Cassation and Justice or the Constitutional Court issues in the exercise of their constitutional powers is not compatible with these principles.

The jurisprudence of the European Court of Human Rights has stated multiple times that the predictability of the law must not be accompanied by absolute certainties, while "the certainty even if is much desired, sometimes is accompanied by an excessive rigor, or the right has to adapt to the changes in the situation"[9].

4. Conclusions

By setting up simpler, more efficient and more vigorous mechanisms, the climate of impartiality and objectivity in the settlement of cases is ensured in accordance with the legal provisions.

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THE OPENING OF THE ADMINISTRATIVE PROCEEDING ON THE BASIS OF DEBTS REPAYMENT PLAN IN THE FIELD OF THE INSOLVENCY OF THE INDIVIDUALS CONSUMERS

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Abstract: *The individuals consumers are a large category of people entering into legal statements in social relations. Their status as non-specialized persons may expose them to certain risks when entering into relations with traders. There are situations when, due to some social circumstances independently of their good faith, the consumers of good faith become over-indebted and are no longer dealing with the debts reaching the state of insolvency.*

In order to ensure a balance between the creditors and the individuals debtors in good faith, in Romania it was established a specific legal framework through the Law no.151/2015 concerning the insolvency procedure of the individuals. One of the types of insolvency covered by the statutory instrument is the insolvency proceeding based on a debt repayment plan, which has a remedy character and that involves a negotiation between the debtor and the creditors and, depending on the result, a repayment plan.

The administrative proceeding based on a debt repayment plan is opened at the debtor's request to the insolvency commission. The debtor's request must include data and information on the debtor's patrimony and its civil and professional status in order to assess its economic and financial situation and the chances of recovery. The examination of the application is made by the insolvency commission and in the result report is issued an admission or rejection decision. If the application is accepted, the proceeding is opened and the steps to approve a debt repayment plan are followed. The decision of the insolvency commission is communicated to the debtor and can be challenged before the court, that is, at the court where the debtor had his domicile or residence at least 6 months prior to the referral.

Keywords*: consumer; individual insolvency; opening proceeding; the decision of the insolvency commission.*

I. The consumers protection of individuals in good faith

1. The balance of the interests of creditors and debtors individuals consumers in the case of the legal statements of insolvency

The individuals consumers represent a fairly large category which enter into legal statements in socio-economic relations. In contrast to traders, they are more exposed to the risks posed by social distortions generated by economic and financial crises[1], especially as they are dominated by contagious phenomena with extensive effects.

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[1] A. M. Găină, *Globalizarea şi crizele financiare*, Ed. ProUniversitaria, Bucureşti, 2012, p. 53-54.

Globalization as a widespread phenomenon, besides the possitive effects it brings, it can also produce negative effects, which may sometimes take the form of economic and financial crises in which there may be some consequences such as: the decreasing of the production; trade and services; unemployment, the degree of incomes of individuals; the increasing of their indebtedness[2].

A globalized world[3] needs always stability, legal solutions to protect debtors in good faith, individuals consumers[4], but also the creditors in order to recover their claims from the relations with them in the proceeding of insolvency, even if their interests are opposite.

By the Law no. 151/2015 on the insolvency proceeding of individuals, it was established the legal framework to ensure a balance between the interests of creditors and debtors as individuals in the case of insolvency proceeding.

When drafting and adopting the mentioned normative act, there were taken into consideration legislative systems, both in the European states, but also in other areas and jurisdictions, which offer a balanced approach to such legal relations[5].

The optimal legal forms of insolvency reached within Law no. 151/2015 are listed in article 5 and consist of: the insolvency proceeding based on a debt repayment plan; court proceedings for insolvency by asset liquidation; simplified insolvency proceeding.

2. The administrative proceeding on the basis of a debt repayment plan – a legal solution to balance the interests of creditors and debtors individuals consumers

The administrative proceeding on the basis of a debt repayment plan is an insolvency proceeding that applies to the individual debtor in good faith in order to restore his financial situation and to adequately manage the incomes and the expenditure to be covered to a certain extent as long as the debts (liabilities) are based on a repayment plan and the release of residual debts finally under the terms of the law (article 3, paragraph 17 of Law no. 151/2015). This procedure has a remedial character[6] and encourages and supports the debtor to find solutions for his financial recovery. The creditors and the debtors are in a constructive and balanced understanding of their interests in the debts repayment plan.

The debts repayment plan is a legal instrument, developed by the debtor together with the administrator of the proceeding, which includes the way claims are covered, the amount of the payments, the payment terms and other measures for the financial recovery of the debtor (article 3, paragraph 15 of Law no. 151/2015).

He is conciliated with the creditors, voted by them, and finally approved if their vote represents at least 55% of the total value of the claims and 30% of the value of the claims which benefit from preferential causes [art. 28 (1) of the Law no. 151/2015].

The repayment plan approved under the above conditions is submitted to the insolvency commission which, by decision, finds the opening of the proceeding on the basis of a debt repayment plan (article 29 of Law no. 151/2015).

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[2] A. M. Găină, *op. cit.*, 2012, p. 124 şi urm.
[3] A. M. Găină, *Comerț internațional*, Ed. Universitaria, Craiova, 2014, p. 33
[4] R. Bufan, A. Deli-Diaconescu, F.Moțiu coord. şi colab., *Tratat practic de insolvență*, Ed. Hamangiu, Bucureşti, p.1019
[5] Expunerea de motive la Legea nr. 151/2015 (ex.: Germania; Franța; Austria; SUA; Australia; Singapore; etc.)
[6] M. Comşa, *Legea privind procedura insolvenței persoanelor fizice nr. 151/2015. Legislație relevantă şi comentarii*, Ediția a II a revăzută şi adăugită, Ed. Universul juridic, Bucureşti, 2018, p. 55

The balancing of the interests of the creditors and the individual consumer debtor is highlighted in the insolvency proceeding on the basis of debts repayment.

The creditors can satisfy their claims and, to the extent that there is such a premise in the repayment plan, they conciliate and vote the plan, and the debtor is released from the imminent pressure of his debts, and in the meantime indulged for their repayment and financial recovery.

The administrative proceeding for insolvency based on a debt repayment plan is recognized by Regulation (EU) no. 845/2015 on insolvency proceedings and is found in the laws of many European countries (e.g.: France, England, Germany, and so on).

In the Preamble to Regulation (EU) no. 845/2015, paragraph 20 is stated that "insolvency proceedings do not necessarily involve the intervention of a judicial authority" and that the term "court " used in this Regulation should be understood broadly as including a person or a body empowered to open insolvency proceedings".

II. The opening of the insolvency administrative proceeding on the basis of a debts repayment plan

1. The notification of the intention to open the proceeding to known creditors

The debtor has the obligation to notify each known creditor of his intention to open the insolvency proceedings (article 13, paragraph 4 of Law no. 151/2015). This obligation must be fulfilled within at least 30 days before the submission of the request for the opening of proceedings. The notification can be made by any means of communication that confirms receipt (e.g.: e-mail, fax, post, submission to the registry, etc.).

Through the notification are followed both to inform creditors but also to begin a conciliation for an agreement on a debts repayment plan without resorting to a judicial insolvency proceeding[7]. It was also considered that an alternative dispute resolution procedure between consumers and traders would also be useful, according to the Emergency Ordinance no. 38/2015, when creditors are professionals[8] because they might avoid the insolvency proceeding[9].

The creditors should behave in good faith and provide the debtor with all the information that would be useful to complete the request to open the proceeding[10].

2. The request of the debtor to open the insolvency proceeding

2.1. The holders of the request

The request for the opening of insolvency proceeding on the basis of a debt repayment plan can be made by the debtor.

[7] M. Comşa, *op. cit.*, 2018, p. 126.
[8] Ibidem.
[9] L. Bercea, *Convergența normativă sau concurența normativă? Accesibilitatea procedurii insolvenței persoanei fizice şi a procedurii de soluționare alternative a litigiilor în domeniul bancar*, RRDA nr. 10/2015, p. 84 şi următoarele
[10] M. Comşa, *op. cit.*, 2018, p. 126.

If the debtor is married then the request to open the proceeding may also be made by both spouses and the procedure will be communicated to them and a single repayment plan or, where appropriate, two correlated repayment plans will be developed. [art. 13 (2) of Law no. 151/2015].

The assignment of the debtor's legitimacy to make a request for the opening of the insolvency proceeding on the basis of a repayment plan, has had the reason to consider that the debtor is the one who knows best the financial situation[11].

When the spouses have common goods or obligations or are co-debtors of the same obligation, the request to open the insolvency proceeding will be made by the debtor, only with the consent of the other spouse, independently of their matrimonial regime.

According to art. 312 of the Civil Code, spouses can choose one of the following matrimonial regimes: the legal community; the separation of the goods; the conventional community.

The matrimonial convention for the establishment of the marital status may be concluded by spouses both before marriage, but also during marriage (article 330 of the Civil Code). It is valid in the form of authentic writing and for opposability to third parties must be entered in the Notarial National Registry of Matrimonial Regimes.

When a request for opening the insolvency proceedings is consigned, the debtor must also specify the matrimonial regime and also attach an extract from the register (article 5 of the Governmental Decision 419/2017 for the approval of the methodological norms for the application of Law 151/2015).

The fiancé or other persons with whom the debtor is living together shall be subject to the same regime as the spouses if they have property acquired in co-ownership or are co-owners of the same obligation [art. 13 (3) of the Law no. 151/2015].

The engagement is the mutual promise to end marriage, and the fiancé is the person who enters engagement (article 266 of the Civil Code). The engagement can only be concluded between man and woman.

Regarding the person who co-exists with the debtor, the law consider to be his life partner, that is, in a sociological relationship assimilated to a family relationship (e.g.: cohabitation).

In these situations, also, as in the case of spouses, the other party's consent is required for the debtor to make the request, which can be expressed directly on the request or by a separate document.

2.2. The content of the request

The debtor's request to open the administrative insolvency proceeding on the basis of a debt repayment plan has the status of a standard form. Probably, the legislator have had considered when regulating this request regime that fact that individuals consumers are anyway in a financial difficulty and can no longer easily bear the costs of the legal assistance[12] in formulating the request.

The debtor's request must meet the requirements of article 148 of the Code of Civil Procedure for any application addressed to the courts.

[11] Ibidem, p. 123.
[12] M. Comşa, *op. cit.*, 2018, p. 127.

According to art. 13, paragraph 5 of Law no. 151/2015, the following elements shall be included in the debtor's request: the reasons that led to insolvency (loss of employment; cut in the wages; the increase in the currency in which it took loans; unforeseen events that have destroyed the debtor's assets; etc.); the identification of creditors, individuals or legal entities by name/naming, residence/head office and their claims (the value; the type; the maturity; the cause of preference); the legal actions against the debtor's request and forced execution proceedings and the measures applied (e.g: litigations in pending cases; forms of forced execution; seizures; impounds and so on); the out-of-court renegotiation of certain debts incurred by the debtor prior to the opening of the insolvency proceedings (e.g.: notifications to creditors; creditors' replies; minutes of conciliation or debt rescheduling; and so on); the debtor's civil status (e.g.: married; unmarried; engaged; concubine; and so on); professional status (e.g.: employee; retired; with a liberal profession; farmer; unemployed); the amount of work and assimilated earnings, pensions or other benefits, income from intellectual property rights and dividends received previously and the changes it forecasts over the next three years (wages, civil-law benefits, old-age benefits, and so on); the debtor`s assets, including those owned by shares or deeds, with the specification of other real rights than the ownership right of the debtor over the assets of other persons (e.g.: the property ownership of immovable and movable assets of greater value; the right to civilian fruitage on property owned by other persons; and so on); the accounts opened with the credit institutions or the investment firms by the debtor as well as the accounts by which the debtor runs its available financial or investment funds and which is available from them (e.g. : accounts opened with banks or non-banking financial institutions; the balance available in the accounts; and so on); the claims of the debtor towards other persons and the real rights other than the right of ownership that the debtor has over the assets of others (e.g.: claims from disposals of goods and unearned value; claims from unincorporated rents; superficial counterparts; usufruct equivalent; counseling servitudes; mortgages; and so on); free of charge documents and transactions of more than 10 minimum wages concluded in the last 3 years prior to the opening of the insolvency proceedings (e.g.: donations, regardless of value; sales worth over 10 minimum wages on the economy; assignments of shares or shares free of charge, and so on); the names of the persons for whom the debtor regularly provides maintenance and the title of the benefit and if other persons contribute together with the debtor to such maintenance [according to art. 516 of the Civil Code, "the maintenance obligation exists between husband and wife, relatives in a straight line, between brothers and sisters, and among other persons prescribed by law"]; the persons that benefit from maintenance (e.g.: husband; child; parent; brother, and so on) must be nominated in the request; the persons that benefit of maintenance [e.g.: the other spouse, the other parent for the child, a brother for parents) must also be nominated in the request]; the disputes in progress or finalized ones in which the debtor is or was a party and which could affect in any way its patrimony [e.g.: litigation that could increase the debtor's patrimony (action for payment of wage rights, action for payment of intellectual property rights, action for obtaining a social insurance pension or maintenance pension); litigation that could diminish the debtor's patrimony (action for the repayment of undue rights received, action for a regular maintenance benefit)]; the

statement that he/she has not been convicted of certain offenses or whether rehabilitation has occurred for them (e.g.: abuse of trust to the creditors; tax evasion; false); the statement that he has not been in an individual insolvency proceedings in the last 5 years, or that he has not been released from residual debt, or that such proceedings have been closed out of the debtor's fault; the name of the companies in which the debtor has been in the last 2 years the status of sole associate, manager or associate/shareholder and what share of the holding had in order to assess the impact on revenue that would be obtained from shares, social parts or interest parts; the status of authorized individual, holder of an individual enterprise or member of a family enterprise held in the last 2 years prior to the submission of the request in order to be able to assess the level of obligations and their nature in relation to such a quality.

The request to open the insolvency based on a debt repayment plan shall be completed in accordance with the required data and information and the debtor's situation and shall be signed by the debtor on the standard form which is assigned free of charge by the insolvency commission. On the standard form or separately the debtor's consent to the processing of personal data must be taken (article 5 of Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data).

2.3. The annexes to the request for the opening of insolvency proceeding

The request for opening the insolvency proceeding must be accompanied by certain documents. The debtor must attach the following documents on request: documents relating to the professional status (e.g.: if he/she is employed, if he/she carries out an income-generating activity; if he/she does not have or has reduced his/her work capacity; if unemployed; if he/she has not been fired for imputable reasons and has taken all steps to obtain a job); documents regarding the incomes from work or assimilated to them or from pensions or social insurance and any other income (e.g.: employee certificate, income statement, pension coupon, service contracts, statement of dividends received in the last 3 years); copies of tax returns for the past 3 years; court criminal record and tax records to date; report from the Credit Bureau issued no more than 30 days before the date of filing the request; a proposal for a debt repayment plan containing at least the amounts that the debtor believes will pay periodically to its creditors.

Regarding the annexes to the request for the opening of proceedings it was considered[13] that their enumeration was declarative and not limitative because, in addition to the ones mentioned in the list, the law also provides to be deposited others with that request (e.g.: extract from the Notarial National Registry of Matrimonial Regimes; the fiancé's consent; the consent of the partner of life; the acceptance for processing of personal data; a copy of the identity card or passport; and so on).

All the annexed documents to the request for the opening of insolvency proceeding are necessary in order to be able to analyze the situation of the debtor, in its whole dimension, by the insolvency commission in order to make an appropriate decision.

[13] M. Comşa, *op. cit.* 2018, p. 131.

2.4. The submission of the request

The request for the opening of the insolvency proceeding on the basis of a debt repayment plan is filed by the debtor at the insolvency commission at the territorial level. The territorial insolvency commission that is competent to invite a request to open the proceeding is the one in whose jurisdiction the debtor has his domicile, residence or usual residence for at least 6 months before the application is filed.

The insolvency commission at the territorial level[14] is organized and operates at the level of each county.

3. The examination of the request

3.1. The review of the competence

The insolvency commission has to verify its own territorial jurisdiction namely if the debtor who submitted the request had its residence domicile or the habitual residence for at least 6 months prior to the filing of the request in Romania in the constituency of the respective commission. The review of the jurisdiction may take place at the time the debtor submits the request or thereafter, within the 30 day time limit set for the settlement of the claim. If is not considered competent, the insolvency commission with which the request was filed, then it will decline the jurisdiction in favor of the competent territorial commission.

3.2. The analysis of the request and of the submitted documents

The insolvency commission declared territorially competent considers the request and the documents submitted in support of it. The analysis of the request and of the documents submitted is done in the context of the fulfillment of the conditions for opening the proceeding, namely: if the debtor is the category of persons to whom the proceeding may be applied, that is, an individual consumer; if he has his domicile or habitual residence or habitual residence for at least 6 months in Romania; if he/she is in a state of insolvency and there is no reasonable likelihood of returning within 12 months; if the value of the due liabilities is at least equal to the threshold value of 15 minimum wages.

3.3 Listening to the debtor and informing on the effects of the proceeding

The individual debtor is invited to the meetings of the insolvency commission and is listened regarding the request and the documents submitted, being the best able to know its financial situation and to support its request. According to art. 6 of the Governmental Decision no. 419/2017, the listening meeting of the debtor must be determined within 5 days from the date of receipt of the request. If necessary, several listening sessions can be organized and an interpreter can be provided for people with disabilities. She is informed of the effects of the proceeding and is made aware[15] of the rights she has.

[14] V. Găină, *Organele care aplică procedura insolvenței persoanelor fizice* în Vol. 6/2018, LTMD, Ed. Arhipelag XXI Press, Tg. Mureş, 2018, p. 9 şi urm.
[15] M. Comşa, *op. cit*. 2018, p. 135

If necessary, the commission may require the debtor to complete his request and provide documents and information relevant for the resolution of the request.

3.4. The settlement deadline

The request of the debtor must be settled within 30 days of filing [article 14 (1) of the Law no.151 / 2015]. We appreciate that the establishment by law of a relatively short term has the basis for resolving the situation of the debtor in a timely manner. The settlement deadline is a referral term and can be extended because there is no sanction in the law if it is exceeded.

If the proceedings for resolving the request have been concluded in relation to the findings, the commission will issue a decision to admit or reject the request.

4. The decision of the insolvency commission

4.1. The decision to admit in principle the debtor's request

a. The content of the decision. If, following the analysis of the debtor's request, the commission finds that the debtor is in a state of insolvency and is not in a situation where the proceeding is not applied and there are grounds for recovering its financial situation, it will issue a decision to admit in principle the application for the opening of the insolvency proceeding on the basis of a debt repayment plan [art. 14 (1), letter a of the Law no.151 / 2015]. The content of the decision must include the designation of the administrator of the proceeding and the indication, if necessary, of the provisional measures.

The administrator of the proceeding is randomly appointed among the persons listed in the list of administrators and liquidators for the insolvency proceeding of individuals who have their registered office in the county to which the debtor belongs. If one of the debtor's assets and revenues are enforceable to a particular executor, then the commission designates him as the administrator of the proceeding on that executor if he/she is enrolled on the list of the administrators of the proceeding. When a contest of executors is organized, then the court executor who started the first execution [art.15 (2) of the Law no.151 / 2015] shall be appointed as the administrator of the procedure.

In the case in which the insolvency commission considers that temporarily measures are necessary, they shall be indicated in the decision to admit the opening of the proceeding. These temporarily measures refer to the provisional suspension until the approval and confirmation of the repayment plan. The period of suspension may not exceed 3 months unless the court has granted the extension of the suspension for a further 3 months [art. 10 (2) of the Law no.151 / 2015].

b. The communication of the decision to admit in principle the request for the opening of proceeding. The decision to admit in principle the application for the opening of the insolvency proceeding on the basis of a debt repayment plan shall be communicated to the debtor, the known creditors and the appointed administrator of the procedure. The communication to debtor is made because he is the holder of the request and a participant to the proceeding. The known creditors are notified of the decision to verify their amount and to participate in the proceeding. The appointed administrator of the proceeding must be informed of the decision to take the case, take

the first measures, or if he refuses for grave reasons to take over, to notify the commission of his refusal to be appointed as another administrator.

c. The publication of the decision to admit the request in principle to the opening of the proceeding.

The decision to admit in principle the request for the opening of the proceeding is published in the Bulletin of insolvency proceedings – the section debtors-individuals with obligations that have resulted from the operation of an enterprise [art.16 (3) of the Law no.151/ 2015). Publishing is done immediately and is designed to ensure that the proceeding is opposed to third parties.

4.2. The decision through which it is found that the financial situation of the debtor is irremediably compromised and the court is required to open the insolvency proceeding by liquidation of assets or the simplified proceeding

a. The content of the decision. The insolvency commission may find, following the analysis of the debtor's request that he is in an irremediably compromised financial situation, but has the traceable goods and/or incomes, and if he obtains the debtor's agreement by that decision, he or she inquires the court for opening the insolvency proceedings by active liquidation.

Another situation that can be ascertained by the insolvency commission is that the debtor fulfills the conditions stipulated by the article 65 of the Law no.151 / 2015, that is, for the opening of the simplified proceeding (e.g.: he has no traceable goods, he is above the standard of care, lost work or reduced by half, the amount of his obligations is no more than 10 minimum wages for the economy) and if the debtor agrees by decision, the court shall notify the court for the opening of the simplified proceeding.

*b. The communication of the decision***.** The decision of the insolvency commission to which the court has been notified shall be communicated to the debtor, following the insolvency proceeding as appropriate, in accordance with the rules for the asset winding-up proceeding or the simplified procedure. Referral to the court by decision of the insolvency commission with the consent of the debtor is assimilated to a request for the opening of proceeding by the debtor.

4.3. The decision to rejecting the request to open the proceeding

a. The content of the decision to reject the debtor's request. The debtor's request shall be rejected if the conditions for carrying out the procedure provided for in article 4 (1) of Law No 151/2015 are not met or if the debtor is in one of the situations referred to in article 4 (3) and (4) from the same law (e.g.: he has benefited from the proceeding, the proceeding was closed due to the debtor's fault, the debtor was convicted for crimes of failure to trust, etc.).

Another situation of rejection is whether the debtor requires assets to be redeemable and that the amounts obtained can cover the debts or would fall below the threshold value. The rejection decision shall state the reasons for the rejection of the factual and legal situation.

b. The communication of the decision. The decision to reject the debtor's application shall be communicated only to the debtor [article 16 (3) of the Law

no.151/2015). The communication is only for the debtor because the decision to reject the request concerns only him and not the creditors or other persons.

c. The effects of the decision to reject the debtor's request. If the decision to reject the debtor was motivated by the fact that the debtor is not in insolvency because the conditions of art. 4 (1) of the Law no.151/2015 and the decision remains final, then the debtor can no longer request the court to open the insolvency proceeding by liquidation of assets. The debtor can make a new request for the opening of the insolvency proceeding only if 6 months have elapsed since the final rejection decision was passed and an actual change of his/her financial situation occurred (Article 18 (2) of the Law no.151 / 2015]. Such time and patrimonial conditions of the debtor were imposed by the law to prevent law abuses by the debtor by introducing repeatedly unreasonable requests.

5. The appeal against the decision of the insolvency commission

5.1. The appeal against the decision to admit the debtor's request in principle

a. Who can appeal the decision? The decision to admit in principle the request for the opening of the debt-based repayment proceeding can be challenged by the debtor or the creditors. Both the debtor and the creditors are interested in the procedure. The debtor to obtain a relaxation and rescheduling of debts by a repayment plan, and the creditors to meet their debts to the debtor.

b. The competent court. The appeal against the decision to admit in principle the request to initiate the proceeding on the basis of a repayment plan shall be lodged with the court in whose jurisdiction the debtor has been habitually resident, residing or habitually resident within the last 6 months prior to the referral to the court. The court has the material and territorial jurisdiction to resolve the appeal (art. 10 of the Law no.151 / 2015).

c. The term of appeal. The appeal against the decision to admit in principle the request to open the proceeding on the basis of a debt repayment plan must be lodged with the court within 7 days of the date of the communication. It is a short term set by the law in view of the speed of the proceeding due to the debtor's financial situation, which requires a quick remedy for the creditors to obtain.

d. The effects of the appeal. The appeal suspends the execution of the decision of the insolvency commission (Article 17 (2) of the Law no.151/2015). A continuation of the procedure and consequences would be avoided if the request were finally rejected.

e. The court's solution. The court can, in relation to the situation, admit or reject the request by a judgment that is not enforceable and can be appealed against within 7 days of communication. The appeal is judged by the tribunal, urgently and above all [Article 17 (4) of the Law no.151 / 2015].

5.2. The appeal against the decision to reject the debtor's request

a. Who can appeal the decision? The decision to reject the debtor's request for the opening of insolvency proceeding can only be challenged by the debtor. He is interested in opening the proceeding and the decision was communicated to him only.

b. The competent court. The appeal against the request for rejection of the debtor's request is filed to the court in whose jurisdiction the debtor has had his or her habitual residence, habitual residence or habitual residence within the last 6 months prior to the court's referral [art.10 (1) of the Law no.151/2015]. The court is competent to deal with the matter in a material and territorial manner.

c. The term of the appeal. The deadline for challenging the decision to reject the debtor's request to open the insolvency proceeding is 7 days from the date of the communication. It is a short term to ensure the work of the procedure.

d. The effects of the appeal. The appeal against the decision rejecting the debtor's request suspends the execution of the decision of the insolvency commission.

e. The court's solution. The court may reject the appeal and then the debtor opens the way of appealing against the rejection sentence. The appeal must be made within 7 days from the date of the judgment. Judgment of the appeal is made by the tribunal in an emergency and above all.

Another solution of the court (the court) can be the admission of the appeal against the decision to reject the application for the opening of the proceeding and the admittance in principle of the debtor's request and the submission of the file to the insolvency commission [Art.18 (1) of Law no.151/2015]. After receiving the file, the insolvency commission appoints by decision a administrator of the procedure and fulfills the communication and publicity formalities provided by art. 16 of the law, for the request for admission, in principle the debtor's request to open the insolvency proceeding on the basis of a repayment plan of debts.

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*** Legea nr. 151/2015 privind procedura insolvenței persoanelor fizice
*** H.G. nr.419/2017 pentru aprobarea normelor metologice de aplicare a Legii nr. 151/2015 privind procedura insolvenței persoanelor fizice

PERSPECTIVES ON THE PREOCCUPATION OF THE INTERNATIONAL COMMUNITY FOR THE PROTECTION OF MIGRANT WORKERS

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Abstract: *Today, globalization and internationalized markets determine migratory attitudes not encountered before, the migration vesting both legal and illegal forms of leaving from origin states, of transiting other states and of entering and settling in the destination states. Practically, migration is a form of manifestation of free movement of people, and its regulating norms are placed at the overlapping between the internal norms of the states involved in the phenomenon and the applicable international law norms. Our aim in this study is to highlight the existing preoccupations at world level to find the best solutions for solving all aspects related to labor migration, being brought to discussion the international conventions concluded under the patronage of UNO by the States for the protection of migrant workers and their family members, as well as the preoccupation existing at regional– Union level – for the implementation of some policies in migration area, including labor policies, by indicating the directives which were adopted to this sense and for the implementation of the created applicable institutional framework.*

Keywords: *labor migration, right to free movement, migrants, international protection*

I. Aspects regarding the labor migration – form of human migration

At present, it is well known the fact that human movements have gained an unprecedented momentum. The economic factors and significant differences existing in the economic development of the States are among the causes that stay at the basis of the migration phenomenon. It has great importance at European level, besides the movement of people and of labor force, the latter being favored mainly by the step by step extension of the European Union, by the ageing of the population of the Western European States and by the economic problems.

The labor external migration has a temporary character, varying in time from weeks or months, to years. There are mainly three large types of workforce, respectively:

1. Highly qualified workforce – the most creative type and with very high chances of winning some long term contracts and even of obtaining the right of establishing the residence in the employment country, due to their experience at high levels in engineering, science and services.

2. Workforce with average qualification degree – which covers a wide area of professions.

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3. Unqualified or partially qualified workforce in several areas, such as agriculture, constructions or sanitation services – which most times work without legal documents, on an undetermined period of time and in the underground market of the host states[1].

Labor migration generates potential benefits and losses for all involved. Thus, for the country of origin, the export of labor is a loss for the economy; for the host state, the effects are mainly positive and recorded primarily on the labor market, by reducing the labor deficit from demographic point of view, by diminishing the demographic aging and economically, by increasing production with positive effects also in the State Budget; and for the workers and their families, the consequences are various, both positive and negative.

Globalization and internationalized markets generate unprecedented migratory attitudes, migration embracing both legal and illegal forms of departure from the countries of origin, of transit in other states, and entry and settlement in the destination countries.

Practically, the migration is a form of manifestation of free movement, fact for which its regulation norms are placed at the crossroads between the internal norms of the States involved in the phenomenon and those from the international applicable laws. A harmonization of the two types of norms – internal and international – is absolutely necessary in order to permanently protect the legitimate rights and interests of individuals, their capacity as citizens, stateless individuals or refugees, their location having no importance for this. The migrants, as human beings, hold universal rights acknowledged to human beings and their rights, security and dignity impose proper, special protection, as not being protected legally by their citizenship states makes them more exposed to exploitation and abuse[2].

II. The preoccupation of the international community for the creation of policies regarding workforce migration and the ways the States cooperate in this area

It seems that the migrants' fundamental rights are not observed, but in fact ignored at international level, many of the destination states not having an adequate legislation, policies and institutions for proper management of the labor migration, for the reduction of irregular migration, for guaranteeing a decent work to migrant workers and for strengthening the social unity in the actual situation of the cross-border movement phenomenon's increase. All this is real, notwithstanding that migration has recently been one of the responses to the productivity of a globalized economy and a means of harmonizing the elements of education, age and areas within national and regional labor markets[3].

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[1] Anghel Stoica, *Illegal migration at the junction with human trafficking*, ProUniversitaria Printing House, 2014, Bucharest, pp. 55-57.

[2] Patric Taran, *Clashing Worlds: Imperative for a Rights-Based Approach to Labor Migration in the Age of Globalization, in Globalization, Migration and Human Right: International Law under Review,* vol. II, Bruylant, Brussels, 2007.

[3] Guide on the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, issued by the International Committee of Coordination for the Campaign of Ratification of the Convention for the rights of the migrants, p.3.

For these reasons, all States have become preoccupied with the establishment of policies and legal provisions that are useful in the field of migration, labor and its control.

For the purpose of honoring and defending the fundamental human rights, the basic instrument at world level is the Universal Declaration of Human Rights adopted in 1948, including the human rights principles as they have evolved over time and giving equal importance to civil, political, economic, social and cultural rights.

Later on, in 1966, two Conventions were concluded, including notions of civil, political, social, economic and cultural rights: The International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR). The two Covenants, together with the Universal Declaration of Human Rights, amount to what is known as "The International Declaration of Human Rights"[4].

Over time, the States have concluded other human rights treaties, where measures have been put in place to protect the rights of vulnerable groups or for a particular human right[5].

In Vienna, in 1993, a Declaration was signed, which also stipulates that the civil and political rights are not separate from the economic, social and cultural rights. Further conventions have been adopted which emphasize that civil, political, economic, social and cultural rights are of equal importance and that they must be applied to all migrant workers. Examples are the Copenhagen Declaration on Social Development of 1995 and the Beijing Declaration on Women of the same year.

All these Declarations, as well as the actions established within the Conferences adopted on civil, political, economic, social and cultural rights, have requested to all states to have in view the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRAMWMF). Subsequently, the Durban Declaration adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, in 2001, has paid attention in a large extent to the migrant issues and requested to all states to ratify the above mentioned convention. At point 38 from the above, it is expressly mentioned: "We call upon all States to review and, where necessary, revise any immigration policies which are inconsistent with international human rights instruments, with a view to eliminating all discriminatory policies and practices against migrants, (…)". At point 47 it is mentioned that it is reaffirmed "the sovereign right of each State to formulate and apply its own legal framework and policies for migration "and it is stated that "these policies should be consistent with applicable human rights instruments, norms and standards (…)".

With the purpose of ensuring some joint minimal measures for how to treat workers, for the establishment of the regime and conditions at the workplace, a competent body represented by the International Labor Organization (ILO) which is a UN agency specialized on these responsibilities was established in 1999, at

[4] *Idem.*

[5] Like for example The Convention on the Rights of Persons with Disabilities adopted in 2006, The Convention on the Rights of the Child in 1989, The Convention on the Elimination of All Forms of Discrimination against Women in 1979 or The Convention on the Elimination of All Forms of Racial Discrimination in 1965.

international level, by achieving international agreements for it. The international labor "standards" are decided under the guidance of these organizations. They come to complete the international law norms comprising the human rights in labor relationship area. The decided standards state criteria for the protection of the migrant workers and the members of their families, but also the scope of the States involved in the labor migration phenomenon.

The legal framework for the protection of the migrants and their labor rights, for the State's internal and international policies on migration and for the international collaboration for regulating the migration, consists in the following UN international conventions: ILO Migration for Employment Convention, 1949 (C-97), ILO Migrant Workers Convention, 1975 (C-143) and UN ICPRAMWMF Convention, 1990, applicable in 2003, when it entered to force. All three Conventions are extremely important because they ensure the legal framework for the definition of the national and international policies on migration, starting from the plans for States' cooperation in the area of fighting against sporadic migration, trafficking migrants and their return to the origin states and their resettlement here.

The application of ICPRAMWMF Convention and its ratification by a large number of states made it an authority standard, actually becoming a reference point both for the States that ratified it and for the ones that expressly mentioned they do not want to ratify it[6]. This Convention is the most extended legal framework with the international law for the protection of the rights of the migrant workers and their families and for guiding the States to the creation of policies for labor migration.

At EU level, the protection of migrant workers and their families has met many difficulties in the process of establishing some provisions with general character which would deal with the entire domain of workforce migration in the UE. Actually, this problem is approached by adopting some legislative acts on various sectors, for each type of migrants. Accordingly, it is desired to create a policy in the legal migration area at Union's level. To this sense, we give as example a series of Directives[7], such as:

- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. It has introduced an accelerated procedure for the issuance of the special permit necesary for residence and labor. At present, the European Parliament and Council are working to review this Directive with the purpose of including some mandatory conditions related to the minimum wage level, the duration of the labor contract and the improvement of the (re)integration conditions of the migrant workers' families.
- Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. Accordingly, seasonal workers are allowed to a legal and temporary residence in the Union for a period between 5 and 9 months – in relation to each Member State – with keeping the residence in a third state.

[6] At the UN ICPRAMWMF Convention, 54 states from all continents have become Member States up to present, and 39 signed it, according to http://migrantsrghts.org.
[7] www.europarl.europa.eu.

– Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification which, as per art. 1, has as purpose the establishment of those conditions in which the right to family reintegration is exercised by the third country nationals having legal residence on the Member States' territory.

At the same time, the European Commission established the European Integration Network as a mechanism for promoting the integration of migrants into the EU, including for work and which functions at EU level to support legal migration.

Obviously, there is also a concern at EU level on dealing with clandestine migration issues, and several legislative acts have been adopted in this respect. We are exemplifying in this study Directive no. 2009/52 / EC concerning sanctions and measures to be applied by the Member States against employers of third-country nationals which are staying illegally.

In order to prevent human trafficking, the EU concludes and negotiates readmission agreements with third (origin and transit) countries, so that those illegal migrants are returned to them.

An important role in adopting the necessary legislative acts in the field of migration at EU level lies with the European Parliament, which, after the Treaty of Lisbon entered into force, has a much more active role in the Union's legislative work.

III. Conclusions

In conclusion, the labor migration, as a form of the right to free movement, is protected at world level, as long as it is legal. The basis of this freedom is given by the removal of any discrimination between the citizens of a State and those of other States (including at EU level), which live or work on the territory of that State. It is about discriminations which can deal with conditions for entry, reciprocal acknowledgement of experience, professions, degrees obtained in the citizenship state, as well as the employment, labor or retribution conditions.

One of the great state-sources of the European East-West migration[8] has been present also in Romania from the second half of the 1980s, fact generated also by factors like economic crisis, reason for which this subject is desired to be analyzed and treated with great care and exactness.

At world level, the three above mentioned international conventions have a special importance given by the legal framework they ensure in order to decide the international and national polices in the migration area. They state the characteristics for a multitude of national policies, rules for the cooperation of states in connection to the applicable problems, as well as the sanctioning of disordered migration migrant trafficking etc.

Also, at UE level, the labor migration represents a constant preoccupation and measures are taken for the compliance with free movement right for the citizens of the Member States and of the third countries and with legal conditions for work and stay in so far as they comply with the norms imposed at EU level in this area.

[8] www.criticatac.ro.

It is also natural to be so in the current human society in which migration and labor movements among many states have become larger, a reality that produces a number of beneficial effects both in countries of origin and in destination countries and migrants itself.

The "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" is highlighted in the Preamble the Universal Declaration of the Human Rights.

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REFLECTIONS CONCERNING THE NOTION AND LEGAL NATURE OF THE CIVIL LAW INSTITUTIONS

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Abstract: *After the entry into force on the 1st October 2011 of a new Civil Code, some classical institutions of our private law have undergone important changes, so it has become useful to discuss their notion and their legal nature, as well as the determination of the regime which is applicable to them. In almost 10 years of this Civil Code (rather, the Private Law Code), the literature and the judicial practice have not adopted a single point of view on these issues, so that any scientific approach to them is equally utility and topicality. Among the civil law institutions that require reflection on these aspects are, for example, disqualification to succession, caducity of inheritance, resolution and termination. In our study, we propose to discuss these traditional institutions of civil law, either from the perspective of their notion or their legal nature.*

Keywords*: disqualification to succession, caducity, resolution, termination, contractual remedy, civil law sanction, civil punishment.*

1. Disqualification to succession – a civil sanction or punishment?

The current Civil Code regulates in art. 958-961 the disqualification to succession, which qualifies as a general condition[1] of the right to inheritance (common to the two kinds of inheritance – legal and testamentary -, together with the succession capacity and the succession vocation), and not a special one[2], specific only to the inheritance as his predecessor. We believe that it is useful for us to show that the current Civil Code distinguishes between two kinds of destitution – law and justice[3] – and what are the

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[1] This qualification results from the fact that the disqualification to succession is governed by Chapter II "Condițiile generale ale dreptului de a moşteni", Chapter I "Dispoziții referitoare la moştenire în general", Book IV "Despre moştenire şi liberalități".

[2] In the previous regulation, disqualification to succession was only a special condition of the right to legal inheritance, its equivalent in the testamentary matter being the judicial revocation of the bond for the ingratitude of the legatee. There is also much to be said about the latter condition of the right to inheritance, maintained improperly by *de lege lata*, we regard as a requirement specific to the testamentary inheritance, overlapping somewhat of disqualification to succession and generating real difficulties of understanding and, especially, application.

[3] As far as we are concerned, we consider that a certain analogy, comparison, parallel between the law and the judicial disqualification/unworthiness, on the one hand, and the absolute and relative nullity, on the other, especially from the perspective of the applicable legal regime them. Thus, the analysis of the legal status of nullity, which is undoubtedly a civil law sanction, requires three questions: who can invoke the nullity, until can it be invoked and whether, by confirming the act, when can the cause of nullity be overcome, removed. With regard to disqualification to succession, the legal status of the court, irrespective of whether it is lawful (called by doctrine and absolute) or judicial, raises two questions: who can rely on it and in what terms. Like the absolute

facts that attract it, so that we can formulate a point of view of nature legal basis of this institution of major importance for succession law. Thus, according to art. 958 par. (1) Civil Code, *has no right* to inherit:

a) the person convicted[4] of committing an offense with the intention of killing the person who leaves the inheritance;

b) the person convicted of committing, before the inheritance, an offense with the intention of killing another successor who, if the inheritance had been opened at the date of the act, would have removed or restricted the vocation to the inheritance perpetrator.

It *may be* declared invalid to inherit, according to art. 959 par. (1) Civil Code:

a) the person convicted of intentionally committing against the person who leaves the inheritance of serious acts of violence, physical or moral, or, as the case may be, of deeds that resulted in the death of the victim;

b) the person who, in bad faith, has hidden, altered, destroyed or forged the will of the deceased;

c) the person who, through violence, prevented the person who left the inheritance from making, amending or revoking the will.

We shall not discuss in the present study other aspects that would be assumed by the disqualification to succession, even though the laws of its regulation contain even some inconsistencies, legal errors[5], but we will summarize to question the ones following, exclusively the legal nature of this. The disqualification to succession is currently defined in the literature[6] as the loss of the legal successor or the will of the

nullity, the lack of right can be ascertained, according to the provisions of art. 958 par. (3) Civil Code, any time, at the request of any interested person or ex officio by the court or by the notary public (obviously, based on the final court judgment resulting disqualification). Judicial disqualification, similar to relative nullity, may be invoked by any successor of interest within the one-year expiration period (art. 959 par. (2) Civil Code]. Moreover, from a terminological perspective, we say that absolute nullity, as well as the lack of law, is *established*, and judicial disqualification as well as relative nullity is *declared*. Therefore, in both cases, it is necessary to have the court (or the notary public, in the case of lack of law), who finds them or, as the case may be, declares them. Only clauses considered unwritten by the Civil Code will genuinely take effect *ope legis*, independent of any court intervention, or even in the sense of the finding. See, to that effect, G. Boroi, C. Al. Anghelescu, *Civil Law Course. General Part*, 2, revised and added, Hamangiu Publ. House, Bucharest, 2012, pp. 245 and 249.

[4] We use the expression "convicted person" and not that used by the legislator in art. 958-959 Civil Code, "Criminal convicted person", which we consider to be pleonastic, since the conviction can only be ordered by the criminal court.

[5] We refer to the provisions of art. 958 par. (2) Civil Code, According to which "If the conviction for the acts mentioned in para. (1) is prevented by the death of the perpetrator, by amnesty or by prescription of criminal liability, the negligence shall operate if those facts have been established by a final civil judicial decision." In our opinion, two are the errors that this law contains and are mainly due to a lack of correlation with criminal law: Firstly, the text of the law in question refers to amnesty as a cause which removes the inheritance delinquency, she can only be detained if she intervened before the conviction, that is, it is ancestral, the post-condemnatory having no relevance from the perspective of the disqualification to succession; then the prescription of criminal liability can not intervene in most of the cases of malpractice, the deeds of murder and those that resulted in the death of the victim being imprescriptible, according to art. 153 par. (2) Criminal Code.

[6] See, by way of example: Fr. Deak, R. Popescu, *Tratat de drept succesoral*, Third Edition, updated and completed, Vol. I. *Legal Heritage*, Universul Juridic Publ. House, Bucharest, 2013, p. 95; B. Pătraşcu, I. Genoiu, "The Condițiile generale ale dreptului de a moşteni", in M. Uliescu (coord.), *Noul Cod civil. Studii şi comentarii*, vol. II, Universul Juridic Publ. House, Bucharest, 2013, p. 606; D.C. Florescu, *Dreptul succesoral*, Universul Juridic Publ. House, Bucharest, 2011, p. 26; L. Stănciulescu, *Moştenirea. Doctrină şi jurisprudență*, Hamangiu Publ. House, Bucharest, 2017, p. 73, D. Vaduva, *Moştenirea legală. Liberalitățile în noul Cod civil*, Universul Juridic Publ. House, Bucharest, 2012, p. 22.

right to inherit, including the inheritance reserve, because he has committed a serious deed, expressly prescribed by law, against the deceased or his successor. In the light of the old Civil Code[7], however, the causes of inheritance and legal status were different. According to art. 655 of the old Civil Code, the lack of succession was attributable to the following facts:

a) assault on the life of the person who leaves the inheritance;

b) the calumnious capital charge against the person who leaves the inheritance;

c) the failure to denounce the killing of the victim who has left the inheritance.

Considering the legal provisions governing the disqualification to succession under the old Civil Code, neither the literature of the time nor the present day was unanimous in affirming that the disqualification to succession has the legal nature of a civil sanction or civil punishment. Thus, as at present, there were different points of view: a majority[8], which considered that the disqualification to succession is a civil punishment, being directed mainly against the person, not his goods or acts; a minority[9] who prefers to classify the condition of inheritance as a civil penalty on the ground that the decision of the civil court to establish delinquency is only declarative, retroactive and not constitutive (as in the case of the revocation of the ingratitude donation).

As we have already shown, there are several points of view here as regards the legal nature of inheritance, an institution of inherited succession law, as follows: a point of view, which seems to be the majority, according to which the institution of civil law in question would present the legal nature of a civil sanction, while retaining the argument formulated since the 1864 Civil Code in force by the reputable Professor Francisc Deak and which I have indicated in the foregoing[10]; a point of view, which we also support, that the inheritance of inheritance would rather have the nature of a civil punishment; an intermediate point of view, according to which "the disqualification of law, operating under the law, has the character of a civil sanction, and the judicial indictment of a civil punishment as it requires a constitutive ruling of the civil court."[11]

As far as we are concerned, we tend to assume that the disqualification of succession is a civil punishment, a species of civil sanction. It has been shown by the doctrine[12] that civil sanctions mainly fulfil a repressive role, primarily targeting the patrimony of the sanctioned person and the fate of the legal acts concluded by it, being part of the category in question, for example the nullity of the civil legal act, the

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[7] Fr. Deak, *Tratat de drept succesoral,* Actami Publ. House, Bucharest, 1999, p. 65.

[8] In this respect, see M. Eliescu, *Moştenirea şi devoluțiunea ei în dreptul Republicii Socialiste România*, Academiei Publ. House, Bucharest, 1966, p. 73, 77; C. Stătescu, *Drept civil. Contractul de transport. Drepturile de creație intelectuală. Succesiunile*, Didactica si Pedagogica Publ. House, Bucharest, 1967, p. 115; St. Cărpenaru, *Dreptul de moştenire*, in "Drept civil. Contractele speciale. Dreptul de autor. Dreptul de moştenire" by Fr. Deak, St. Carpenaru, University of Bucharest Publ. House, 1983, p. 389; I. Zinveliu, *Dreptul la moştenire în Republica Socialistă România*, Dacia Publishing House, Cluj-Napoca, 1975, p. 17.

[9] Sustained, mainly by the professor Fr. Deak, *op. cit.,* p. 39 and the following.

[10] Fr. Deak, R. Popescu, *op. cit*., p. 95; D.C. Florescu, *op. cit*., p. 26; L. Stănciulescu, *op. cit*., p. 73, D. Văduva, *op. cit*., p. 22.

[11] C. Macovei, M.C. Dobrilă, „Cartea a IV-a. Despre moştenire şi liberalități", in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole,* C.H. Beck Publ. House, Bucharest, 2012, p. 1008-1009.

[12] C. Oprişan, *Sancțiunile în dreptul civil român – o posibilă sinteză*, in R.R.D. no. 11/1982, p. 11-12.

caducity of the legacy, the reduction of excessive liberalities, inability of the civil legal act, damages-interests, etc. However, civil penalties have a suppressive role, the purpose of which is to inhibit the instinct of the subject of civil law from infringing legal provisions, primarily targeting the person of the subject, even if in the alternative there are some legal effects and on the assets of the person or legal acts concluded by the person. Moreover, it is appreciated in the literature[13] that civil sanctions are transmissible, while civil punishments are, on the contrary, personal in nature and, consequently, inaccessible, non-transmissible. Specifically, civil punishments are the fact that they restrict or forbid a right, being likely to attract even public atrocities, blames from society. This happens, for example, in the case of the ingratitude of the donor or the legatee, the deprivation of parental rights, the forced acceptance of the inheritance, etc.

At least for these reasons, and without neglecting or, even less, denying the argument that the judgment of the civil court to establish delinquency is merely declarative, retroactive and not constitutive, we believe it is more appropriate to argue that the lack of knowledge the succession would rather have the legal nature of a civil punishment[14]. The designation of this successor law institution, the new regulation of which is inspired by the Québec Civil Code (Articles 620 and 621) and the French Civil Code (Articles 726 and 727), is to declare the successor who has committed one of the deeds (whether retroactively, from the date of the inheritance, if the deficiency was ascertained or declared after that moment) of the right to collect the inheritance, including the inheritance reserve, if any. As a result, the disqualification of succession mainly concerns the unworthy person, being removed from his inheritance. It is true that he will also be deprived of the salary he could have earned if he had not committed the deeds provided by art. 958-959 Civil Code and that, insofar as it has concluded certain legal acts in respect of the succession property, they will have to be considered in terms of their validity, and the situation may be abolished [art. 960 par. (3) Civil Code], but these effects are only secondary, subsidiary, in relation to the first, is *in personam*. Then, regarding the last two facts regulated by art. 959 par. (1) lit. b) and c) Civil Code, such as to attract judicial deficiency, as stated in the doctrine, a constitutive decision of the civil court is necessary[15].

However, the unworthy person can be forgiven by the author, under Art. 961 Civil Code, And could eventually gain from the inheritance the right conferred on him by the succession vocation, which he did not lose at all[16]. Indirectly, the unworthy person can acquire the inheritance to which it is unworthy, wholly or in part, depending on the vocation it has. Thus, for example, although the unworthy person, C is removed on the grounds of the inherited inheritance of his author, A, which is inherited by another successor, B, the unworthy one can acquire the goods in question as a result of B's

[13] C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligațiilor*, All Publ. House, Bucharest, 1994, p. 114.
[14] See in this regard, also D. Chirică, *Tratat de drept civil. Succesiunile şi liberalitățile,* C.H. Beck Publ. House, Bucharest, 2014, p. 23 and the following.
[15] C. Macovei, M.C. Dobrilă, *op. cit.,* p. 1008-1009.
[16] D. Chirică, *op. cit.,* p. 29. On the same author, „civil penalty of disqualification produces effects *in personam,* not *in rem*"; in *op. cit.,* p. 30.

inheritance, in which the latter precedes C, who fulfils the conditions to inherit him. This, since the deficiency has effects only on A's inheritance and does not remove C from other inheritances to which it satisfies the general and special conditions required by law.

And finally, one of the sources of inspiration of the Romanian legislator, animated by the intention to "revive" an almost inoperative inheritance right institution, with numerous shortcomings sanctioned by the ECHR[17], was the French Civil Code. In the French doctrine, the inheritance of inheritance is considered to be "une peine privée (...) non par interpretation de la volonté de défunt, mais par punition"[18].

2. Caducity – a fully preserved or partially reformed legal institution[19]?

Traditionally, in the general theory of civil law, caducity is considered to be "the cause of ineffectiveness consisting in depriving the legal act of any effects due to the occurrence of causes subsequent to its conclusion and independently of the will of the author of the act."[20] Contrary to the nullity, which is delimited for didactic reasons in all specialized papers, the caducity requires a valid legal act concluded, produces only *ex nunc* effects and is attracted by causes subsequent to the conclusion of the act and independent of the will of the author.

In the doctrine[21], can be found regarding caducity, no doubt a civil law sanction, and other relatively similar definitions, which also emphasize that it is attracted by the intervention of circumstances after the conclusion of the legal act, as the legator precedes the testator or the object left hanging is lost. So, most often, speaking of caducity, we think about legatee, for, as far as the Civil Code is concerned, both the now abrogated and the one in existence, list the causes of this civil sanction. It is true that we can talk about the caducity of other legal acts, such as the preciput clause[22] or the offer to contract[23].

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[17] We refer to the cause Velcea et Mazăre c. Roumanie, n° 64301/01 (Sect. 3) (fr) – (1.XII.09), published translated in romanian in O.M. no. 373/7 June 2010, as well as M.D. Bob, *Probleme de moşteniri în vechiul şi în noul Cod civil,* Hamangiu Publ. House, Bucharest, 2012, p. 103 and the following.

[18] Ph. Malaurie, L. Aynès, *Les successions. Les libéralités,* 3e édition, Defrénois, 2008, p. 43.

[19] Regarding the legal act's caducity, we are no longer interested in determining, as a matter of fact, the legal nature of a legal act, without even a civil law sanction, a cause of ineffectiveness of the civil legal act, but the validity of its definition to the doctrine, the aptitude of this definition to cover through its generality all the cases that attract it.

[20] Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil,* Universul Juridic Publ. House, Bucharest, 2001, p. 214.

[21] A. Cojocaru, *Drept civil. Partea generală,* Lumina Lex Publ. House, Bucharest, 2000, p. 276.

[22] It becomes obsolete when the spouses' property community ceases during their lifetime when the beneficiary's husband has died before a dispensable husband or when they have died at the same time or when the goods which have been the subject, have been sold at the request of the joint creditors [333 par. (4) Civil Code].

[23] The offer to contract shall lapse if: acceptance does not reach the bid within the prescribed time limit or, failing that, within a reasonable time; the recipient refuses it; the death or insolvency of the bidder occurs but only when the nature of the business or circumstances impose the obsolescence of the offer (Article 1195 Civil Code).

Therefore, at the level of succession law, caducity is considered to be a cause of ineffectiveness of the connection due to events, circumstances subsequent to the drawing of the will (thus distinguishing the nullity of the ultimate will), produced independently and even against the will of the testator (distinguished from this perspective of the voluntary revocation of the will/legatee), not determined or conditioned by the culprit of the legatee (can be delimited in this way by the judicial revocation of the legatee)[24]. All these differences were all valid under the old Civil Code, which, in art. 924 et seq., detained as the cause of the legatee's caducity the following: the death of the legatee; the legatee's inability to receive the inheritance; non-acceptance of the inheritance by the legatee; the total destruction of the inheritance.

Most succession law authors defined (and still do so) the caducity of the inheritance as the cause of ineffectiveness of the inheritance, due to circumstances subsequent to the making of the will, independent of the will of the testator and the legatee, and impeding the execution of the inheritance[25].

However, *de lege lata* (article 1071 Civil Code) the caducity of inheritance causes are the following:

a) the legatee is no longer alive at the date of the inheritance opening;

b) the legatee is incapable of receiving the inheritance, at the date of the inheritance opening;

c) the legatee is unworthy;

d) the legatee renounces the inheritance;

e) the legatee dies before fulfilling the suspensive condition that affects the inheritance if it was purely personal;

f) the property forming the object of the private inheritance has been totally lost for reasons beyond the will of the testator during the testator's life or before the fulfilment of the suspensive condition affecting the legatee.

To these causes are added the one provided by art. 1048 par. (1) first sentence Civil Code, according to which "The privileged will becomes obsolete 15 days from the date when the dispositor could have tested in any of the ordinary forms ...".

Considering in particular the provisions of art. 1071 letter c) Civil Code, we see ourselves to alleviate the traditional definition of caducity, as this sanction only intervenes because of circumstances *following* the valid conclusion of the legal act, since, as can be easily observed, the caducity of the bond can be attracted by the legatee unworthiness. In this case, we can not only talk about cases *following* the conclusion of the legal act. This, among other things, is likely to attract the caducity of the inheritance, according to Art. 958 and 959 Civil Code, as we have already pointed out, the commission against the deceased or other successor of a crime with the intention of killing, committing acts of physical or moral violence against the one who gives the inheritance or hindrance of the one who gives the inheritance to make the will. These facts can be committed either before or just before the will (which contains

[24] See in this regard, as an example, Fr. Deak, *op. cit.*, p. 282.

[25] For example: Fr. Deak, R. Popescu, *Tratat de drept succesoral*, third edition updated and completed, Vol. II. *Moştenirea testamentară*, Universul Juridic Publ. House, Bucharest, 2014, pp. 169-170; C. Macovei, M.C. Good, op. cit., p. 1104, etc.

the inheritance), so that we can no longer say that the circumstances giving rise to the caducity of a legal act falls, without exception, after its valid conclusion.

A second reconsideration of the definition of caducity relates to the appearance that the facts which attract it are not determined or conditioned by the culprit of the legatee. Or, in reality, we can not even imagine any of the unworthy deeds outside the culprit's fault. The Civil Code itself speaks of committing these unworthy acts with intent, in bad faith, or through violence.

In the light of all this, we can not doubt the need for reformulation, the reconsideration of the traditional definition of caducity. Maybe a satisfactory definition, at the civil law level, that we are interested in here is the following: caducity is the cause of ineffectiveness consisting in the absence of legal act of any effects due to the intervention of causes, in principle after its conclusion and independent by the will of the author of the act.

From the perspective of succession law, it may be appropriate for this legal institution to be defined as the cause of ineffectiveness of the inheritance which is in principle due to circumstances subsequent to the making of the will, as a rule independent of the will of the testator and of the legatee, and which prevents the execution of the inheritance[26].

3. Resolution and Termination – Civil Sanctions or Contractual Remedies?

As in the case of caducity, and in terms of resolutions and termination, the general theory of civil law was interested in defining and differentiating them from the nullity of the civil legal act in the context of the analysis of the issue for the latter civil sanction. The doctrine[27], starting from the provisions of art. 1021 of the Civil Code now abrogated, unanimously defined the resolution as the sanction consisting in the abolition of a reciprocal contract, with *uno ictu* execution, for the culpable non-fulfilment of the obligations of one of the parties. Correlatively, the termination was considered to be the sanction consisting in the abolition of a reciprocal contract with successive enforcement for the culpable non-performance of the obligations of one party. As a result, the two legal institutions were, as is currently the case, only separated from the perspective of the type of contract giving rise to unimpaired rights and obligations culpably committed by one of the parties: with one-time execution (*uno ictu),* respectively successive execution. Thus, between nullity and resolution, the following were identified as common points: both were civil sanctions, attracting the ineffectiveness of the legal act; both have retroactive effects; both were, in principle, judicial. The elements that differentiated the two civil sanctions were also revealed as follows: the nullity intervened for sanctioning the non-compliance with the conditions of validity of the legal act, while the resolution sanctioned the non-execution of one of the contractual obligations by one of the parties; the cause that gave rise to nullity was

[26] See, in this respect, I. Genoiu, *Drept civil. Succesiuni. Caiet de seminar*, 4th Edition, C.H. Beck Publ. House, Bucharest, 2019, pp. 203-204.
[27] For example, C. Stătescu, C. Bîrsan, *op. cit.,* p. 88; Gh. Beleiu, *op. cit.,* p. 213-214.

at the time of the conclusion of the legal act, while the one that determined the resolution arose later; the nullity was applicable to any category of legal acts, while the resolution concerned only the reciprocal contracts with a one-time execution; absolute nullity and relative nullity invoked by way of exception were not subject to extinctive prescription, whereas relative nullity invoked by action and resolution were subject to extinctive prescription.

Nearly the same elements of resemblance and difference between termination and nullity were identified; only that the termination concerned only the reciprocal contracts with successive execution and produced effects exclusively for the future, not discussing the past.[28]

After the entry into force of the new Civil Code which, in Part V "About Obligations", Section V, "Exercise of Obligations", Chapter II "Enforced Execution of Obligations", Section 5 "Resolution, termination and reduction of benefits", article 1549 et seq., regulates the resolution, termination and reduction of benefits, the authors concerned with the issue of the general theory of civil law continued to regard the resolution and termination as *sanctions* of civil law attributable to the *culpable* non-performance of the contractual obligations assumed by one of the parties[29].

At the level of the general theory of obligations, however, some authors[30] have not qualified the two civil law institutions that are of interest to us as specific effects of reciprocal[31] contracts, but substitutive contractual remedies, together with the reduction of benefits and damages. From the second category of contractual remedies, namely the *natural* ones, are the additional term of execution, forced execution in kind, rectification or correction of the execution, repair or replacement, the exception for non-performance of the contract. This is because the resolution and termination are considered to be the rights of the creditor in the event of non-performance of the obligations assumed by the contract, whether or not it is guilty. As a result, two of the major changes that the institutions involved here would suffer with the entry into force of the new Civil Code, from the point of view of their legal nature and their notion: their qualification as contractual remedies (not sanctions) and their intervention in the case of not performing (not necessarily violating) the obligations assumed by contract.

There are many aspects of resolution and termination and which deserve our attention.[32] In the present study, however, we will focus exclusively on the outline, the

[28] See also A. Cojocaru, *op. cit.,* p. 274-275.

[29] For example: G. Boroi, C. Al. Anghelescu, *op. cit.,* p. 238-240; E. Chelaru, *Teoria generală a dreptului civil în reglementarea NCC,* C.H. Beck Publ. House, Bucharest, 2014, p. 185-186.

[30] See, in this respect, L. Pop, I.F. Popa, St. I. Vidu, *Tratat elementar de drept civil. Obligațiile,* Universul Juridic Publ. House, Bucharest, 2012, p. 254 and the following.

[31] See, C. Stătescu, C. Bîrsan, *op. cit.,* p. 89.

[32] For example, *de lege lata*, resolution and termination may be lawful, may be ordered by the court on request (being judicial), may be declared unilaterally by the entitled party or may be conventional, based on the pacts of the commissioner. Under the old Civil Code, resolutions and terminations were, in principle, judicial, and the commissioners' pacts could exceptionally be taken. Also, *de lege lata*, in order to intervene, the non-fulfilment of the obligation must be significant, this conclusion being reached by the interpretation of the provisions of Art. 1551 par. (1) first sentence Civil Code. On the contrary, in the case of successive contracts, the creditor is entitled to termination, even if the non-execution is of minor importance, but has a repeated character (art. 1551 par. (1) second sentence Civil Code].

formulation of a definition of these, satisfactory from the perspective of the general theory of civil law. Supporters of the opinion of contractual remedies mainly invoke the provisions of art. 1549 par. (1) Civil Code, according to which "If he does not demand the forced execution of the contractual obligations, *the creditor is entitled* (s.n.: I.G., B.P.) to the rescission or, as the case may be, the termination of the contract, as well as the damages, if entitled". It therefore seems that the current Civil Code focuses on the rights of the creditor, the instruments, the legal levers which he has at his disposal in order to fulfil the obligations owed to him, on satisfying him in terms that best resemble the performance of the contract[33], rather than sanctioning the debtor, who guiltily fails to perform his obligations under the contract.

The Old Civil Code provided in Article 1021, second sentence that "The party in respect of which the engagement has not been enforced has the choice or force the other to execute the convention whenever possible, or to ask for its dissolution with damages." Therefore, this text of the law, the ground for rescission and termination, did not talk about the culpable non-execution of obligations by the debtor, and yet, the literature unanimously retained this element in their definition. From the perspective of the guilty or ineligible character of the non-fulfilment of the obligations, the provisions of article 1549 Civil Code, partially reproduced in the foregoing, must be corroborated with others of the same normative act. We refer, for example, to article 1516 Civil Code, bearing the indicative name "Rights of the creditor", which provides that the creditor may obtain, inter alia, the resolution or termination of the contract when the debtor fails to perform his obligation "without justification", that is, when the excusable causes of liability – force majeure, fortuitous case, exception for non-performance of the contract, actual act of the creditor or deed of a third party for which the creditor is not held responsible. As far as we are concerned, we believe that the expression "non-execution without justification" induces the fault of the debtor[34], which, according to article 1548 Civil Code, is presumed by the mere fact of non-execution (Article 1548 Civil Code). However, in Art. 1557 par. (2) Civil Code, states that "if the impossibility of performing the obligations is partial, the creditor may suspend the performance of his obligations or obtain the termination of the contract. In the latter case, the rules in the matter of resolutions are applicable accordingly." Therefore, the provisions of the Civil Code with an incidence in the matter that concerns us here are somewhat contradictory, permitting, we appreciate, the support of different points of view regarding the guilty or inexcusable nature of the non-fulfilment of the obligations assumed by the contract, the basis of the resolution or termination, all of which have textual arguments.

Regarding the legal nature of the two legal institutions, in their legal qualification, we should also consider, inter alia, the provisions of Article 1724 Civil Code, "The penalty for non-payment of the price", according to which "When the buyer has not paid, the seller is entitled to either the forced execution of the payment obligations or the rescission of the sale, as well as, in both cases, damages, is the case". Thus, the

[33] L. Pop, I.F. Popa, St. I. Vidu, *Curs de drept civil. Obligațiile,* Universul Juridic Publ. House, Bucharest, 2015, p. 119.

[34] See also Zamşa, "Rezoluțiunea, rezilierea şi reducerea prestațiilor" in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit*., pp. 1642-1643.

legislature itself is not consistent in its option, sometimes qualifying the resolution as a creditor's right, placing the latter in the centre of its concerns, and sometimes qualifying *expressis verbis* this legal institution, sanction, seemingly rather oriented to sanction the debtor who has not fulfilled his obligations. Then, article 1554 par. (1) Civil Code provides as follows: "The disbanded contract (s. n.: I.G., B.P.) by resolution is deemed never to have been concluded". As a result, the rescission and termination have the effect of cancelling – retroactively, respectively for the future of the contract – which means that they are causes of ineffectiveness of that manifestation of wills, such as nullity and, why not, sanctions of civil law.

If we tend to appreciate that it is justified (but not to the shelter of criticism) the non-observance of the guilty character of the non-fulfilment of the obligations in the definition of the resolution and the termination, there are some arguments of the text, which we have also pointed out in the preceding, in the classification of these institutions of law, we do not believe that the nature of legal punishment is far too foreign to them. It is, we appreciate, the argumentation of the authors who support the qualification of the resolution and termination as contractual remedies and, at the same time, conforms to the spirit of the modern legal regulations (which characterize the common law and the German system), but we believe that our legislator failed to make a detachment total of the old approaches, so there are some contradictory elements.

Finally, we consider that resolution and termination could be defined in the general theory of civil law as sanctions consisting in the abolition (retroactively or only for the future) of a reciprocal contract, with *uno ictu* execution, or, as the case may be, one with successive execution, for non-fulfilment of the obligations of one of the parties.

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PARTICULARITIES OF DISCIPLINARY LEARNING OF TEACHING STAFF IN SUPERIOR EDUCATION

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Abstract: *Disciplinary liability is an important legal institution of labor law. Both Framework Law no. 53/2003 (Labor Code)[1] and other special normative acts (eg Law 188/1999 on the Civil Servants' Statute[2]) pay due attention (by separate legal norms) to this form of liability. Employee quality (of an employee or civil servant, etc.) implies a number of obligations, including the observance of the labor discipline[3]. Disciplinary liability – a form of legal liability – occurs when the employee commits a disciplinary offense, that is to say, an unlawful act consisting of failure to observe his / her duties, violation of order and discipline at the workplace[4].*

Keywords: *liability, employee, employer, disciplinary offense, disciplinary liability.*

In accordance with Art. 291 of the national education law, the staff of higher education consists of teaching staff and non-teaching staff. The teaching staff consists of teaching / research teaching staff, auxiliary teaching / research staff from universities, university libraries and university central libraries. Teaching and research staff means staff legally holding one of the academic or research degrees prescribed by law, which belongs to a higher education institution and conducts didactic and / or research activities.

The research and development functions of the universities and their staff are subject to the provisions of Law no. 319/2003 on the status of research and development staff[5].

Teaching staff in higher education is disciplined for violation of their duties under the individual employment contract, as well as for violation of rules of conduct that harm the education / prestige of the unit / institution.

The rules of conduct are set out in the University Charter, without prejudice to the right to opinion, freedom of expression and academic freedom. From a disciplinary point of view, the employer has the right to apply, according to the law, disciplinary sanctions to his employees whenever he finds that they have committed a disciplinary offense.

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[1] Published in: Official Monitoring No. 345 of May 18, 2011. Republished on the basis of art. V of Law no. 40/2011 for amending and completing the Law no. 53/2003 – Labor Code, published in the Official Gazette of Romania, Part I, no. 225 of 31 March 2011, giving the texts a new numbering.

[2] Published in: Official Monitoring No. 365 of May 29, 2007. Republished on the basis of art. III of Law no. 251/2006 for amending and completing the Law no. 188/1999 on the Statute of civil servants, published in the Official Gazette of Romania, Part I, no. 574 of July 4, 2006, giving the texts a new numbering.

[3] art. 39 par. (2) lit. b) of the Labor Code; art. 43-45 of the Law no. 188/1999.

[4] TICLEA, Alexandru, Disciplinary Responsibility, Universul Juridic Publishing House, Bucharest, 2014, p.18.

[5] Published in: Official Monitoring No. 530 of 23 July 2003.

Disciplinary offense is a work-related act consisting of an action or omission committed by the employee by which he has breached the rules of law, the internal regulation, the individual employment contract or the applicable collective labor contract, the orders and the provisions legal hierarchical leaders. In this sense, Article 312 of the National Education Act stipulates that "Teaching and research staff, teaching and research staff, as well as the leading, guidance and control staff in higher education shall be disciplinary in respect of the violation of their duties according to the individual labor contract, as well as for violation of the norms of behavior that damages the education / prestige of the unit / institution.

The rules of conduct are set out in the University Charter, without prejudice to the right to opinion, freedom of expression and academic freedom.

At the same time, art. 315 of the national education law stipulates "The patrimonial responsibility of teaching staff, research and auxiliary teaching staff shall be determined according to labor law.

Measures for the recovery of damages and damages shall be taken according to labor law. Disciplinary liability, as a form of legal liability, occurs when the employee commits a disciplinary offense, that is to say, an unlawful act consisting of failure to observe his or her duties, violation of order and discipline at the workplace[6].

Article 264 paragraph 2 of the Labor Code stipulates that if a special sanctioning regime is established by professional statutes approved by special law, it shall be applied.

The Law on National Education regulates the structure, functions, organization and functioning of the national state, private and confessional education system.

The mission assumed by the law is to educate the mental infrastructure of the Romanian society in accordance with the new requirements deriving from the status of Romania as a member of the European Union and from the functioning in the context of globalization and the sustainable generation of human resources highly competitive national, able to function effectively in today's and future society.

The teaching staff comprises the persons in the education system responsible for training and education. The category of teaching staff may include persons who meet the conditions of study prescribed by law, who have the ability to exercise their rights in full, a moral conduct conforming to professional ethics and are medically and psychologically apt to perform their duties.

Legal provisions on the disciplinary liability of teaching staff in higher education can be found in Law no.1 / 2011 of January 5, 2011, the Law on National Education[7]; Law No.206 of 27 May 2004 on good conduct in scientific research, technological development and innovation[8] and Law No.319 of 8 July 2003 on the status of research and development staff[9].

Also, for the deviations from good conduct in research and development, the disciplinary sanctions stipulated in the Code of Ethics and Professional Ethics of R & D personnel, as well as the sanctions provided by the Law no. 64/1991 on patents for

[6] Ticlea, Alexandru, *Disciplinary Responsibility*, Universul Juridic Publishing House, Bucharest, 2014, p.18.
[7] published in the Official Gazette of Romania, Part I, no. 18 of 10 January 2011.
[8] published in the Official Gazette no. 505 of 4 June 200.
[9] published in the Official Gazette no. 530 of 23 July 2003.

invention, republished[10], as subsequently amended, in the Law no. 129/1992 on the protection of industrial designs, republished[11] and in the Law no.8 / 1996 on copyright and related rights, as subsequently amended and supplemented[12]. The disciplinary sanctions that may apply to teaching and research staff are as follows:

a) written warning;

b) reduction of basic salary, cumulative, where appropriate, with management, mentoring and control allowance;

c) suspended, for a limited period of time, the right to enroll in a competition for a higher teaching position or a management, mentoring and control position as a member of doctoral, master or license boards;

d) dismissal from the management position in education;

e) Disciplinary dissolution of the employment contract

In the higher education institutions, the proposal for disciplinary sanction is made by the head of department or unit of research, design, microproduction by the dean or rector or at least 2/3 of the total number of the members of the department, faculty council or senate university, as appropriate. They act upon a received notification or self-report in the case of a directly detected offense. The dean or rector, as the case may be, enforces disciplinary sanctions.

In higher education, sanctions shall be communicated in writing to teaching and research staff, as well as to auxiliary teaching and research staff from the institution's human resources service. The disciplinary sanction applies only after the investigation of the offense, the hearing of the person concerned and the verification of the defense made by him.

In order to investigate the disciplinary deviations committed by the teaching staff, the research staff or the administrative staff, analytical committees consisting of 3-5 members, teachers having at least the same teaching function as the one who committed the deviation and a representative of the trade union organization.

Analysis committees are appointed, as appropriate, by:

a) Rector, with the approval of the university senate;

b) the Ministry of Education, Research, Youth and Sport, for the senior management of the higher education institutions and for solving the complaints regarding the decisions of the university senates.

If the disciplinary sanctioned person did not commit disciplinary irregularities within one year after the sanction, improving his / her activity and behavior, the authority that applied the disciplinary sanction may order the lifting and deletion of the sanction by making the appropriate mention in the personal state service of the person concerned.

Any person may refer the educational establishment / institution to commit an act that may constitute disciplinary offense. The referral shall be in writing and shall be recorded at the registration of the educational establishment / institution.

[10] republished in the Official Gazette of Romania, Part I, no. 752 of 15 October 2002.
[11] republished in the Official Gazette of Romania, Part I, no. 193 of 26 March 2003.
[12] republished under art. III of Law no. 74/2018 for amending and completing the Law no. 8/1996 on copyright and neighboring rights, published in the Official Gazette of Romania, Part I, no. 268 of March 27, 2018, giving the texts a new numbering.

The right of the disciplined person to address the courts is guaranteed.

The law on national education also regulates the situation in which teaching and research staff and teaching and research staff can be sanctioned by the university ethics committee for violating university ethics or for deviating from good conduct in scientific research. In the case of deviations from the provisions of the Code of Ethics and Professional Ethics, the ethics committee establishes, according to the Code of Ethics and Professional Ethics, one or more of the sanctions provided by the law.

If the violations of the Code of Ethics penalties applicable under national education law and if deviations are on good scientific research, academic ethics committee established under Law no. 206/2004, as amended and supplemented[13], code of ethics and professional conduct of research and development personnel and code of ethics and professional conduct one or more of the sanctions provided by the law. The sanctions laid down by the ethics and university deontology committee are implemented by the Dean or the Rector, as the case may be, within 30 days of the setting of the sanctions. National Council of Ethics for Research, Technological Development and Innovation examines cases concerning violation of good conduct R & D, following complaints or own initiative, and issue decisions by establishing guilt or innocence of the person or persons concerned; in cases of convictions, the decisions also determine the sanctions to be applied, according to the law. The National Ethics Council for Scientific Research, Technological Development and Innovation keeps the identity of the person making the referral confidential. Decisions of the National Council for Ethics of Scientific Research, Technological Development and Innovation are endorsed by the Legal Directorate of the Ministry of Education, Research, Youth and Sport. The Ministry of Education, Research, Youth and Sport has the legal responsibility for the decisions of the National Council for Ethics of Scientific Research, Technological Development and Innovation.

For the deviations from good conduct in research and development of staff in higher education institutions, ascertained and proven, the National Council for Ethics of Scientific Research, Technological Development and Innovation determines the application of one or more of the following sanctions:

a) written warning;

b) withdrawing and / or correcting all published works in violation of the rules of good conduct;

c) withdrawing the academic degree or degree of research or relegation;

d) dismissal from the position of senior management in the higher education institution;

e) Disciplinary dissolution of the employment contract;

f) prohibiting, for a determined period of time, access to public funding for research and development.

It is forbidden to occupy teaching and research positions by persons who have been found to have committed serious misconduct to good conduct in scientific research and academic activity, established by law.

[13] Published in the Official Gazette no. 505 of 4 June 2004.

Also, the competition for a didactic or research post is canceled, and the employment contract with the university ceases as a law, regardless of the moment when it has been proved that a person has committed serious deviations from good conduct in scientific research and university activity. The finding of deviations is made by the National Ethics Council for Scientific Research, Technological Development and Innovation, according to the law.

Finally, Article 36b (b) of the National Education Act regulates a special form of contravention liability in the sense that *"non-compliance with the provisions of Art. 143 para. (5) with a fine from 5,000 lei to 50,000 lei."* And art.143 paragraph 5" It is forbidden to sell scientific papers in order to facilitate the buyer's falsification of the quality of author of a bachelor's, diploma, dissertation or doctorate."

The active subject of this form of contravention liability can be both higher education and non-tertiary staff.

Teaching staff in higher education is disciplined for violation of their duties under the individual employment contract, as well as for violation of rules of conduct that harm the education / prestige of the unit / institution.

In higher education institutions the teaching functions are:

a) university assistant;

b) university lecturer / chief of works;

c) university lecturer;

d) university professor.

In higher education institutions research functions are:

a) research assistant;

b) scientific researcher;

c) third degree scientific researcher;

d) second degree scientific researcher;

e) 1st degree scientific researcher

Disciplinary sanctions that may apply to higher education staff can be classified according to several criteria, as follows:

I. According to the criterion of the normative act that provides them, we have:

A. Disciplinary sanctions provided by the law of national education:

1. Disciplinary sanctions that can be applied to teaching and research staff, for violation of their duties under the individual labor contract, and for violation of norms of conduct harmful to the interest of education / prestige of the unit / institution[14], which are:

a) written warning;

b) reduction of basic salary, cumulative, where appropriate, with management, mentoring and control allowance;

c) suspended, for a limited period of time, the right to enroll in a competition for a higher teaching position or a management, mentoring and control position as a member of doctoral, master or license boards;

d) dismissal from the management position in education;

[14] Provided by Article 312 (2) of the National Education Act.

e) Disciplinary dissolution of the employment contract.

2. Disciplinary sanctions to be applied to teaching and research staff and to teaching and research staff, for violation of university ethics or for deviations from good conduct in scientific research[15], which are the same as set out in Article 312 (2).

3. Disciplinary sanctions to be applied for deviations from the provisions of the Code of Ethics and Professional Ethics[16]. These can apply to both teaching staff and PhD students and students. 4. Disciplinary sanctions to be applied for deviations from good conduct in scientific research[17].

5. Disciplinary sanctions to be applied for deviations from good conduct in research and development by the staff of higher education institutions, which are:

a) written warning;

b) withdrawing and / or correcting all published works in violation of the rules of good conduct;

c) withdrawing the academic degree or degree of research or relegation;

d) dismissal from the position of senior management in the higher education institution;

e) Disciplinary dissolution of the employment contract;

f) the prohibition for a determined period of access to public funding for research and development.

B. Disciplinary sanctions provided by law no. 319 of 8 July 2003 on the Status of Research and Development Staff and by Law no. 206 of 27 May 2004 on good conduct in scientific research, technological development and innovation

In accordance with the provisions of the aforementioned normative acts, they apply to R & D personnel operating within the national R & D system, within other organizational structures with state, private or mixed capital, of public institutions, as well as in associative forms or individually. The activity in the planned research and development structures is carried out by the following categories of staff[18]:

a) research and development personnel;

b) university teachers;

c) auxiliary personnel from the research-development activity;

d) personnel from the functional device.

University teaching staff can act as research associate staff in their R & D institutions, units, or structures to participate in the management and execution of R & D programs and projects, and to capitalize on their results. Also, academic staff may conclude fixed-term scientific cooperation and technology agreements or conventions with their R & D institutions, units or structures to participate in the coordination and

[15] Provided by Article 318 of the National Education Act.
[16] Provided by Art.318 and Art.319 of the National Education Act.
[17] These are those provided by art.318 and art.319 of the national education law and can be applied to both teaching staff and doctoral students and students.
[18] Art. 6 of the Law no.319 / 2003.

execution of research and development programs and projects in National plan or sectoral research and development plans[19].

The sanctions provided by the two normative acts are:

I. Disciplinary sanctions for deviations found from good conduct in the research-development activity, which can also be applied to the teaching staff:

a) written warning;

b) Withdrawal and / or correction of all published works in violation of the rules of good conduct;

c) withdrawing the academic degree or degree of research or relegation;

d) dismissal from the management position of the research-development institution;

e) Disciplinary dissolution of the employment contract;

f) prohibition, for a determined period of time, of access to financing from public funds dedicated to research and development;

g) Suspension, for a fixed period of time between 1 year and 10 years, of the right to enroll in a competition for a higher position or a management, guidance and control function or as a member of the competition commissions;

h) removal of the person (s) from the project team;

i) stopping project funding;

j) stopping the financing of the project, with the obligation to return the funds.

II. By the criterion of the person / authority to identify / distinguish them:

1. Disciplinary sanctions found by faculty councils or university senates[20].

2. Disciplinary sanctions found by the university ethics committee or ethics committees within the units and institutions of the national R & D system[21]

3. Disciplinary sanctions set by the National Ethics Council for Scientific Research, Technological Development and Innovation

III. According to the criterion of the person / competent authority to apply them, we distinguish: 1. Disciplinary sanctions applied by the dean or rector

2. Disciplinary sanctions applied by the National Council of Ethics for Scientific Research, Technological Development and Innovation

3. The Ministry of Education, Research, Youth and Sport, the President of the National Authority for Scientific Research, the National Council for Attestation of Titles, Diplomas and Certificates, the heads of the Contracting Authorities that provide financing from public funds for research and development, higher education or research-development units.

[19] Adoptat prin H.G.nr. 556 din 7 iunie 2001privind reactualizarea Planului național pentru cercetare-dezvoltare şi inovare.

[20] consisting of analytical committees with 3-5 members, teachers having at least the same teaching function as the one who committed the offense and a representative of the trade union organization.

[21] According to art.318 from the law of national education and art.9 of the law no.206 / 2004.

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5. Law no. 53 of 24 January 2003, republished, Labor Code. Published in the Official Gazette no. 345 of May 18, 2011. Republished on the basis of art. V of Law no. 40/2011 for amending and completing the Law no. 53/2003 – Labor Code, published in the Official Gazette of Romania, Part I, no. 225 of 31 March 2011, giving the texts a new numbering. Law no. 53/2003 – The Labor Code was published in the Official Gazette of Romania, Part I, no. 72 of 5 February 2003.
6. Law no. 319 of 8 July 2003 on the Statute of Research and Development Staff, published in the Official Gazette no. 530 of 23 July 2003.

THE CONTRIBUTION OF HUMAN RESOURCES WITHIN PUBLIC ADMINISTRATION ON PUBLIC PROCUREMENT PROCESS

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Abstract: *Contracting authorities defined under Law 98/2016 on public procurement*[1] *are directly responsible for making public procurement and quality. In order to carry out public procurement, the contracting authorities set up a specialized internal compartment consisting of at least three persons, two thirds with higher education, and specializations in the field of procurement. To the extent that the organizational structure does not allow this, the main tasks*[2] *shall be performed by other persons designated by an administrative act of the head of the contracting authority. The lack of a profession or the passing of professional stages in the field of public procurement in Romania, an inadequate reputation in relation to the complexity of the work done by the staff responsible for public procurement, are problems that have not been resolved and lead to fluctuations of staff. The field of public procurement continues to be a challenge, although progress has been made in terms of the functionality of the Romanian public procurement system by transposing the new European directives into national legislation.*

Keywords*: human resource, normative acts, professionalization, public procurement, contracting authority, evaluation commission.*

1. The role of human resources in public procurement procedures. Why human capital and public procurement?

Human capital is the biggest asset for organizations, as well as the greatest expense. Human capital is a matter of human resources, as is the problem of public procurement; these two departments have become more complicated than ever. Not only do they have human capital in common, but also indirect services that are purchased are related to human resources. As such, these two functions should collaborate; strategize on this complex but important resource in order to achieve maximum value. Public procurement specialists build a harmonious relationship is to

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[1] Law no. 98/2016 on public procurement, Section 3, Contracting Authority, Article 4, published in the Official Gazette, Part I no. 390 of May 23, 2016.
[2] H.G. 395/2016, the meteorological norms for the application of the provisions regarding the award of the public procurement contract / framework agreement in the Public Procurement Law 98/2016, Chapter I General and organizational provisions, Section I General Provisions, article 2, published in the Official Gazette, Part I no. 423 of June 6, 2016.

divide work and set defined and specific roles and responsibilities in a way that best uses professional skills by correctly applying existing legislation on public procurement, of public procurement, apply principles in elaborating the requirements for selection and elaboration of the specifications; draw up the public tender dossier; performs specific public procurement procedures; manage appeals in the award procedure; assess offers submitted; assigns the public acquisition contract;

Regardless of the nature of public procurement procedures, they are complex and involve complex, legal issues, complex and complicated, legal, financial or technical issues. Therefore, the legislator ordered by art. Article 73 (1) first sentence of the H.G. no. 925/2006, with subsequent modifications and completions, offering contracting authorities the possibility to call on specialists, called co-opted experts.

Professionals or procurement cooption experts are responsible for verifying and evaluating technical proposals; analysis of the financial situation of the bidders / candidates or financial analysis of the effects that certain elements of the offer or contractual clauses proposed by the bidder may determine; an analysis of the legal effects that certain elements of the offer or certain contractual clauses proposed by the bidder may determine.

2. Elements of the public procurement system

Public procurement plays a decisive role in the member states' economies, estimated at over 16% of the Union's GDP. In fact, public procurement has become the key to improving society, being an indispensable activity, and its success is essential to any organization.

The public procurement system reflects a part of the economic, technical, juridical reality of the society with the main purpose of satisfying the public interest, respectively the development and improvement of the community's living environment. Within this system the regulatory authority, contracting authorities, economic operators, procurement system supervisors are distinguished as the main components.

The National Agency for Public Procurement (ANAP) established by O.U.G. no. 13/2015 regarding the establishment, organization and functioning of the National Agency for Public Procurement, took over the attributions, activity, posts and staff from the National Authority for Regulation and Monitoring of Public Procurement (ANRMAP), from the Unit for Coordination and Verification of Public Acquisitions (UCVAP) the Ministry of Public Finance and the Public Procurement Review Departments of the Regional Directorates-General for Public Finance.

Any situation for which there is no clear, explicit regulation is interpreted in terms of principles. The process of applying procurement procedures cannot be carried out without respecting the seven principles: non-discrimination, equal treatment, mutual recognition, transparency, proportionality, efficiency of the use of funds, assuming responsibility. The acquisition process is characterized by the establishment and application of rules, requirements, identical criteria for all economic operators, acceptance of products, services, works offered on the European Union market,

recognition of diplomas, certificates issued by the authorities of the EU Member States and specifications technical requirements equivalent to those requested at national level.

To inform the public of all information on the application of award procedures, contracting authorities are required to publish, at least in the SICAP, the notice of intent (if applicable),the contract notice /invitation to tender and the award notice. The provisions of the Law no.544 / 2001 regarding the free access to public information are subject to the entire procurement file except for the data in the offer that the economic operators have declared as intellectual property or commercial secret.

The new Electronic Public Procurement System, developed within the framework of the collaborative Information System for SICAP, was an IT project funded by European funds launched by the Agency for the Digital Agenda of Romania – AADR. Implementation of the SICAP platform has led to a way to search for real-time information, using multiple search filters, an extensive service of reports and statistics that provides an overview of all purchases over a given period of time. Generated reports can be exported in editable formats so they can be processed and interpreted. The new procurement system has been harmonized with the requirements of the legal forms for the submission of notices to the Official Journal of the European Union (JOUE), with the requirements of the ex-ante verification activity and is integrated with key public procurement institutions such as the National Agency for Public Procurement (ANAP), the National Council for Settlement of Complaints (CNSC), the Court of Accounts, the National Integrity Agency (ANI).

By Government Emergency Ordinance no. 114/2018 on the introduction of measures in the field of public investments and fiscal-budgetary measures, the amendment and completion of some normative acts and the extension of some deadlines introduced the notion of voluntary ex-ante control, defined as the control over the quality aspects and aspects regularity, at the request of the contracting authority. Under the new regulation, ex-ante control is carried out at the request of the contracting authority on the basis of checklists.

3. Stages of the public acquisition process

For the health sector there is a central purchasing unit, established by Government Ordinance no.71 / 2012, as a necessity to balance the ratio between the revenues allocated to the health system and the expenditures made for the obtaining of quality products at lower prices but and due to the fact that the centralized purchasing system is used by several European countries that have achieved significant price cuts of around 10-30%.

At present, public procurement is carried out in a decentralized system by thousands of contracting authorities. At local government level, some officials have the exclusive responsibility of organizing public procurement procedures while other officials perform other activities, engaging in the public procurement process being minimal and only becoming active when needed.

At the national level, all contracting authorities have a department / department responsible for conducting public procurement procedures.

The professional training of the staff of the contracting authority is different (engineers, economists, lawyers), therefore the knowledge of public procurement is acquired as a result of the activities carried out over the years and not as a result of specialized studies in the field.

Public procurement is a multidisciplinary field, which is why there is a continuing need for specialized training in public procurement but also the need for national training programs for contracting authorities.

Training from a key task in this function has become limited to the organization of informative conferences and seminars with the exposure of the legislative framework.

Specialty studies in the field of public procurement are short-term courses ranging from 4 to 8 days.

These training courses are designed according to the Occupational Standard for Occupation of Expert Procurement Code COR 241940 as amended from 2012 onwards in COR code 214946. According to the standard, the occupation of public procurement expert is a new occupation necessary for the correct and consistent application of all legal provisions regarding the awarding of public procurement contracts and / or framework agreements by the contracting authority.

The standard provides for an Expert in Public Procurement to have specialized technical or economical-financial background or legal training, obtained by graduating from a long or short-term higher education degree with a Bachelor's degree, as well as knowledge of computer use, communication inter-human and negotiation to enable him to meet all the requirements of this occupation.

As the economic and legal field has a clear and explicit impact on the field of public procurement through the formulation of technical training, it is still to be understood that the graduation of a higher technical education form, in the end being accepted any kind of graduate of technical, or legal, hence the need to professionalize this function.

The public procurement process is carried out through a succession of stages. In the case of award procedures governed by Law 98/2016[3] concerning the public acquisitions authorities carry out the procurement through the stage of planning / preparation of the procedure, the stage of organizing the contract award / framework agreement procedure, the post-award / the framework agreement stage and the implementation and monitoring of the implementation of the contract.

The procurement process portfolio planning stage, the coordination of the award procedures, the monitoring of the implementation of the annual procurement plan are the responsibility of the specialized internal compartment. The initiation of the procurement process is done by identifying the needs and preparing the necessity report, sending it to the internal department specialized in public procurement.

The procedure for the organization of the procedure and the award of the contract / framework agreement begins with the publication of the award documentation in the

[3] Law no. 98/2016 on public procurement, published in the Official Gazette no. 390 / 23.05.2016, art.7 par. (5) letter a) open tender, letter. b) restricted tender, letter c) competitive bargaining, letter. e) partnership for innovation, letter. f) negotiation without prior publication, letter. g) contest of solutions, letter .h) award procedure applicable to social services and other specific services, letter. i) simplified procedure.

SEPA / SICAC (Public Procurement System) and ends with the entry into force of the public procurement / framework agreement. The main internal and external factors involved are the internal compartments of the contracting authority, the National Agency for Public Procurement (NAPA), procurement providers, economic operators interested in participating in the procurement procedure, the National Council for Settlement of Complaints (CNSC) competent court.

When the contract / framework agreement enters into force, the post-contract award stage begins. The contract management aims at obtaining products, services or works according to the quality / performance levels required by the specification within the limits of the approved funds and the time periods assumed by the contract.

4. Objectives, attributions, obligations

The National Strategy for Public Procurement approved by GD no. 901/2015 highlights the need to strengthen the administrative capacity of contracting authorities[4]. It is worth mentioning at the level of 2015 the existence of more than 15,000 contracting authorities, of which an average of 7300 authorities carried out public procurement during the period 2007-2014.

The size of the quality of the procurement process is largely affected by the shortcomings faced by contracting authorities in the maintenance of human resources. Therefore, vocational training must be done as a correlation between the learning process itself and the work process, acting both to ensure that everyone with a greater volume of specialist knowledge and to develop practical working skills. The lack of technical capacity and abilities at the level of contracting authorities in the initial stages of the procurement process such as identification of needs, preparation of award documentation, evaluation of tenders and project implementation lead to the submission of complaints.

Between 01 January and 31 December 2017, according to the activity report of the National Council for Solving Complaints (CNSC), 4,782 files were made by the economic operators. The report shows that compared to 2017, there was an increase in the number of complaints made in the awarding documentation (+ 55.53%) and the number of complaints regarding the outcome of the award procedure (+ 62.30%).The increase in the number of complaints occurred amid an increase (+ 47.62%) in the number of procedures initiated in the Electronic Procurement System.

From the analysis of the object of the complaints formulated in 2017 against the requirements imposed in the awarding documents, it was found that the names of the technologies, products, brands, manufacturers (148), the restrictive requirements on the similar experience, qualification criteria, technical specifications (224).

In the appeals against the outcome of the procedure, it was noted that the most often contested were the rejection of bids submitted by economic operators as non-conforming or unacceptable (2460).

[4] H.G. no. 901/2015 regarding the national strategy in the field of public procurement published in the Official Gazette no. 881 of November 25, 2015.

The campaign for the professionalization of the public procurement specialists as a measure envisaged in the National Strategy is initiated by the National Agency for Public Procurement (ANAP) starting with 2015 through numerous interactive meetings.

During these meetings clarifications were requested regarding the lack of specialized personnel to fill in the tender dossiers, the remuneration of specialists in this field according to the responsibilities as well as the lack of professional insurances.

Simultaneously with the organization of regional meetings, each contracting authority was notified electronically by the National Agency for Public Procurement (ANAP) with a view to completing the Questionnaire on the analysis of the staff with attributions in the field of public procurement. Completing the questionnaire has led to the development of a national database containing information on the number of people, their professional qualifications and their attributions.

Based on the data obtained and centralized, 5791 questionnaires were completed in January 2016,of which 18% have exclusive attributions in the field of public procurement, and 5% have secondary education, 8% have higher education short-term and 87% have long-term higher education.

The ex-ante control function of the public procurement award process is carried out by a specialized structure within the National Agency for Public Procurement, organized at central and territorial level, called General Ex-ante Control Directorate. Ex ante control is carried out on the basis of checklists, selectively and on the basis of a selection methodology.

By the end of 2017, the European Commission has recommended a package of public procurement measures, including, as a matter of priority, the professionalism of public procurement staff. By European Commission Recommendation (EU) 2017/1805 of 3 October 2017 on the professionalization of public procurement, this objective is necessary as a global improvement of the whole range of professional competences and abilities, knowledge and experience of persons who carry out or who participate in the procurement tasks. It is recommended to develop long-term strategies in coordination with other policies across the public sector to address all participants involved in the public procurement process. At national level, it is necessary to identify and define the reference situation of the abilities and components to be studied, taking into account the multidisciplinary character of the public procurement projects.

In the same direction, one of the objectives of the General Directorate for Policies, Strategy and Projects of the National Agency for Public Procurement for the year 2019 is the approval of the draft of the Public Procurement Plan 2019-2023.

5. Procedures for the award of public procurement contracts

Procedures for the award of public / sectoral procurement contracts initiated in 2018 by publishing a notice of participation on the Law no. 98/2016, Law no. 99/2016, Law no. 100/2016 and GEO no. 114/2011 within the Electronic Public Procurement System (SEAP).

Through the contract award procedure under SEAP, a percentage of 35,354% was recorded for 2018, which was awarded through the competitive procedure with negotiation, non-negotiation, restricted bidding, accelerated open bidding, bidding, competitive dialogue. The award procedure was based on the types of contracts as follows: 15,086% supply, works 10,173%, services 10,095%.Within the awarding procedures there are two ways of awarding and running.

The awarding of public procurement procedures was carried out through public procurement contracts 28,477%, the conclusion of a framework agreement of 6,876%, dynamic purchasing system (ADS), 1%.

The manner of conducting public procurement procedures was online 35,122% offline and 0,232% offline.

6. Conclusions

The present work is an analysis of the involvement of human capital in the procurement process, provides a progress of objects in public procurement and reduce the number of appeals, the need for staff training, the need to establish new institutions, the need for structural change within existing public institutions.

The efforts made to implement the new legal framework should be noticed and attention those were analyzed and identified hurdles procedural ones in terms of human resources, the technical and financially by the National Agency for Public Procurement (PPA).

Intelligent management of public procurement requires good organization, well-trained staff with a wealth of skills. These include both public procurement and managerial skills. The need for such competencies will be more evident in the case of complex public acquisitions that are novel to the contracting authority, especially when an innovative acquisition requires organizational change. Communication between procurement staff, financial planners and decision-makers is essential. If there is good communication, economies of scale and innovative features can be exploited in a decentralized system through co-operation and coordination.

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DOES INHERITANCE DISQUALIFICATION OPERATE ALSO IN THE CASE OF COMMITTING A CRIME OF MURDER AT THE REQUEST OF THE VICTIM?

Nicolae GRĂDINARU[*]

Abstract: *Inheritance disqualification is basically a personal civil sanction with personal characteristic (applies only to the perpetrator of the act prescribed by law) that removes a natural person from the inheritance in cases stipulated by law.*

Disqualification is the decline in the succession of the individual, and has the effect of removing the legal or testament successor from the inheritance.

Disqualification of the legal successor is found only by the court. It operates by law, it is found by the court at the request of any interested party or ex officio, but in order to avoid the processes by which disqualification is found, the successor can renounce the inheritance.

Keywords: *disqualification, civil sanction, intent, inheritance disqualification.*

1. Introduction.

For a person to come and collect the legacy or testamentary legacy he must not be unworthy to inherit.

Inheritance disqualification is basically a personal civil sanction (applies only to the perpetrator of the act prescribed by law) which removes a natural person from inheritance in cases provided for by law.

Inheritance disqualification is the decline in the succession of the individual, and has the effect of removing this legal or testament successor from the inheritance.

According to Article 960 of the Civil Code, the unworthy is removed from both the legal and the testamentary inheritance.

Legal characteristics:

– disqualification removes the successor from both the natural legacy and the testamentary legacy.

– disqualification operates by law, but it can also be ascertained by the court, meaning, it is by court decision.

– the effects of disqualification may be removed by the person who leaves the inheritance by will or other authentic written document by the public notary.

– disqualification is a sanction of civil law, producing effects only on the one who committed the act.

– the perpetrator of the deed should have had discernment at the time of committing the deed in order to have the form of guilt required by law, that is, intent.

Inheritance disqualification can be lawful and judicial.

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2. Lawful inheritance disqualification.

The lawful inheritance disqualification is found only by the court. It works by law, it is found by the court at the request of any interested person or ex officio, but in order to avoid the processes by which to find the disqualification, the successor can renounce the inheritance

According to Article 958 of the Civil Code, is legally unqualified to inherit:

a) the person convicted for the commission of a crime with the intention of killing the person who leaves the inheritance.

Killing without intent is not a reason to punish successively with dearth;

b) a person convicted of committing an offense with the intention of killing another successor before the inheritance, which, if the inheritance had been opened at the date of the act, would have removed or restricted the vocation to the inheritance of the perpetrator.

If the conviction for the said deeds is prevented by the death of the perpetrator, by amnesty or by the prescription of criminal liability, disqualification shall operate if those deeds have been established by a final civil judicial decision.

Legal disqualification can be ascertained at any time, at the request of any interested party or ex officio by the court or by the public notary, on the basis of a court judgment resulting in disqualification.

3. Judicial inheritance disqualification.

This disqualification is pronounced by the court that declares the natural person unworthy to inherit in the cases provided by art.959 of the Civil Code. Thus, can be declared unworthy to inherit:

a) the person convicted of intentionally committing, against the person who leaves the inheritance, of serious acts of violence, physical or moral, or, as the case may be, of deeds that resulted in the death of the victim;

b) the person who, in bad faith, has hidden, altered, destroyed or falsified the will of the deceased;

c) the person who, through dowry or violence, has prevented the person who leaves the inheritance from drawing up, amending or revoking the will.

Under the penalty of forfeiture, any successor may request the court to declare delinquency within one year from the date of the inheritance, the one-year period shall run from the date when the successor has become aware of the cause of delinquency if that date is subsequent to the opening of the succession.

The introduction of the action constitutes an act of tacit acceptance of the inheritance by the successive plaintiff.

If the conviction for the deeds referred to in a) is pronounced after the date of the opening of the inheritance, the one-year term is calculated from the date of the final conviction.

When convicting for the deeds referred to in a) is prevented by the death of the perpetrator of the deed, by amnesty or by prescription of criminal liability, the disqualification can be ascertained if those deeds have been established by a final civil judicial decision. In this case, the one-year period runs from the occurrence of the cause of avoiding imprisonment, if it occurred after the inheritance was opened.

In the cases referred to in b) and c), the term of one year shall run from the date when the successor has known the reason for lack of merit, if this date is after the opening of the inheritance.

The commune, town or, as the case may be, the municipality in whose territory the property was located at the date of the inheritance may bring an action for the declaration of disqualification if, apart from the author of one of the deeds of inheritance disqualification, there are no other successors. The lack of other successions attracts the declaration of vacant legacy.

4. The effects of inheritance disqualification

Inheritance disqualification shall take effect after the final judgment of the court finding that there has been a disqualification or of a decision of disqualification.

Disqualification may be found or declared by the court before the inheritance proceedings are opened and the unworthy successor is removed from the inheritance or following the procedure when the heirloom certificate has been obtained and the disqualification has a resolving effect, that is, the dissolution of that title is retroactive and the unworthy heir is considered to have never been the heir.

Inheritance disqualification can be invoked during the life of the successor, and it produces effects and removes the unworthy from the inheritance even if he is a backup heir.

If the successor has been in possession of the assets of the estate before being declared unfit, the possession of undue ownership of the assets of the estate shall be considered bad faith and shall be liable to the return of the goods and the return of the collected fruits and the interest received for the amounts of the estate received (art. 960, paragraph 2 of the Civil Code). However, the unworthy is entitled to the heirs for reimbursement of the utility and necessary expenses made by him with the estate of the succession and those made with the payment of the debts of the succession.

According to art. 960, paragraph 3 of the Civil Code, the acts of preservation, as well as the administrative acts, so far as they advantage the heirs, concluded between the unworthy and third parties, are valid. Also, the acts of provision for pecuniary interest concluded between the unworthy and third parties and good-faith acquirers are also maintained, but the rules of the land book matter are applicable.

The unworthy heir is removed from both the legacy and the testamentary inheritance, but the inheritance disqualification having a personal character, the descendants can still collect the inheritance by representing the unworthy, ie the part of the inheritance that would have been due to him if it was not unworthy. Thus, according to Article 965 of the Civil Code, by succession representation, a legal heir of a more distant degree, called representative, ascends, by virtue of the law, in the rights of his ascendant, called the represented, to collect the part of his inheritance, would

have been due to him if he had not been unworthy of the defunct or deceased at the time of the inheritance.

Only descendants of the deceased's children and descendants of the deceased brothers or sisters can come to the inheritance by succession representation.

The person lacking the ability to inherit, as well as the unworthy, even alive at the time of the inheritance, can be represented.

In order to come through succession representation to the deceased's inheritance, the representative must meet all the general conditions to inherit him.

Representation operates even if the representative is unworthy of the represented or has renounced the inheritance left by him or was disowned by him.

The children of the unworthy before the opening of the inheritance from which the unworthy was excluded shall refer to the inheritance of the latter the goods which they inherited by representing the unworthy if they come to his inheritance in concurrence with his other children who were conceived after the opening of the inheritance to which the unworthy was removed. The report shall be made only if and to the extent that the value of the goods received by representing the non-signatory exceeded the amount of the inheritance liability that the representative had to bear as a result of the representation.

5. Removing the effects of disqualification

The effects of non-legal or judicial disqualification may be expressly removed by will or by a notarial act by the person who leaves the inheritance. Without an express statement, it is not an elimination of the effects of unreasonable ties left to the unworthy after committing the deed that attracts disqualification.

The effects of disqualification can not be removed by rehabilitation of the unworthy, amnesty after conviction, pardon or by prescription of the execution of the criminal punishment.

6. Murder offense at victim's request

The crime of killing at the victim's request is not a novelty on the criminal plane. There are many states that criminalize this crime, but also states that preferred not to sanction this crime.

In France, this offense is not provided for in the Criminal Code as a distinct act of murder. Thus, in French law, killing at victim's request or euthanasia is no different from the murder offense.

In other countries, such an act is punished by murder distinctly, taking into account their nature and the purpose envisaged by the perpetrator. The German Penal Code provides for and punishes this in Art. 216 with imprisonment from 6 months to 5 years.

In the Netherlands, US states like Oregon, Washington, or Vermont, have decriminalized this act.

Killing at the victim's request is an offense that was not regulated in the previous Criminal Code, but was provided by the Criminal Code of 1936 in Art. 468[1].

The generic legal object of this crime, as with other crimes against life, is the defense of social relations regarding the person's life.

The material object is the body of the living person, and the active and passive subject can be any person.

As far as the objective side is concerned, the material element consists of a killing activity, which is possible both through action and by inaction.

The conditions that the law imposes in art. 190 of the Criminal Code: [2]

1. Request to be explicit – the request must be clear, unequivocal, so that the author understands that the victim wishes to die and asks for his support in suppressing his life.

2. The request must be serious – the request made by the victim must be serious, real, and not joking. Thus, the demands made in annoyance or how it is customary to say "I would rather die than to ..." do not fulfill this condition.

3. Request to be aware – the victim is in a normal state that allows him to fully understand the outcome of his request rather than in a state of unconsciousness.

4. Repeat request – thus spontaneity is eliminated and the victim is required to endure the suppression of life several times and even under several circumstances. The text of the law does not show how much the number of repetitions is necessary, but it must be proven that it is the offense under art. 190 of the Penal Code.

The offense is always committed with direct intent, as the nature of the offense implies that the author fulfills the victim's wish, ie to act and to pursue the outcome.[3].

There are situations in which treatments are very expensive and their achievement is never more accomplished, and terrible sufferings lead to the cessation of suffering by killing.

It is welcomed to sanction this fact in the criminal plan, but also to attract the lack of legal right over the perpetrator.

The hypothesis in which the son kills his father at his request in order to curtail his suffering, sanctioning his son, both on the criminal and on the civil plan, with his exclusion from the inheritance, we consider it correct.

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[1] Article 468 of the Criminal Code of 1936.
The one who kills a man, following his earnest and repeated prayer, commits the act of murder to his prayers and is punished with a heavy prison from 3 to 8 years.
The same punishment applies to the one who causes another to commit suicide, or to reinforce the decision to commit suicide, or to facilitate in any way the execution, if the suicide occurred.
The punishment is the correctional prison from one to five years when the act was committed under the conditions of the preceding paragraphs under the impulse of a sense of mercy in order to curb the physical torment of a person suffering from an incurable disease and whose death was inevitable in this case.

[2]. Article 190 of the Criminal Code of 2009.
The murder committed at the explicit, serious, conscious and repeated request of the victim who suffers from an incurable disease or a medically certified infirmity that causes permanent suffering and is hard to bear is punished by imprisonment from one to five years.

[3] Article 16 paragraph 3 of the Criminal Code.
The act is committed intentionally when the perpetrator:
a) forsees the result of his deed, pursuing its outcome by committing that act;
b) forsees the result of his deed and, although he does not pursue it, accepts its outcome.

We consider that no one can open their way to an inheritance by killing the author who leaves the inheritance, which is why even the legislator chose the term "killing" and not "murder" both in Article 958 of the Civil Code governing the lack of justice and Article 190 of the Criminal Code.[4]

The crime of killing at the victim's request should not be confused with the person's deed of determining or facilitating the suicide of a person if suicide occurred. Such an act will not constitute a murder at the victim's request, but a determination or facilitation of suicide provided by art. 191 of the New Penal Code.

As can be seen, such an offense committed and punished by the Criminal Code will also lead to disqualification for the perpetrator of the offense if there is an inheritance right of the perpetrator of the deed at the death of the deceased.

7. Conclusions

The murder committed at the explicit, serious, conscious and repeated request of the victim who suffers from an incurable disease or a medically certified infirmity that causes permanent suffering and is hard to bear is punished by imprisonment from one to five years.

This is because the legislator considered that he can not open his way to an inheritance by killing the author who leaves the inheritance, so even the legislator chose the term "killing" and not "killing" both in art.958 of the Civil Code regulates the illegality of law and art.190 of the Criminal Code.

Therefore, the crime of killing at the victim's request should not be confused with the person's deed of determining or facilitating the suicide of a person if the suicide occurred. Such an act will not constitute a murder at the victim's request, but a determination or facilitation of suicide provided by art. 191 of the New Penal Code.

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[4]Art.958 of the Civil Code – Legal disqualification
The legally unworthy to inherit is:
a) the person convicted for committing a crime with the intention of killing the person who leaves the inheritance;
b) a person convicted of committing an offense with the intention of killing another successor before the inheritance, which, if the inheritance had been opened at the date of the act, would have removed or restricted the vocation to the inheritance of the perpetrator.
Where the conviction for the offenses referred to in paragraph (1) is prevented by the death of the perpetrator, by amnesty or by the prescription of criminal liability, disqualification shall operate if those acts have been established by a final civil judicial decision.
Disqualification can be ascertained at any time, at the request of any interested party or ex officio by the court or by the public notary, based on a court ruling resulting in disqualification.

THE IMPORTANCE OF SOLVING ENVIRONMENTAL DISPUTES. PREVENTION MECHANISMS

Dan-Alexandru GUNĂ*

Abstract: *Starting from the specificity of environmental disputes and especially of the effects of these conflicts, many regulations in international environmental law pay special attention to preventing their occurrence. In this respect, mechanisms have been created to signal as early as possible any difficulties raised by the concrete implementation of environmental agreements. More emphasis is placed on problem management that could lead to disputes rather than resolving them. The compliance assurance mechanisms are a welcome adaptation to the specificities of the issues raised by the application of international environmental law, traditional dispute resolution methods being more confrontational. Within these mechanisms, they are trying to monitor compliance and financial, technological support of states in fulfilling their obligations, building on the idea that it is in the interest of the international community as a whole that all states should be able to fulfill their environmental commitments.*

Keywords: *environmental disputes, prevention, compliance mechanisms*

1. Introduction

Often, environmental disputes involve difficult scientific issues, of which there are no clear answers. Numerous environmental issues have complex effects over a long period of time. For instance, it cannot be clearly stated whether and to what extent genetically modified organisms affect human health or other species or whether and to what extent global warming is generated by greenhouse gases. This feature requires that experts in the field be involved in the settlement of such disputes.

Sometimes, the identification of the polluter is objectively almost impossible and the application of the rules of responsibility is inadequate, as in the case of vehicle pollution or smoke caused by the combustion of fossil fuel, which become particularly dangerous due to cumulative effects, which gives priority to the determination by appropriate means[1].

The traditional dispute resolution methods have been criticized for being, to a certain extent, inappropriate for resolving environmental disputes. Thus, the traditional methods emphasize the confrontational side and less the constructive side, preventing the emergence of disputes. For instance, in the case of the most used diplomatic means of solving the disputes, namely the negotiation, each party tries to win the most favorable result. Also, the classical means emphasizes the determination of responsibility for non-fulfillment or breach of obligations, the punitive aspect is pursued, which in the specific conditions of the environmental dispute is not always suitable. For example, there are environmental damage that, even if established, cannot

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[1] Mircea Duțu, *Tratat de dreptul mediului*, 3rd Edition, C.H. Beck, Publ.-house, Bucharest, 2007, p. 469.

be repaired, such as the disappearance of a plant species, animals. In some cases, the suspension or exclusion of a state from a treaty with the purpose of sanctioning it for its non-compliance with the obligations related to the protection of a natural resource, species, ecosystem shall generate the incrementation of the risk for that resource or species to be even more endangered[2].

The classic means for solving disputes are focused on a bilateral approach, while the environmental disputes may have a multilateral feature or even if they have a strictly bilateral feature, the way they are resolved concerns many more states due to possible implications. There may be strictly bilateral disputes such as a short episode of pollution of a shared water course, but due to direct or indirect connections between the elements of the natural environment there shall always be an interest in the appropriate solving of the dispute from the entire international community.

In order to fill in these gaps the international environmental law emphasizes the management of the issues which may generate the disputes than on the solving of disputes. In this context, the non-compliance procedures have been developed to assist the states who fail in fulfilling their environmental engagements. In this meaning, the mechanisms for the insurance of conformity represent a welcomed adjustment to the specificity of the issues generated by the application of the international environmental law. Within these mechanisms, they are trying to monitor compliance and financial, technological support of states in fulfilling their obligations, building on the idea that it is in the interest of the international community as a whole that all states should be able to fulfill their environmental commitments. Thus, the cooperation replaces the sanction or the compensation[3].

2. Prevention mechanisms

According to the United Nations Environment Program (UNEP) guide with regard to ensuring compliance and enforcing multilateral environmental agreements, adopted in Nairobi in 2002, the term "compliance" refers to the fulfilment of the obligations assumed by the parties of a multilateral environmental treaty, including the ones stated by the amendments to the treaty. The "conformity mechanism" refers to an instrument of insuring the efficiency of the environmental treaties and verification of their application[4]. The specialized doctrine has explained the term "conformity mechanism" in the meaning that it represents that system established by the parties of an international treaty by which it is analyzed the stage of the implementation of the obligations assumed, are evaluated their performances and provides support for their

[2] Karen N Scott, *Non-compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements*, in International Law and Dispute Settlement: New Problems and Techniques, Edt. Duncan French, Matthew Saul and Nigel D White, Ed. Hart Publishing Ltd, Oxford and Portland, Oregon, 2010, p. 228.

[3] Mircea Duțu, *Dreptul internațional al mediului*, Economic Publ.-house, Bucharest, 2004, p. 216.

[4] United Nations Environment Program, *Training Manual on International Environmental Law*, Ed. Kurukulasuriya L., Robinson A. N. – Nairobi, Kenya, 2006, p. 39.

fulfilment[5]. Regarding the non-compliance, *per a contrario*, we shall see it as the failure to fulfil the assumed obligations with the mention that usually we are not talking about a total non-compliance of the obligations, but about a partial one.

The legal nature of the non-compliance mechanisms has been assessed as a procedure between the prevention and dispute resolution procedures. Some authors have treated them as alternative means for solving the disputes[6], while others, starting from their non-adversarial feature have placed them among the preventive rather than dispute resolution means[7]. There are opinions in the specialized doctrine according to which it is just an apparent differentiation between the mechanisms for the insurance of conformity and the mechanisms for dispute resolution. Thus, while compliance mechanisms address the issue of nonconformity in a non-contradictory manner, in a multilateral framework and with regard to future conduct, classical dispute resolution systems deal with past, bilateral and contradictory acts of non-conformance, less suitable for environmental issues[8].

The conformity mechanisms have the following features:

- They have a non-contradictory feature, emphasizing the cooperation, the assistance in fulfilling the obligations. Though, it may look like a contradictorial dialogue between the party who failed to fulfil all obligations and the organism for the insurance of conformity, it does not have the same nature as the one within the mechanisms for dispute resolution. The purpose of these mechanisms is not to hold accountability but to find solutions to fulfill the obligations. The non-contradictory feature is underlined by multiple regulations in this area.

The non-contradictory feature is supported also by the fact that the procedure for ascertaining the non-conformity can be initiated even by the state who founds itself in the impossibility of fulfilling the assumed obligations or by an organism appointed by the convention. In practice, these are the most frequent means for the initiation of the procedures for non-conformity. For instance, for the Basel Convention of 2013 there were registered 10 requests to ascertain the non-conformity of which 9 of them were initiated by the Secretariat and one was submitted by the state found in the position of not fulfilling its obligations (Oman).

For the Aarhus Convention of April 2013 there were 84 requests registered by the Committee for Conformity of which one of the requests belonged to a state regarding the conformity of another state (we are referring to Romania regarding Ukraine in the Bâstroe case), while the rest of 83 requests originate from the public who is entitled to submit them based on the convention.

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[5] Nele Matz, *Financial and Other Incentives for Complying with MEA Obligations*, in Ensuring Compliance with Multilateral Environmental Agreements A Dialogue between Practitioners and Academia Edt. Ulrich Beyerlin, Peter-Tobias Stoll, Rüdiger Wolfrum, Martinus Nijhoff Publishers Leiden / Boston, 2006, p. 303.

[6] P Birnie, A Boyle, *International Environmental Law*, Oxford University Press, 2002, p. 206.

[7] Ulrich Beyerlin, Peter-Tobias Stoll, Rüdiger Wolfrum, *Conclusions drawn from the Conference on Ensuring Compliance with MEAs*, in Ensuring Compliance with Multilateral Environmental Agreements A Dialogue between Practitioners and Academia, Edt. Ulrich Beyerlin, Peter-Tobias Stoll, Rüdiger Wolfrum, Martinus Nijhoff Publishers Leiden / Boston, 2006, p. 368.

[8] N. van Woudenberg, *Compliance Mechanisms – A Useful Instrument*, Environmental Policy and Law, Vol. 34, No. 4-5, 2004, p. 155.

The fact that the rule in the field of initiation of procedures is self-declaring or triggering by the bodies established by the Convention does not mean that there are in practice no cases of a state request for non-compliance by another state. For instance, there were 6 requests based on the Espoo Convention of 2013 (of which 2 submitted by the Romania in relation to the Bâstroe case).

How to initiate procedures is an element of differentiation from dispute resolution methods that usually require the parties to agree to be used. Even if the procedures of non-conformity have as purpose to assist the states to overcome the difficulties emerged in the implementation of the obligations, though the initiation of these procedures by the state found in difficulty remains a sensitive political matter because during these procedures information that they would not want to disclose may come to the attention of the public or other states. This is the main reason why for which the initiation of the procedures represents a difficult chapter during the negotiations of environmental treaties[9]. From this point of view, the means of solving disputes are less transparent, which is convenient for the states, but criticized by the public opinion.

- There are procedures created to assist the parties in fulfilling their obligations, in this case being used multiple types of means such as the financial or technical assistance. Once found the non-compliance, the state is not held accountable, but measures are taken to remedy the non-compliance, which are usually stimulating, but in some cases may also be penalizing. The terminology used by the regulations regarding these procedures reflect this idea. The term "sanction" is rarely used, usually being used the term "measures". For instance, the Kyoto Protocol uses the term "consequences" in Art 18 the same term being used also by the regulations regarding the non-conformity stated by the Conference of the Parties of 2005.

The Montreal Protocol of 1990 uses within the regulations regarding the non-conformity the terms "measures" and "steps" to remedy the non-conformity.

This approach of non-conformity is found in most environmental agreements. For instance, the system stated by the Kyoto Protocol presents in its structure a Committee for conformity formed by a sector which eases the implementation and one that imposes it. The structure reflects the conception regarding the causes for non-conformity which may depend upon the lack of financial, technical or human resources, and for this latter case imposing sanctions would not be for the benefit of anyone because it would not solve the substantive issue. Even if the nonconformity is due to willful attitude of bad faith then coercive measures find reason. Art 14 of the Procedures and Mechanisms for insuring the conformity with the Kyoto Protocol states that the Subsidiary Body

for Implementation, taking into consideration the principle of common, but differentiated liability, may adopt one or more measures to insure the conformity. These measures may consist of: consultancy provided for the insurance of conformity, financial or technical assistance or technological transfer.

[9] Francesca Romanin Jacur, *Triggering Non-Compliance Procedures*, in Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements, Edt. Tullio Treves, Laura Pineschi, Attila Tanzi, Cesare Pitea, Chiara Ragni, Francesca Romanin Jacurp, Ed T.M.C. Asser Press, The Hague, 2009, p. 373.

The same decision also establishes the measures which may be taken by the Subsidiary Body for Implementation consisting in: declaring non-compliance, establishing a remediation plan. This plan shall consist of: an analysis of the causes which have generated the nonconformity, the measures for its remedy and the program for the application of these measures. The declaration of nonconformity is a measure which may affect the reputation of that state, not at all neglected in a world in increased interdependence. If the non-compliance with the obligation to diminish the emissions of the greenhouse gases established by Art 3.1 of the Protocol is ascertained, the following measures may be taken:

a) Penalties of 30% for each ton surpassing the engagement of reduction. These penalties consist of the deduction from the allocation of each country for the next period of the equivalent of 1.3 tons of excess emissions. This measure seeks to prevent the postponement of the reduction measures for the next period;

b) The suspension of the quality as eligible state within the flexibility mechanisms. This measure has the effect of suspending the right to trade the pollution permits.

In the case of procedures for remedying the non-compliance under the Basel Convention, the Implementation Committee supports the state concerned with information and recommendations. Under the assistance provided, the Committee helps the state access financial resources, draw up a compliance plan whose performance is monitored. Considering the causes, type and frequency of non-conformity, the Committee, if sees as necessary, shall recommend the Conference of the Parties to adopt supplementary measures.

Another convention whose compliance mechanism combines incentive and punitive measures is CITES. As part of the measures to be taken to ensure compliance, assistance may be given to that State, indicating the legislative measures to be taken internally, given a period of time to remedy the non-compliance. Under this Convention, the Secretariat plays an active role for the Compliance Assurance System. It warns the states which are non-compliant, receives information from those states by monitoring the implementation of the conformity measures, may carry out inspections on site. The most drastic method of compliance within CITES is to suspend trade in one or more protected species at the recommendation of the Conference of the Parties. The measure shall have the feature of a recommendation, but it is very efficient due to its important economic impact. If the recommendation is adopted by the main importing states of the target species, the measure is effective immediately, forcing the state to comply with CITES regulations even if it is not a party to the Convention. In such situation was Singapore, which is not a party to CITES and who wanted to take advantage of this to allow trade in rhinoceros horn considered illegal by members of the Convention.

After the US on 25 September 1986 banned the import from any wildlife coming from Singapore, the latter one banned the trade of rhino products on 25 November 1986[10].

[10] Peter H. Sand, *Sanctions in Case of Non-Compliance and State Responsibility: pacta sunt servanda – Or Else?* in, Ensuring Compliance with Multilateral Environmental Agreements A Dialogue between Practitioners and Academia Edt. Ulrich Beyerlin, Peter-Tobias Stoll, Rüdiger Wolfrum, Martinus Nijhoff Publishers Leiden / Boston, 2006, p. 264.

A very important role in the insurance of conformity is played by the financial and technical assistance. The approach of this type of support shall be made under certain circumstances, such as navigation accidents, a nuclear accident etc. Also, sometimes it appears as an obligation of the developed states to support the poorer, developing states. The Montreal Protocol, the Climate Change Convention are some examples of agreements by which the developed states have assumed in the virtue of the principle of common but differentiated liability, such obligations.

During this process of technical and financial assistance, an active implication belongs to international organizations such as: FAO, OMM, AIEA or BM. There are numerous environmental treaties stating the establishment of special financing funds for the state-parties to be assisted in fulfilling their obligations such as: the Fund for the protection of the world cultural and natural heritage stated by the Convention concerning the protection of the world cultural and natural heritage on 16 November 1972; the Small Grants Fund for preserving wetlands established by the Ramsar Convention; the Multilateral Fund stated by the Montreal Protocol.

A very important role in financing is held by the Global Environmental Fund established by the World Bank in 1991. The GEF finances actions created to counterattack the dangers of worldwide environmental decay, namely: the loss of biological diversity, climate changes, degradation of international waters, the destruction of the ozone layer, the degradation of fields and persistent organic pollutants. At such, it is a financial mechanism for: the UN Convention on biological diversity, the Kyoto Protocol, the Stockholm Convention on persistent organic pollutants.

The doctrine underlines the difference between the assistance granted before the non-compliance and that after declaring the non-compliance. The first has the role to avoid the non-conformity, while the second one to remedy it. It is also interesting the relation between the financial and technical assistance and the traditional means for solving disputes, in the meaning that sometimes the developed states provide for financial support to the states who need to resort to bodies specially set up to resolve disputes or to enforce decisions of international courts[11].

- The compliance procedures often involve implementing bodies, committees for non-compliance with predominantly technical functions but also a decision-making body such as the Conference of the Parties. They have a political feature and are not judicial organs. Within their componence are governmental negotiators which proves their political nature[12]. This reflects the conception of the states regarding the measures which are to be taken to insure the conformity with the environmental obligations, the measures in this area being flexible, pragmatic and not legalist or judicial. There are rare cases of procedures for non-conformity with a quasi-judicial feature. We are considering the procedures stated by the Kyoto Protocol which state that the decisions of the Committee shall be reasoned, with the possibility for the parties to appeal the

[11] Laurence Boisson de Chazournes, *Technical and Financial Assistance and Compliance: the Interplay* in, Ensuring Compliance with Multilateral Environmental Agreements A Dialogue between Practitioners and Academia Edt. Ulrich Beyerlin, Peter-Tobias Stoll, Rüdiger Wolfrum, Martinus Nijhoff Publishers Leiden / Boston, 2006, p. 277.

[12] Daniel Bodansky, *The Art and Craft of International Environmental Law*, Harvard University Press Cambridge, Massachusetts London, 2010, p. 248.

decisions of the Subsidiary Body for Implementation within 45 days. The appeal shall be analyzed by the Conference of the Parties, and a decision will be taken by a majority of ¾ of the members.

- The structure of these procedures usually consists of: the obligation to periodically report the status of implementation of the Convention, the procedures to analyze the states' conformation with the obligations imposed, measures to remedy the non-conformity if it is ascertained that a state failed to fulfil its obligations.

a) The obligation to periodically report the status of implementation of the Convention is a very used method by the international environmental law in order to track the conformity with the obligations assumed by the agreement. The states draft annual reports regarding the implementation measures (economic, judicial, political) which are sent for analysis to the authority appointed by the Convention to monitor the conformity, usually the Secretariat. Regarding the nature of the information presented by the report there is a wide practice. Among the conventions stating this obligation to report we mention: the Vienna Convention on the protection of the ozone layer of 1985, the Montreal Protocol of 1987, the Kyoto Protocol of 1997, CITES, the Convention concerning the protection of the world cultural and natural heritage of 1972 etc.

This procedure of reporting creates a constant dialogue between the institutions stated by the agreement and the state parties, having the nature of easing their implementation. For a correct analysis of the means of fulfilling the obligations assumed it is important the accuracy of the information. Many times, the states face the lack of resources, expertise to produce adequate reports. In addition, there are numerous agreements stating this formality, so that the states have difficulties in fulfilling these agreements.

b) The procedures for analyzing the conformity of the states with the obligations imposed have as purpose the analysis in a non-contradictory manner of the issues arose during the implementation of the engagements to improve the conformity degree. The non-conformity may be generated by the non-fulfilment, usually partial, of the substantive and procedural obligations, such as the obligation to report. Within these mechanisms are involved the Subsidiary Body for Implementation, the Secretariat, the Conference of the Parties. The latter one issues the final decision after receiving the report and the recommendations from the Subsidiary Body for Implementation. The right to initiate the procedures ascertaining the conformity belongs: to the organisms created by the convention, especially the Subsidiary Body for Implementation, to the other state parties, to the state facing this issue and sometimes to the public (as the case of the Aarhus Convention).

c) The measures to remedy the nonconformity – if at the end of the conformity clearance procedures it is found that the state concerned is in a non-compliance situation, a multilateral response is required, which must take into account the specificity of the case. Often, the non-compliance is explained by the lack of financial, technical, human resources, and lack of political will. In relation with these causes, incentive and/or punitive measures shall also be used. The measures which are taken in relation to these situations may vary from the obligation to draw up supplementary

reports, measures conditioned by financial or technical assistance up to the suspension of the rights and privileges stated by the convention.

The issue of the relation between the non-conformity procedures and the system for solving disputes was first raised during the negotiations of the procedures for non-conformity with the Montreal Protocol. Following these negotiations, a standard non-judgment clause on dispute resolution procedures has been set out in many regulations on compliance with environmental agreements such as: the Montreal Protocol, the Kyoto Protocol, the Basel Convention, the Cartagena Protocol, the Aarhus Convention, the Espoo Convention, the Stockholm Convention on the Organic Persistent Pollutants on 2001 etc. Taking into consideration this clause, as well as the nature of the procedure for non-conformity one can say that the provisions on dispute solving shall have priority but the provisions of the environmental agreements are incomplete in this regard. In procedures for non-compliance with the provisions of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, it is stipulated in Para 15 of Annex II relating to these procedures that if a matter is investigated under Art 3, Para 7 of the Convention (which states the situation in which the parties do not agree with the negative transboundary impact of the proposed activity) the procedures for non-conformity shall not be invoked. However, the reverse issue is not detailed, i.e. what effect does the triggering of non-compliance procedures on dispute resolution. Even if the performance of such procedure for solving disputes shall not be affected by the analysis of non-conformity, one cannot say that the results of such procedure for non-conformity have no value in solving the dispute. They have no binding force, but they are not irrelevant. For instance, if the parties use the diplomatic methods for solving the dispute, the conclusions of the procedure for non-conformity become arguments for the negotiation. On the other hand, even in front of a judicial authority these conclusions could be invoked as applicable rules of law or subsequent practice for the interpretation of the agreement, as stated by Art 31.3 of the Vienna Convention on the law of treaties. All the more so in the case of those conventions, such as that in Aarhus, where the conclusions of the Compliance Committee are approved by the supreme political body, the Conference of the Parties, becoming a subsequent practice accepted by the parties.

On the other hand, the question arises, and vice versa, what effect would the imposition of a means of settling disputes on the non-conformity procedure? Except certain express regulations (such as the Espoo Convention) suspending the procedure for non-conformity we consider that the two may function simultaneously. Regarding this hypothesis, multiple situations may emerge: the procedure for non-conformity may be initiated upon the request of the Compliance Committee or by another state than the one involved in the dispute because of the multilateral feature of these procedures. If the states themselves concerned would initiate the non-compliance procedure, due to their role in facilitating the fulfillment of obligations not in accountability, we consider that the two procedures could run in parallel. Moreover, the international practice of states reveals that they prefer the use of non-compliance mechanisms to dispute resolution. Although some environmental conventions are relatively recent, they have detailed provisions on ensuring compliance with dispute resolution, which supports this

orientation of states towards preventing environmental conflicts, treating them in a non-contradictory manner.

3. Conclusions

The mechanisms for solving disputes mentioned by the international environmental law are influenced by the specificity of this type of dispute given by factors such as: difficult scientific issues involved, the priorities that states have to give relative to the welfare of the society, the difficulty of determining the damage caused, the person responsible, the incidence of several regulations in different branches of international law. As such, the prevention of disputes with the help of the mechanisms for compliance, mainly focused on the assistance granted and not on the problem of accountability, has represented an answer adjusted to the specificity of this area. These mechanisms have attempted to remedy the disadvantages of classical methods of settlement such as: the bilateral approach to resolving the dispute, the strengthening of the confrontational side, the compensatory. Thus, the cooperation replaces the sanction or the compensation. The prevention of non-compliance represents the first step in avoiding disputes and in many cases the failure of the states to fulfil their obligations is not related to the political will, but to the absence of financial, human or technological resources.

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4. The Convention on international trade in endangered species of wild fauna and flora adopted in Washington on 3 March 1973
5. The Montreal Protocol on substances that deplete the ozone layer adopted on 16 September 1987
6. The Kyoto Protocol on climatic changes signed on 11 December 1997

OFFENSES DISCOVERED BY THE COURT ADMINISTRATOR IN INSOLVENCY PROCEEDINGS

Natalia JANU*

Abstract: *According to statistical data, the number of entities that declared insolvent in the Republic of Moldova has increased significantly. Thus, if, in 2016, 673 economic agents were declared insolvent, then only in the first quarter of 2019 their number stood at 2546[1]. In all countries of the world, no matter the level and degree of development of their economy, there is such a phenomenon as insolvency. It is obvious that a natural or legal person could become insolvent because of excess debt or lack of liquidity. In some cases, the state of insolvency is due to economic crises, fierce competition or forcible cases and major force. In other cases, however, it is found that insolvency occurs because entrepreneurs are not able to manage their business, or they intentionally, through illicit actions, cause the company's poor economic condition. As a consequence, the economic and financial difficulties of an enterprise may have the "domino" negative effect of attracting the financial collapse of business partner[2]s. On the other hand, the continuous expansion of trade and the intensification of national and international investments, tempts the criminal subjects to illegally obtain financial advantages, and therefore leads to the emergence of new factual situations, including criminal ones. In this article, we set out to investigate and perform the legal framing of the illicit actions of the debtor that led to its insolvency and thus caused the prejudice to creditors. In this regard, we will draw attention to the effects of the insolvency process, the role of the authorized administrator in the detection of bankruptcy offenses and what problems are encountered in this respect. In the same way, we will try to provide solutions to increase the efficiency of the authorized administrator and state bodies in the process of detecting and preventing insolvency offenses.*

Keywords: *insolvency, bankruptcy, economic crime, authorized administrator insolvabilitate.*

Introduction

For a more understandable approach of the criminal phenomena detected in the insolvency process, we consider it is necessary to provide some explanation of what insolvency process means, who are the participants of this process and what effects it produces.

Thus, the insolvency process is a complex procedure initiated at the request of the insolvent person (the debtor) or at the request of one of the creditors, filed with the court (the insolvency court). The purpose of the process is to bring together all

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[1] [on-line]: http://date.gov.md/ckan/en/dataset/15281-date-statistice-privind-numarul-agentilor-economici-declarati-in-stare-de-insolvabilitate.

[2] Floroiu Mihai, Otovescu Cristina, "Considerations on International Bankruptcy, Moratorium and Concordat at European Level", *Journal of Legal Sciences* no. 1-2, 2005, pp. 209-213.

creditors and satisfy their claims on the account of the insolvent debtor's patrimony[3]. The entire process of capitalizing the debtor's goods and distributing the finished product between creditors is led by the authorized and inspected administrator of the insolvency court and the creditors' meeting.

Presentation of the insolvency procedure

The insolvency process is initiated by a court order, which becomes final and enforceable from the moment of its pronouncement. This is of particular importance for the immediate application of insurance measures inherent in the insolvency process: the appointment of an authorized administrator, the seizure of movable and immovable property bank accounts, correspondence, etc. At this stage, it is usually decided to liquidate the debtor or apply the restructuring procedure to it.

In the case of the liquidation decision, an inventory of the debtor's assets, their valuation and their sale is made in order to settle the claims of the creditors. As a rule, the insolvency process by liquidation ceases with the sale of all the goods, the distribution of the money between the creditors, and even if the receivables have remained unchanged, the debtor is extinguished from the state registers, with the relief of all the debts. In turn, the injured creditors are forced to lose their unqualified claims in their accounts.

Such a procedure is a "forgiveness" of debts to the bona fide borrower, and for the debtor of bad faith, who knows the effects of the insolvency process, there is a legal possibility to deliberately evade debt repayment. Thus, we often struggle in practice with situations when some people deliberately bankrupt the firm they run, and then open up new business, free of any debt. It is worth mentioning that among the injured people are listed not only the bankruptcy contractors, with whom he had commercial relations, but also the ordinary people, such as the employees and the state bodies, including the State Tax Service, the National Insurance House Social, etc. So the whole state economy is being harmed.

This intentional or culpable bankruptcy phenomenon seems to be even more drastic if we find that the criminal prosecution authorities find it very difficult to trace the illicit actions the debtor's directors would make in order to get insolvent. The reason for these difficulties lies in the fact that nobody has access to the legal acts or the accounting documents of these enterprises. An exception would be made by the competent authorities, who intervene only when suspicious operations are reported. However, if such operations are not known, only members of the debtor's management bodies will know about them.

The insolvency procedure is the perfect platform for detecting the illicit actions of the debtor, in this respect, because a third person is drawn to the debtor and acts with the diligence of a professional professional, on his own responsibility, addressing an objective attitude, aimed at preserving, increasing and the most efficient use of the debtor mass in order to satisfy as many claims as possible.

[3] Insolvency Law no. 149 of 29.06.2012. In the Official Monitor of the Republic of Moldova no. 193-197 of 14.09.2012, art. 1, par. (1).

We are talking about the authorized administrator or the judicial administrator, who, since the insolvency process, has a central role. It takes over the debtor's management and administration, as the former leader is removed from the leadership. Thus, the role of the authorized administrator, which holds the ownership, constitution and accounting records of the debtor, is decisive in the detection of the illicit acts committed by the debtor and the notification of the competent bodies.

In the following, we will attempt to enumerate and classify the offenses detected in the insolvency process. Here it is important to understand that some of the offenses detected during the insolvency process are committed before the trial is initiated in order to cause insolvency, and another part of the offenses are committed after the insolvency proceedings have been initiated, in order to prevents an authorized administrator from exercising his powers and creditors to meet his claims.

Typical offenses related to insolvency, ie those that have the effect of provoking an insolvency, are governed by the Criminal Code of the Republic of Moldova[4] under the name of *fictitious insolvency* and *intentional insolvency*.

a) "(1) In art. 252 The criminal code, under the same name of *intentional insolvency*, brings together two types of offenses and one variant aggravated by the offense for the case when the debtor is a legal person and two types are the case when the debtor is a commercial bank. According to the regulations of the Criminal Code "(1) The intentional insolvency which caused the lender large amounts of damage [...]. (2) The same action committed: a) by two or more persons; b) causing damage in particularly high proportions [...]. (3) Causing the insolvency of the bank through intentional actions or inactions of its administrator, including excessive spending, selling the bank's assets at a price below their real value, assuming unreasonable obligations, engaging in business relationships with an insolvent person, omitting the collection the bank's receivables at maturity or in any other way contrary to good administration, which deliberately diminishes the bank's patrimony, [...]. (4) The actions provided in paragraph (3) committed by: a) a group of directors and / or shareholders; (b) in order to avoid payment of debts and re-establishment of the banking business, [...]"

Thus, after this review of the technical and legislative aspects of the offenses under art. 252 of the Criminal Code, we shall mention that the special legal object of the offense provided in paragraphs (1) and (2) art.252 of the Criminal Code is to form the social relations on the correctness of the debtor's honoring of the obligations to the creditors [5]

The material object of the offense in question is, as the case may be: the assets forming part of the debtor's assets; assets that are part of the debtor's liability (due to creditors); any act of accounting or statistical evidence of the economic activity of the debtor; any other information that is of particular importance to creditors, etc.

Victim of the offense referred to in paragraphs (1) and (2) Article 252 The criminal code is the creditor – the natural person or legal person holding a claim on

[4] Criminal Code of the Republic Of Moldova no. 985 of 18.04.2002. In the Official Monitor of the Republic of Moldova no.72-74 of 14.04.2009.

[5] Stati Vitalie, "Insolvency Offenses: Implications of the Adoption of the Insolvency Law No. 149/2012", *Scientific Review of the State University of Moldova* No.3 (63), Chisinau, 2013, p. 197.

the debtor's patrimony that can prove its claim to this patrimony under the conditions insolvency Law

The objective aspect of the offense specified in paragraphs (1) and (2) Article 252 The criminal code has the following structure: *the detrimental act*, consisting in the action or inaction committed by one or more persons in creating or exacerbating insolvency; *damaging consequences* in the form of large claims; *the causal link* between the detrimental act and the injurious consequences; *the insolvency process*.

Concerning the concrete forms (actions or inactions) that create or aggravate insolvency, they may be: concealment or alienation of assets that are part of the debtor's assets or liabilities; conceal, destroy or falsify any act of accounting or statistical evidence of the economic activity of the debtor; non-operation of required entries in accounting documents, etc.

It is clear from practice that the above-mentioned forms are duplicated, forming different combinations, which can lead to the discovery and more difficult framing of the offense concerned. For example, withdrawing money from the bank account for the purpose of acquiring it in personal interests may be accompanied by the submission of false acquisition papers; the appropriation in a personal interest of a good may be combined with the offense of forgery of accounting documents.

For its part, the criminal law imposes the condition *of "harmful consequences in particularly great proportions"*, so that the act is qualified as an offense. In the absence of "particularly large" consequences, the deed is to be classified as a contravention

It is also worth mentioning here the importance of confusing the premise or the condition for this type of crime – the existence of the insolvency process, or, in the absence of the above-mentioned ambience, the perpetrated ones lose their individualistic character compared to other crimes, constituting one of the facts incriminated in art .190, 191, 327, 335, 360, 361 or others in the Criminal Code.

The *subjective nature* of the offense specified in paragraphs (1) and (2) Article 252 of the Criminal Code is characterized by direct or indirect intent, based on the most frequent reasons of maternal characterl.

The *subject of the crime* referred to in paragraphs (1) and (2) of Article 252 of the Criminal Code is the natural person or several responsible persons who are either employed on the basis of an employment contract or perform their duties on the basis of a statute or a judicial act, and so on.

As regards par. (3) and (4) art. 252 of the Criminal Code, which have been introduced later, we mention that the *special legal object* of the Code establishes the social relations regarding the correctness of the debtor's honoring the obligations towards the creditors.

The *material object* of the offense in question is the assets forming part of the debtor-bank's assets.

The victim of the offense referred to in paragraphs (3) and (4) Article 252 The criminal code is both the banking institution and the creditor – the natural person or legal person holding a claim on the debtor's patrimony.

The objective aspect of the offense specified in paragraphs (3) and (4) Article 252 The Penal code implies the following conditions: *the harmful act* consisting in the act or inaction committed by one or more persons to create or aggravate the insolvency of

the bank; *damaging consequences* in the form of diminishing the patrimony brought to the bank; *the causal link* between the detrimental act and the injurious consequences; *the existence of insolvency* proceedings against a banking institution.

The subjective side of the offense specified in paragraphs (3) and (4) of Article 252 The Penal code is characterized by direct or indirect intent and *the subject* is the individual or several responsible persons who are either employed on the basis of a contract of employment, or perform their duties on the basis of a statute or a judicial act, etc.

The maximum penalty for committing these offenses is 5 to 6 years' imprisonment and a fine of 2850 to 3350 conventional units, which is 167500 lei or 8375 EURO.

b) *Fictitious insolvency* is included in art. 253 of the Criminal Code: "(1) The fictitious insolvency which caused the creditor to suffer in large proportions, [...]. (2) The same action committed: a) by two or more persons; (b) causing particularly serious damage [...].

According to art. 253 of the Penal Code, in the same notion of fictitious insolvency, two types of crimes are again brought together and one variant is aggravated by the offense. In both cases, the *special legal object* is the social relations with regard to the merits of insolvency proceedings, and *the material object* of the offense being analyzed is the false acts such as: the false preliminary application filed by the insolvency proceedings and the annexes, also falsified.

As with the offense provided for in Art. 252 par. (1) and (2), a victim of the offense referred to in paragraph (1) of Article 253 Penal Code is the creditor within the meaning of Article 2 of the Insolvency Law no.149.

The *objective aspect* of the offense referred to in paragraphs (1) and (2) of Article 253 of the Criminal Code implies the cumulation of the following conditions*: the prejudicial act* designated by the formula "fictive insolvency", which would imply a false declaration by the perpetrator of the insolvency of the debtor, has real possibilities to satisfy creditors' claims; *damaging consequences* in the form of large claims; the causal link between the detrimental act and the injurious consequences; *the intention to enter into insolvency.*

The subjective aspect of the offense specified in paragraphs (1) and (2) of Article 253 of the Criminal Code is characterized by direct intent, and the special purpose of the offense provided for in Article 253 of the Penal Code is to mislead creditors to obtain from they either postpone and / or reschedule the payments due to the creditors or reduce the debts.

The *subject or subjects of the offense* specified in Article 253 of the Criminal Code are natural persons responsible.

The maximum penalty provided for this crime is a fine of 1350 conventional units (3375 EURO) or imprisonment for up to 4 years in both cases with the right to occupy certain positions or to exercise a certain activity for a term of up to 5 years.

As it is established, the offences provided in the Criminal Code under art. 252 and 253 could not be criminalised outside insolvency proceedings, which are closely linked to each other.

We also notice that the forms comisive or oversight through which they can accomplish these offences criminalise as separate offences in the Criminal Code of the Republic of Moldova, for example: concealment or alienation of property forming part

of the assets or liabilities of the debtor – could be framed in art. 243 of the Criminal Code of the Republic of Moldova" money laundering " or art. 244 "tax evasion", 251 "concealment of pledged assets".

But what distinguishes intentional insolvency offenses and fictitious insolvency from separate offenses (comisive and omisive acts) through which they can be committed lies in the ultimate purpose of these offenses (bringing to insolvency) and the circumstance / situation in which the deed the existence of insolvency and the ongoing insolvency procedure).

In Romanian legislation, compared to the one in the Republic of Moldova, the illicit act of bankruptcy is the simple bankruptcy (characterized by the failure to declare the insolvency) and the fraudulent bankruptcy. The latter form is manifested by: falsification, evasion or destruction of company records or concealment of part of the company's assets; the appearance of non-existent debts or the presentation of undue amounts in the company's registers in another act or in the balance sheet, each of these facts being done in order to diminish the value of the assets; the alienation of creditors in the event of a company's bankruptcy of a significant part of the assets.

However, as far as fictitious insolvency is concerned, the legal literature in Romania discusses the legal relevance of the simulation of the state of insolvency. Thus, most opinions argue that there can be no offense outside a real state of insolvency, or creditors can only be defrauded if the cessation of payments actually exists. What interest would the borrower have to simulate that it is insolvent if no one is concerned about it, and if it is actually solvable? In terms of trade, what is relevant is reality, not appearances that the debtor proposes to create[6]. Therefore, it should not be confused the apparent diminishing of the debtor's assets, which may be unrealistic, with the state of insolvency, which can only be real. An act may constitute an offense only if it has been committed in reality; without the state of insolvency, the content of the bankruptcy offense can not be achieved[7].

We believe, however, that the fictitious or simulated insolvency crime finds its rightful place among the crimes criminalized by the Criminal Code. We believe that the apparent induction of the debtor's insolvency by asset concealment, forgery of documents, etc., allows management bodies to file a claim for insolvency proceedings and ultimately obtains liquidation of the debtor, damaging its creditors.

As regards the illicit actions of the debtor after insolvency proceedings, it is important to take into account two factors: these actions are usually committed by the members of the governing bodies; the purpose of these actions is to avoid paying debts by capitalizing on the goods.

As I said before, with the insolvency process being put in place, a number of insurance measures are applied to the debtor's assets to prevent change and worsening of the state of affairs and a series of insurance measures with respect to the debtor – the right to administer and manage, all the constitutive, ownership and bookkeeping records of the debtor to the authorized administrator.

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[6] Jurma Anca, *Fraudulent Bankruta. Contributions*, RDP no. 4/2000, p. 116, with *The editor's note* (to the contrary).

[7] Hotca Mihai Adrian , *Fraudulent Bankruta*, C.H. Beck House, Bucharest, 2008, pp. 110-111.

Regardless of the fact that the judicial act of enforcing these measures is enforceable from the moment of pronouncement, often in practice, for some technical reasons, it is enforced with delay, which "gives time" to the debtor of bad faith to commit acts which result in the evasion of the execution of the judicial act. Such acts are often directed at concealing assets, selling them to third parties at a reduced price, assigning claims, falsifying or concealing accounting records, etc.

Thus, following the insolvency process, such offenses as: embezzlement of foreign property, that is to say the appropriation, disposition or illegal use of the property of another or of other persons by the person entrusted to him under a title and with a certain purpose or refusal to return them (Article 191, Criminal Code); abuse of service (Article 335, Criminal Code); fake in accounting documents (Article 3351, Criminal Code); falsifying vehicle identification (Article 276, Criminal Code), deliberate destruction or damage to property (Article 197 of the Criminal Code); non-enforcement of the court decision (Article 320, Criminal Code); acquiring, alienating, forfeited, leased, seized or seized (Article 251 of the Criminal Code) in cases not permitted by law.

The primary role in identifying the illicit actions of the debtor, as I said, lies with the authorized administrator.

However, an essential role in this respect also lies with the state tax body. According to the tax legislation, the State Tax Service, with the insolvency process, has the obligation to start the last fiscal control of the debtor. Under these circumstances, the fiscal body often identifies such offenses as tax evasion or money laundering[8]. . Moreover, in the process of finding economic crimes, the State Tax Service has attributions similar to the criminal prosecution body such as: detention of the perpetrator, removal of the offending bodies, requesting the information and documents necessary for the detection of the offenses, evaluation of the damage, receipt and registration of declarations and checking them, etc.[9] These rights granted to the fiscal body make enormous the working process of the criminal investigation bodies.

The identification of offenses is sometimes a very difficult process because the debtor's management bodies are either not found or do not fulfill the requirements of the authorized administrator to transmit to the latter the patrimony and the accounting records. Thus, it is absolutely impossible to analyze, for example, the veracity of accounting records once you do not have them. Similarly, it is not possible to get any information from a person who has died or is being searched.

In such situations, as a rule, a lengthy and lengthy process of re-establishing the debtor's accounts is commenced. In this process, modern electronic tools provide us with a great advantage. For example, for several years in the Republic of Moldova, the draft VAT electronic declarations project has been implemented. These statements generate the debtors' electronic records of deliveries and purchases from which we obtain such information: with whom the debtor has economic relations, under whose act (tax invoice) and in what amount. Similarly, electronic statements on state social

[8] The Fiscal Code of the Republic of Moldova no. 1163-XIII from 24.04.1997. In the Official Monitor of the Republic of Moldova, special edition of 08.02.2007, art. 1324, par. (7).
[9] *Ibid.* Art.. 133 par. (4).

security contributions provide us with information about the debtor's employees and the amount of their remuneration.

Therefore, the process of detecting insolvency or bankruptcy offenses is quite annoying. The legal or generic legal object of these offenses is the social business relationship. Some Romanian authors define this legal object as "the social relations in the normal course of economic activity"[10] or as being "the social relations regarding the normal functioning and the social economic purpose of the commercial companies".

Thus, it can be said that the bankruptcy offense is part of the category (genre) of business crimes, crimes that have certain peculiarities over the other offenses.

One of the main features of business crimes is that the black figure of crime, ie the difference between actual crime and that discovered by criminal justice bodies, is higher than the overall average of the criminal phenomenonOne of the main features of business crimes is that the black figure of crime, ie the difference between actual crime and that discovered by criminal justice bodies, is higher than the overall average of the criminal phenomenon.[11]

Another particular feature of these crimes is that they sometimes cause very great damage.

It is not without interest and another particularly important feature: in most cases, those committing business crimes are, as a rule, people who, through their high social position (in the business environment, in the political field or in the apparatus of state, including with attribution in the discovery and fight against crime) are above all suspicions. That is why this kind of crime is part of the "white collar crime", a concept endorsed by E.H. Sutherland in his famous White Collar Criminality, published in 1940.

In the above, it should also be mentioned that the criminal justice bodies do not always use the same measure in the application of the criminal law. Thus, while for the "minor" offenders, criminal prosecution and judgment are mostly conducted in an urgent procedure and the sanction is prompt and exemplary, sometimes even exceeding the gravity of the offense, business criminals benefit from some " indulgence "and" gentle "sanctions, even if the offenses committed pose a high degree of social danger.

Some conclusions

Finally, I note that the theoretical study allows us to formulate conclusions aimed at solving financial problems and preventing the insolvency situation among Moldovan economic agents.

1. We consider that the legislation of the Republic of Moldova provides sufficient instruments for the authorized administrator and the State Tax Service to have the

[10] Voicu Costica, Boroi Alexandru, *Criminal Law of Business*, 3rd edition, C. Beck Publishing House, Bucharest, 2006, p. 120.

[11] Gheoghe Ivan, "Bankruptcy – a Crime Specific to the Business Environment", *Criminal Law Review*, XVII. 2/2010, p. 7.

possibility, together with the insolvency process, to identify offenses committed by the debtor even after the insolvency proceedings have been initiated.

The identification process can be made more difficult if there is no accounting or death / disappearance of the management body, but these gaps are partially covered by the implementation of electronic declarations.

On the other hand, we believe that the lack of readiness of the authorized administrator or certain intersections of him in favor of the debtor may serve as grounds for the "omission" of certain illegal actions committed by the debtor. In this sense, we believe that the authorized administrator is to be a qualified person not only in the legal but also economic field, and the insolvency offenses are part of the category of economic crimes.

2. At the same time, we can assume that the detection of the insolvency offense in the Republic of Moldova is a rare phenomenon, because we are confronted with the problem of lack of professional training and specialization in the given field of the criminal investigation bodies, the competence in examining these crimes is the general organs of Ministry of Internal Affairs, according to art. 266 of the Criminal Procedure Code of the Republic of Moldova. However, the offense of insolvency (fictitious and intentional), as an economic crime, requires extensive knowledge of the financial and accounting field, civil law, insolvency, etc., for the instrumental provision of complex strategic investigations following the experience of the European Union. It is therefore important that criminal investigation structures investigating economic offenses in general and insolvency offenses in particular should have a high return through full use of institutional and professional capacities.

3. Economic crimes in general, and those related to insolvency in particular, are virtually impossible to predict, because they are committed by the people trained, who have a certain economic status and social and which are above all beings. In this sense, it is essential to prioritize the role of the punishment that needs to be more severe in order to re-educate the perpetrator's conduct, but also to prevent others from damaging the business environment and the economy of the country. By way of example, the maximum penalty for such an offence in Germany is imprisonment of up to 10 years, and in France – imprisonment up to 3 years and a fine of 45000 EUROS.

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CONSIDERATIONS ON THE COMPLIANCE WITH THE PRINCIPLES SPECIFIC TO THE TRIAL PHASE WITHIN THE CRIMINAL PROCEEDINGS

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Abstract: *The principles of carrying out the trial phase have an important role in this procedural stage. Since it situates itself between the criminal prosecution, which prepares the trial, and the stage of the execution of the criminal judgments, through which the court decision is put into practice, the judgment is considered the main phase of the trial. The main purpose of this procedural phase is to find out the truth about the defendant and the deed committed and the lawful settlement of the case.*

The main objectives in the course of the trial relate to: verifying the legality and the soundness of the accusation brought against the defendant; adopting the solution on the criminal action and the civil action in the criminal proceedings; verifying the legality and merits of the judgment given by the court of first instance.

Keywords: *Criminal Procedure Code, principles, rules.*

Introduction

Compared to the criminal investigation phase, which has a preparatory character, within the criminal prosecution activity the sanctions provided by the criminal law are applied to the defendants found guilty of committing crimes.

Article 10 of the Universal Declaration of Human Rights[1] states that: "Every person is entitled in full equality to be heard fairly and publicly by an independent and impartial court which will decide either on his/her rights and obligations or on the merits of any criminal charges against him/her."

In the Constitution of Romania, Article 126 stipulates that "Justice shall be exercised by the High Court of Cassation and Justice and by the other courts established by law."

Both nationally and internationally, system has been established according to which the trial phase is the only criminal process in which a punishment can be imposed on the perpetrator and a final conviction can be given. This attribute belongs to the court.

The procedural activity carried out during the trial phase is coordinated by principles other than those in the criminal prosecution phase. The court establishes the defendant's guilt (innocence) and punishment and other criminal measures, or orders the acquittal or termination of the criminal proceedings when there is a cause for exclusion or forgiveness of the criminal liability. The final judgment of the court

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[1] Universal Declaration of Human Rights, December 10, 1948.

sentencing the defendant removes the presumption of innocence and replaces it with a full conviction of guilt which, together with the sanction applied, has the power of law, being opposed to all.[2]

The prosecution takes place before the criminal investigation authorities and the prosecutor. In the current regulation, the judge and the court do not intervene in the course of the criminal prosecution except only to resolve the prosecutor's proposals and complaints about the procedural steps taken by the prosecutor and the appeals against the judgments handed down on these proposals and complaints. In the current Code of Criminal Procedure, the activity of a separate judge – the judge of rights and freedoms – is established during the criminal prosecution.

The activity of the courts takes place in a court hearing, with the participation of the prosecutor, who supports the accusation, and of the parties. The Defendant may exercise his or her right of defence either personally or through a defendant elected or appointed ex officio.

The samples administered during the criminal prosecution phase are subject to debate, under oral, contradictory and non-adversarial conditions, and new evidence may be administered. The court, with the participation of the prosecutor and the parties, clarifies the case by evidence in all its aspects.

Specific to the judgment phase are the judicial debates, which have a substantial role; in which the defendant has the last word.

In the settlement of criminal and civil action, the court renders a judgment ordering, in the criminal proceedings, the conviction, payment or termination of the criminal proceedings, and in the civil action it is ordered to admit it, with the obligation to civilian repairs or its dismissal as unfounded.

Both the principles governing the trial phase and the procedural position of the participants in the criminal trial are different due to the distinct object of this phase of the prosecution.

In the Code of Criminal Procedure, the judgment in the main proceedings was conceived as a complex of specific procedural acts, with the aim of rendering a legal and sound solution, equally based on law and truth.

The prosecutor, as the owner of the criminal action, will have to prove the accusation by taking evidence. As a consequence, the role of the judge is rethought, implying the judge will predominantly see that the proceedings carried out before him/her are fair, the principle of the active role not being consecrated as such in the General Part of the Code. To this end, if judged necessary, the judge may also order the taking of evidence other than those indicated by the indictment or the defence.

The trial is usually judged in the presence of the defendant. In all cases where it does not appear that the absence of the defendant in the court is the result of a wilful and unequivocal act by him/her to waive his/her right to be heard by a court and to defend himself/herself in the proceedings, a subsequent procedure is regulated, to re-establish, after listening to the missing person, the merits of the accusations brought to him/her.

[2]Grigore Theodoru, *Tratat de drept procesual penal* (Treaty of Criminal Law), Hamangiu Publishing House, Bucharest, 2008, p. 656.

The right to defence has in the current regulation, from the point of view of the judgment phase, the value of principle. To this is added the legality, which means the execution of justice in the name of the law by the courts, within the limits of the powers conferred on them by the legislator, as well as the submission of the judges only before the law.

The requirement that the case be dealt with within a reasonable time must be reported on a case-by-case basis, taking into account the duration of the proceedings, the nature of the claims, the complexity of the process, the conduct of the competent authorities and parties, the difficulty of the proceedings, the agglomeration of the role of the court. In this respect, the project addresses conceptual benchmarks from the perspective of the international regulations applicable to Romania, so that the substantive settlement of the case will respond to this purpose.

The simplicity of judging the trials has not been previously enshrined in the criminal law, and is not enshrined in the current code, but indirect provisions of this principle are found as a dimension of the fair trial.

Also, in order to ensure that the trial phase is carried out as a matter of urgency, the parties have the option of requesting that the trial be held in absentia, in which case they will not be quoted for the following terms.

Unlike the prosecution, which is non-contradictory, non-public and preponderantly written, in the judgmental phase, contrary principles are applied, the trial being conducted in a public, oral, direct and contradictory trial meeting (Article 351-352 Criminal Procedure Code).

a) Principle of publicity of the hearing

Article 127 of the Romanian Constitution and the Criminal Procedure Code stipulate that the hearings are public, except for the cases provided by the law. Failure to comply with this principle results in absolute nullity.

The publicity of the court hearing is a reaction against the secret nature of the inquisitorial process, thus establishing public control over the way in which justice is done, but also for educational purposes, since the conduct of the judgement can act in an intimidating way on those willing to commit crimes.[3]

Judgment sessions are public, with the participation of any person, including the press. The presence of the public confers a guarantee on the way in which the act of justice is performed, as well as its ability to know the way the act of justice has been performed.

The press may have access to court hearings, with the court having the duty to observe the media rights guaranteed by art. 10 of the European Convention on Human Rights. Also, the court has the duty to ensure that the right to privacy or family life is respected, the right of the parties involved in the process to be respected.

The principle of the public hearing of the trial involves ensuring free access to the place of trial of any person who has no procedural status in the case being judged. There are exceptions to this rule, juveniles under 16 are not allowed in the courtroom

[3]Idem, p. 667.

to watch the trial, and adult people are allowed only within the capacity of the meeting room.

Judgment in public hearing may harm the moral, dignity or intimate life of a person (parties, witness) in the case of offenses concerning sexual life (Article 218-223 of the Criminal Code) or blackmail. The non-public hearing is the exception to the principle of the publicity of the hearing. If the court at a public hearing violates the aforementioned values, the court may, at the request of the prosecutor, of the parties or ex officio, order the non-public hearing for the whole course or only for a certain part of its trial. The declaration of the non-public hearing is made at a public hearing, the order of the court being enforceable.

Only the parties, the injured person, their representatives, as well as the other persons authorised by the court have access to the non-public session in the courtroom.

Also, in the case of juvenile offenders, the trial is always held in a non-public hearing in order to be protected and not to have a negative influence on their behaviour, being considered at an early age with the personality in training. The Constitutional Court[4] has held that in the case of minors aged between 14 and 18 and who are suspected or accused of criminal proceedings, they must be guaranteed the specific procedural safeguards in view of the apparent vulnerability in which they are.

In this respect, the High Court of Cassation and Justice held the following issues[5]: "The cases in which the defendant is a minor are judged by the certain judges designated by law. The hearing shall be held separately from the other sittings and shall not be public.

If, in the meantime, the defendant reaches the age of 18 years, the court remains competent to hear the case under the special procedure in cases involving minors, unless the defendant committed the offense while he/she was a minor but reached the age of 18 before the date the case being referred to the court, in which case he/she is judged according to the ordinary procedure.

When, in the same case, there are more defendants, some of whom are minors and others adults, the panel is made up of specifically appointed judges, but the trial is done in accordance with the ordinary procedure in a public hearing."

The European Convention on Human Rights has highlighted that the principle of advertising court proceedings is not absolute, the national authorities being able to take into account the imperatives of efficiency and economy.

The European Court of Human Rights assessed that the lack of publicity at the stage of the court of first instance may be remedied by the public hearings within an appeal before a court having full jurisdiction over matters of fact and law.[6]

As regards the delivery of judgments, the same Article 6 provides that they must be pronounced publicly. The judicial practice of the Romanian courts is firm in the sense that non-observance of this express requirement, contained both in article 7 of the

[4]Constitutional Court, decision no. 102/2018, published in the official Gazette 400 of May 10, 2018.
[5] I.C.C.J., Criminal Section, Decision no. 1405 of 19 March 2003, available on www.scj.ro.
[6]ECHR judgment of 22 February 1984 in Sutter vs. Switzerland, paragraph 29-30, quoted by Leontin Coraş, "*Theoretical and practical considerations regarding the publicity of the hearing sitting and the sentence, from the perspective of the European Convention for the Protection of Human Rights and the of fundamental freedoms*" in the Law journal no. 12/2011, p. 247.

Civil Procedure Code (Article 121 (3) of the old Code of Civil Procedure) and in Article 405 Civil Procedure Code, constitutes a violation of the principle of publicity and is punished with nullity.

As regards juveniles, "the European Court of Justice has held that even in the absence of precise rules in the Contracting States concerning the age at which a minor is criminally liable, it cannot be considered a priori that the trial of a child accused of committing a deed even if he/she is only 11 years old, constitutes in itself a violation of the right to a fair trial guaranteed by Article 6 ECHR.[7]" However, the Court considered it essential that a child in such a situation be treated in the course of the trial in such a way that his/her age, his/her intellectual and emotional capacities can be taken into account; as such, the court is required to take all steps to facilitate the understanding of the proceedings by the accused and his/her participation in the proceedings.

In Romania, according to article 113, paragraph 1 of the Criminal Code "The minor who has not reached the age of 14 is not criminally liable."

From the ECHR jurisprudence point of view, in the case V versus Great Britain[8], the European Court has highlighted the need to conduct the proceedings in a way that reduces the intimidation or inhibition of the accused, a 10-year-old child accused of committing a serious crime. Depending on the young age and the peculiarities of the child, it was considered necessary to make a selection of the public attending the trial.

Advertising the proceedings is not an absolute principle, both the press and the public may be excluded from the whole procedure or part thereof for the purpose of preserving national order and security in a democratic society, protecting the morals, privacy or interests of the minors, or to the extent that the court considers that, given the particular circumstances of the case, the disclosure of the proceedings would harm the interests of the judiciary[9]

The access to the meeting room, as long as it is secret, is allowed only to parties, to their representatives, to the defenders and to the other participating persons (witnesses, experts, interpreters). By the fact that in the case of the secret meeting the parties can participate in the debates, it differs from the lack of publicity of the criminal prosecution acts, which is a secret also for the parties to the trial, until the presentation of the criminal investigation material, until the criminal investigation is completed.

Also, the proposal for preventive arrest, the proposal to extend the punitive arrest measure, the proposal to dispose of a home search, the proposal to intercept or register the communications is carried out in the council chamber.

According to article 68 paragraph (5) Criminal Procedure Code, the handling of requests for refutation or abstention shall be made in a secret session.

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[7]V. Pătulea – *Fair Trial Commented jurisprudence of the European Court of Human Rights*, Romanian Institute for Human Rights, Bucharest, 2007, p.153.

[8]ECHR, judgment of 16 December 1999 in Case V vs. The United Kingdom, paragraph 87, available at www.echr.coe.int.

[9]ECHR, judgment of 13 November 2007 in Boccelari and Rizza vs. Italy, paragraph. 5; ECHR judgment of 26 September 1995 in Diennet vs. France, paragraph 33; ECHR, judgment of 14 November 2000 in Riepan vs. Austria, paragraph 34; ECHR, judgment of 24 April 2001 in Case B. and P. vs. The United Kingdom, paragraph 35-41, quoted by Mihail Udroiu, Ovidiu Predescu, *European Protection of Human Rights and the Romanian Criminal Procedure*, Treaty, C.H.Beck Publishing House, Bucharest, 2008, p. 649.

According to article 6 paragraph (1) of the European Convention on Human Rights, access to the meeting room maybe forbidden to the press and the public throughout the trial or part of it when the interests of minors impose it or to the extent judged necessary by the court when, in special circumstances, advertising would be likely to prejudice the interests of the judiciary.

Failure to comply with the provisions on publicity of court proceedings entails the absolute nullity of procedural acts performed by the court (Article 281 (1) (c) of the Code of Criminal Procedure). The legislator uses the words "secret", "non-public", "in the council room" to highlight the lack of publicity of the criminal proceedings.

The advantages of advertising consist in the fact that this means controls the public opinion on the work of the judges, which stimulates them to be as preoccupied with the fulfilment of their function, to investigate and thoroughly examine the reality of facts, to preserve impartiality, the eye and control of public opinion, which also represents a brake on arbitrariness and abuse for judges.[10]

The jurisprudence of the European Court of Human Rights is not extremely rich in the publicity of the hearing. In the case of Axen vs. Germany (1983), the Court pointed out that that advertising condition applies to the whole of the procedure affecting the 'determination' of the case at issue, and in Le Compte, Van Leuven and De Meyere vs. Belgium (1981) The Court stated that the right to publicity is not necessarily breached if the two parties to the proceedings consent to the proceedings in a secret hearing.[11]

b) Holding of the oral hearing.

During the criminal investigation phase, the parties are aware of the evidence gleaned through written documents: minutes, written statements, ordinances. Unlike this phase, the judgment is conducted verbally. Failure to comply with this principle raises relative nullity.

The oral character is ensured by the way the law regulates the holding of the hearing: the president declares open the court hearing, orders the parties, the witnesses, the court notification, the preliminary issues are heard, the parties, the witnesses are heard gives the prosecutor and the parties the word, gives the defendant the last word, decides on the decision adopted.

c) The contradictory character of the hearing.

The principle of contradictory rule expresses the fact that the accusation function is on a procedural position equal to the defence function. In front of the court, the accusation and the defence fight so that the court can properly assess the evidence and make a lawful and substantive ruling.

So, as emphasized in the legal literature, contradictoriality is the engine of the court. The process evolves through the help of the contradictory character, through successive contradictions, up to the decision that will remove the contradiction.

[10]Traian Pop, *Criminal Procedural Law*, vol. I, National Printing House, Cluj, 1946, p. 338.
[11]Doina Micu, *Guarantee of the Human Rights*, All Beck Publishing House, Bucharest, 1998, p. 79, the cases are discussed by the author mentioned.

Counter-party opposition opposes, but also unites parties in the process, since none of the parties can do anything in court except only in the other's eyes.

In order to comply with the principle of contradictory law, the court must subject to debate for the parties and the prosecutor to any state, situation, circumstance that is essential for the full settlement of the case.

An important element of the contradictory character is the procedural equality of the parties[12], who have equal opportunities to argue and formulate their position in the process.

In order to meet the principle of contradictory, it is necessary to have the parties present, the participation of the prosecutor being, as a rule, mandatory.

In the European Convention on Human Rights and Fundamental Freedoms this principle is not directly expressed. It is inserted alongside the equality of arms, motivation of judgments and the right of the accused to keep silent and not self-criminalise, among the guarantees necessary for the fair conduct of the criminal process.

The court in Strasbourg has made appraisals on various aspects, such as: the personal presence of the defendant in court, how to present and discuss evidence in court, undisclosed evidence, the procedural position of the Prosecutor General, the Advocate General and the Commissioner of the Government.

The principle of contradictory in Criminal matters, in the ECHR's view, requires "the defendant's ability to combat the claims of the injured party either by confronting it or by having the possibility of obtaining a questioning at the trial stage, a ruling illustrating that the principle of equality of arms applies and in the relationship between the defendant and the injured party.[13]„

The necessity of distinguishing between the principle of contradictory and the principle of equality of arms has often been the subject of the decisions of the European Court of Human Rights. It decided that this distinction should be made when it comes to the "obligation to communicate of the parties of the case": if the absence of communication of a piece relates only to one of them, while the other party knew it, the Court examines the situation thus created "in terms of the principle of equality of arms". If both parties were deprived to the same extent, of the opportunity to get acquainted with the content of useful information produced to the judge without being able to discuss them, this situation finds its application on the principle of contradictory. The imbalance in the communication of useful and relevant information to the cause is sanctioned on the basis of the principle of equality of arms, while the failure to communicate such information to both parties is regarded as a violation of the principle of contradictory, even if, in some cases, this distinction would not always appear with the same clarity.[14]

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[12]Igor Soroceanu, "*Legal Reflections on the role of the principle of contradiction in the criminal proceeding*", in the *Law Journal* no. 7/2018, p. 89.

[13]Elisa Toma, *"Principiul egalității de arme – parte a procesului echitabil" ("The principle of equality of arms – part of the fair trial")*, in the Law Journal no. 8/2011, p. 210.

[14]ECHR, judgment of 18 February 1997 in the case of Niderost-Huber vs. Switzerland, paragraph 23, in "Recueil ...", 1997-I; ECHR, judgment of 22 February 1996 in Bulut vs. Austria, paragraph 47, in "Recueil ...", 1996-II; ECHR, judgment of 22 June 2000 in Coeme vs. Belgium, paragraph 102, in "Recueil ...", 2000-VII; ECHR, judgment of 25 March 1998 in the case of Belziuk vs. Poland, paragraph 105, in "Recueil ...", 1998-II, quoted by Vasile Pătulea, *Fair trial. The jurisprudence of the European Court of Human Rights*, Romanian Institute for Human Rights, Bucharest 2007, pp. 179-180.

d) The principle of direct consideration of the hearing.

This principle requires that the court hearing the case should be directly aware of the evidence administered, as well as the requests and conclusions made by the prosecutor and the parties to the trial, personally or through their defence.

During the trial stage, the evidence can be directly perceived: the parties, the witnesses, the members of the panel can be heard to fill in and clarify the uncertainties. This aspect was also highlighted in the literature, mentioning that the court directly comes in direct contact with all the evidence.[15]

Unlike the criminal investigation phase, where only requests and written memos can be used, oral court hearings are underway. In these court hearings, the prosecutor has the floor to support the accusation, and the parties have the floor to defend their legitimate interests. The court re-administered the evidence that was administered during the criminal investigation.

Conclusions

The principles of carrying out the trial phase in the criminal trial are important legal rules within it. Their importance derives from the fact that human rights derive from principles, and respect for human rights in the criminal process is based on these principles.

Promptness in the proceedings is one of the principles that do not receive a specific regulation in legislation.

The European judge, as well as the national one, must interpret the principles both from the point of view of the rules included in the laws and from the point of view of the treaties and jurisprudence, particularly that of the European Court of Human Rights.

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PARTICULARITIES OF THE PATRIMONIAL PERSONAL RESPONSIBILITY OF HIGHER EDUCATION

Gheorghe LUCIAN*

Abstract: *The patrimonial responsibility of the teaching staff who are active in education is regulated by the National Education Law no. 1/2011, differently, from the procedural point of view, depending on the employees working in the pre-university education or those working in higher education. The imputation decision, as well as the other acts for the recovery of damages and damages, shall be made by the management of the unit or the institution whose employee is the employee concerned, except when otherwise provided by law. The patrimonial liability of the personnel working in higher education shall be determined, under the conditions of the common labor law, within the limitation period of 3 years from the material damage or by a court decision, following the action of the employee accused by the employer, under certain conditions, by agreement of the parties, following the employee's acceptance of the employer's note of assessment and assessment of the damage.*

Keywords: *patrimonial liability, teaching staff, injury*

Legal responsibility is a form of social responsibility, and it is fulfilled by the means specific to law. In particular, this involves engaging in liability for breach of rules of conduct arising from the rule of law. These rules are regulated to protect the fundamental interests of a company and its people. The cumulation of several forms of liability in the case of one person is possible insofar as the misconduct violates social values of a different nature and naturally if it meets the constitutive and legal content of different deviations regulated by the legislation in force. The patrimonial liability is one of the most important legal institutions of labor law being a form of legal liability very often encountered in judicial practice given the onerous nature of legal employment relationships. The patrimonial responsibility of the teaching, research and auxiliary teaching staff is determined according to the labor legislation[1].

Measures for the recovery of damages and damages are taken according to labor law.

In accordance with Art. 291 of the national education law, the staff of higher education consists of teaching staff and non-teaching staff. The teaching staff consists of teaching / research teaching staff, auxiliary teaching / research staff from universities, university libraries and university central libraries. Teaching and research staff means staff legally holding one of the academic or research titles of this law, which belongs to a higher education institution and conducts didactic and / or research activities. The research and development functions of the universities and their staff are subject to the provisions of Law no. 319/2003 on the status of research and

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[1] Art.315 of the Law no. 1/2011, the law of national education.

development staff[2]. Teaching staff in higher education is disciplined for violation of their duties under the individual employment contract, as well as for violation of rules of conduct that harm the education / prestige of the unit / institution.

The rules of conduct are set out in the University Charter, without prejudice to the right to opinion, freedom of expression and academic freedom.

The teaching staff in higher education responds patrimonically under the conditions established by the Labor Code, the employer having a legal prerogative, which is expressly enshrined.

In view of the above, I will further analyze the patrimonial responsibility of teaching staff in higher education from the perspective of labor law specific regulations.

According to the provisions of the Labor Code, the following substantive conditions have been deducted for the existence of patrimonial liability, which must be fulfilled cumulatively:

– the quality of the employee at the injured unit of the person who caused the damage;
– the existence of a valid contract of employment;
– the illicit and personal deed of the person committed in connection with his work;
– damage caused to the patrimony of the unit;
– a causal relationship between the illicit act and the damage;
– the guiltyness of the employee.

The cumulative meeting of these conditions attracts, according to the judicial practice, the patrimonial liability of the employee and the lack of one of the conditions removes this responsibility. The quality of the employee at the injured unit of the person who caused the damage In order to analyze this condition, it is explicitly necessary to have a legal relationship of work between the person who committed the offense and caused a loss and, of course, the employer. Where there is no legal relationship between the parties, the patrimonial liability can not be committed in any way whatsoever under the labor code in order to establish and recover the damage caused. Of course, if the guilty persons perform their productive activity in atypical legal relationships (apprentices, students and students during production practice, etc.), legal responsibility and engagement is completely different. In these cases, the liability for the recovery of damages caused by the responsible persons will be committed under the common law (civil) law. However, as I have said, the general rule establishes that patrimonial liability occurs whenever a certain legal relationship presents, even if only in part, characters of the legal employment relationship. There are of course exceptions to this rule.

Thus, in practice, a situation occurs when a person, although he no longer has the quality of an employee, is still patrimonial from the point of view of labor law.

This is the case where a person's injury was discovered after the termination of the employment relationship with the unity of the unit and, of course, after losing its status as an employee. In this case, the recovery of the damage will also be done under patrimonial liability, even if the person has ceased working relations with the former employer.

[2] published in the Official Gazette no. 530 of 23 July 2003.

Also, in accordance with O.G. 121/1998 on the material liability of soldiers[3], soldiers and civil servants of military units are responsible for material matters whether after the damage they have or not have military personnel.

Existence of a valid employment contract

An individual employment contract is a contract under which a natural person, called an employee, undertakes to perform work for and under the authority of an employer, a natural or legal person, in return for a salary called salary.

In order to be valid, the individual labor contract is concluded on the basis of the written consent of the parties, in Romanian, no later than the day before the beginning of the activity by the employee. The obligation to conclude the individual labor contract in written form is the responsibility of the employer. Prior to commencing the activity, the individual labor contract is registered in the General Register of Employees, which is sent to the territorial labor inspectorate no later than the day before the start of the activity.

The employer is obliged to give a copy of the individual labor contract to the employee, and to keep a copy of the individual work contract for the employees who work in that place before the commencement of their activity. Therefore, the legal employment relationship is proved by the individual contract of employment concluded in writing, one of which must be in the possession of the employee. Insofar as, for various reasons, the employee is not in possession of a copy of the individual employment contract, evidence of his existence may be required by the employer, party to the contract, or by the territorial labor inspectorate where the individual employment contract should be submitted for registration. It is noted that at present the written form is requested ad valiantly for the formation of the will of the parties, and the failure to perform the individual work contract in written form is equivalent to its invalidity.

Prior to the Law no. 40/2011 for amending and completing the Law no. 53/2003 – Labor Code[4], according to art. 16 par. (1) and (2) of the Labor Code, the individual labor contract is concluded on the basis of the written consent of the parties in Romanian.

The obligation to conclude the individual labor contract in written form is the responsibility of the employer. The employing legal person, the natural person authorized to work independently and other forms regulated by the legislation in force shall have the obligation to conclude in written form the individual labor contract prior to commencement of the employment relationship and in case the individual contract the work has not been concluded in writing, it is presumed to have been concluded for an indefinite period, and the parties can prove the contractual provisions and benefits provided by any other means of proof.

Consequently, prior to April 1, 2011, it can be stated that the written form of the individual labor contract was required *ad-hoc* and not *valid*[5], the legislator expressly

[3] Published in the Official Gazette no. 328 of August 29, 1998.

[4] published in the Official Gazette of Romania no. 225 of 31 March 2011.

[5] Al. Țiclea (coordinator), Labor Code. Commented and annotated by legislation, doctrine and jurisprudence, vol. I (articles 1-170), Universul Juridic Publishing House, Bucharest, 2008, p. L. Uță, F. Rotaru, S. Cristescu, *Labor Code annotated, Legislation. National and Community jurisprudence, doctrine and comments*, vol. I, art. 1-153, Hamangiu Publishing House, Bucharest, 2009, p. 151.

admitting that in the absence of the document the parties could prove the existence and fulfillment (employer's interrogation, other documents – certificates issued by the employer, documents drawn up by the employee in the performance of his duties and resulting from the records of the employer or third parties with which the employer had legal relations, the testimony test.

The illicit and personal act of the framed, committed in connection with his work

By illicit deed is meant that act which contravenes the norms of objective law and which also violates the subjective right of the injured person[6].

Regarding the illicit character of the act, it is analyzed in relation to the obligations arising from the service attribution found in the job description or in other documents describing the concrete obligations specific to the nature of the function of the type and place of Labor.

Under Article 254 (2) of the Labor Code, employees are not liable for the damage caused by force majeure or other unforeseen causes that could not be eliminated, nor by the damage that falls within the normal risk of the service.

Force and force majeure are also cases of patrimonial liability. For the existence of the fortuitous case the event must be unpredictable and for force majeure the essential characteristic is the invincibility of the event.

Injury

The existence of injury is an essential condition for the employee's material liability.

This manifests itself either as a decrease in the employer's assets or as an increase in the patrimonial liability. Of course, injury must cumulatively fulfill certain features, as follows:

a) the damage is real and certain

this requirement implies that the employee is responsible for the amounts actually lost from the employer's patrimony, not for the eventual ones. The certainty of injury involves determining its extent by accurately evaluating it in a sum of money. Proof of the certainty of injury falls under the responsibility of unity.

b) the damage is directly caused to the unit

As a peculiarity, with respect to the damage created to the employee, we note that the law only refers to those situations in which it is produced "while performing the duties" or "in connection with the service", which is why the employer's liability also engages in the following situations : when traveling for business in the same or another location, if the transport was provided with the means of transport of the establishment; during the breaks that take place during the work program; before or after the termination of the work, whether the employee is in the interests of the service in the establishment where he is working or of another establishment to which he was sent to work or in any place where he is performing his duties.

[6] Ion M. Anghel, Francisc Deak, Marin F. Popa, *Civil Liability*, Scientific Publishing House, Bucharest 1969, p.74.

Damage may be to the detriment of the employer directly by the unlawful act in connection with performance of the employment contract but also indirectly when, in his capacity as principal, the employer is called upon to compensate a third party for damages caused by his employee during the performance service duties.

In this situation only patrimonial liability can be established in the case of direct damage.

With regard to the second case where the employer is liable to third parties under the rules of tort law, the recovery of the sums paid as compensation is carried out by the guilty party under the rules of ordinary law.

At the same time when the employer is called upon to respond to third parties for non-fulfillment of a contractual obligation, the liability of the employee to the employer is determined according to the labor code, unless the act that led to the non-performance of the contract constitutes an offense.

The assessment of the damage shall be made in relation to the price in force at the time when the court decides on the final settlement of damages based on the principle of full reparation of the damage. With regard to the assessment of damages constituting deficiencies in management, account shall be taken of the possibility of offsetting these deficiencies with the allowances, which can be approved only if the respective deficiencies result from a confusion between the assortments of the same product due to the similarity of the external aspect without diminishing values employer's patrimony.

Causal link between the unlawful act and the damage

By causality relation is meant the connection that must exist between two phenomena, one of which is the cause precedes and determines the other, ie the effect.

Guilt

It is the subjective psychological attitude that the author had at the time of committing the deed of the committed deed and its consequences. So it is necessary that the act be attributable to her author, that is, the perpetrator had a blame when he committed the deed.

Because the Labor Code makes no distinction, patrimonial liability will be equally committed to all forms of guilt, whether committed intentionally or by fault.

The burden of proof in labor disputes rests with the employer, who is obliged to file evidence in his defense until the first day of appearance[7].

How to recover the injury

According to art. 254 paragraph 3 of the Labor Code, if the employer finds that his / her employee has caused a fault and in connection with his / her work he / she will be able to request the employee, by means of a note for establishing and assessing the damage, by agreement between the parties, within a time limit which may not be less than 30 days from the date of communication. Of course, if the parties do not

[7] Art.272 of the Labor Code.

understand, damages will be recovered through a request to the court, according to the rules and principles of contractual civil liability.

It is necessary to make the following statement regarding the value of the damages recovered by agreement of the parties, in that it can not be higher than the equivalent of 5 gross salary in economy. *Per a contrario*, for damages exceeding this value, it is mandatory to go through the litigation before the court.

Terms of jurisdiction of labor

According to Article 253, paragraph 1 of the Labor Code, "Employees are patrimonial in accordance with the rules and principles of contractual civil liability for material damage caused to the employer by fault and in connection with their work." The term within which the patrimonial liability of the employees to the employer may take place is 3 years from the date of the right of action (art. 268 para 1 letter c) of the Labor Code.

Also, in the case of non-performance of the collective labor contract or clauses thereof, the term giving the right to action is 6 months from the moment of its birth.

The 3-year and 6-month terms are limitation periods, therefore the provisions on suspension and discontinuance of extinctive prescription are not applicable.

The two terms are objective, as the moment when they start to run is the date of an external event, the occurrence of the damage or the receipt of the sums or the goods when the person concerned has benefited from the undue services.

For certain categories of employed persons, the normative acts of a special nature provide for administrative research prior to the issuance of the imputation decision (in the case of the Government Ordinance No. 121/1998 on the material liability of the military, approved by the Law no.25/1999).

At present, the provisions of the Labor Code do not disclose the obligation to conduct administrative research. We appreciate that only in the case of the recovery of the damage, the support of such an action could only be carried out under the conditions of an administrative investigation by the persons designated for that purpose.

Thus, limited regulation of administrative research will not prevent its use by employers. Enforced indemnity is made by:

1. deductions from salary, as well as any other amounts (including unemployment benefits) attributable to the employees of the unit. Deductions are made in monthly installments at a rate of 1/3 of the net salary, and if other deductions are made, the rates for covering all claims may not exceed half of the salary.

2. enforcement of the goods. Tracking to cover damages will be made to any property of the person liable for payment if he is no longer employed, in addition to the assets exempt from the law, under the terms of the Code of Civil Procedure.

In conclusion, the entire context examined above shows that patrimonial liability has sufficient defining and derogatory features from common law that is capable of giving it specific, specific regulation. Thus, it is noted that where labor law does not expressly regulate, common law becomes applicable insofar as it is compliant with the requirements and specificities of the regulation of employment relationships. The current regulation of liability for damages caused by legal labor relations is assimilated to the principles of contractual liability not only because the law of the Labor Code so

provides, but also because the current regulation of patrimonial liability no longer contains elements incompatible with the legal regime of liability civil contracts. Thus, strictly in terms of establishing patrimonial liability, the principle of legal equality between the employer and the employee, neither of which is subordinated to the other.

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JUDICIAL ERROR AND THE FUNDAMENTAL RIGHTS

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Abstract: *The constant case-law of the European Court of Human Rights offers an extensive interpretation to the autonomous notion of the fundamental rights, accordingl to the need of protecting these values, that manifest through various forms in nowadays society.*

The need of a right to take legal action in order to repair the damage caused through an illicit deed even in the absence of any blame has been stated.

In this context, the internal regulation regarding the objective civil liability of the State for the damage caused by a judicial error and the possibility to take legal action to repair it are in agreement with the Convention..

Keywords: *judicial error, tort liability, fundamental rights, compensation*

The evolution of the notion describing the human being, seen not only as a holder of rights and obligations, but as a complex entity, whose moral and pshychological characteristics require special means of protection, lead to the development of the theory related to the rights of the personality, a distinctive category which, unlike real rights or civil rights claim, cannot be acquired through a certain action, but they are born along with the human being and are inseparable and intimately connected to it.[1]

These rights are non economic, cannot be transmited (are strictly personal), cannot be foreclosed, are imprescriptibles and can can only be exercised personaly by the holder, every person having to comply with them.[2]

The Romanian Civil Code mentions some of these rights of the personality, in the article 58: the right to life, to health, to physical and moral integrity, to dignity and self image, the right to the respect of private life; other such rights can be included in this category, if they are regulated by the internal law. The doctrine also included here the notion of civil freedoms, the ones that are regulated by internal laws – such as the freedom of conscience, of religion, of expression or of movement, but also those regulated by the international conventions adopted by Romania, as long as " right is a freedom and freedom is a right".[3]

The fundamental rights of the human being enjoy the protection offered by the constant case-law of the European Court of Human Rights, which, although it has not stated a genuine principle of civil liability, has created a constant jurisprudence affirming that the injured party must have the right to obtain the damage repair through a legal action.[4]

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[1] Ph. Malaurie, L. Aynès, *Les personnes. Les incapacités*, ed. a 5-a, Ed. Cujas, Paris, 1999, p 213.

[2] Radu I. Motica, Gheorghe C. Mihai, *Fundamentele dreptului. Optima Justitia*, Ed All Beck, Bucureşti, 1999, p 76.

[3] *I.* Muraru, E.S. Tănăsescu, *Drept constituțional şi instituții politice*, vol. I, ed. a XI-a, Ed. All Beck, Bucureşti, 2003, p. 141.

[4] B. Girard, *Responsabilité civile extracontractuelle et droits fundamentaux*, LGDJ, Paris, 2015, p 115.

Nevertheless, the jurisprudence of the European Court does not allow setting clear rules, based on a coercive legal precedent, as long as it is a custom of this instance to analyze distinctively, from case to case, the situations brought before the Court, and this excessively prudent approach has the downside of generating judicial insecurity which makes predictions of future decisions very less probable. And so, every decision being founded on the characteristics of the particular case brought before the Court, trying to systematize it would distort the meaning of the case-law. Nevertheless, the doctrine stated certain guidelines regarding the conditions and the effects of the protection of the fundamental rights and the civil liability[5].

The main condition in order to entail the liability is the harm caused to one of the fundamental rights, which are protected by the Convention. These fundamental rights are also found among the so called rights of the personality of a human being, as they are regulated in the internal legislation.

It must be mentioned that, separately from the necessity to repair the damage caused by one's own action, the Court also protects the fundamental rights even when they were violated in the absence of a blame of the author of the deed, thus in the case of an objective civil liability.

Following the need to protect the fundamental rights, the Court applies the rules stating the necessity to regulate the right to an action in order to repair the damage caused. The lack of this right, thus meaning the lack of the protective measure that can be undertaken, equates damaging the fundamental right, and therefore, for example, the violation of the right to a good reputation opens the way to repairing the damage using the civil tort regulations, founded on the necessity to protect the right of a person to a private life, one of the fundamental values protected by the Convention.[6]

Starting with the first decisions that expressly stated the necessity to repair the damage caused by injuring the right to physical integrity, the case-law of the European Court developed gradually, reaching the point of including the necessity to repair the damage caused by violating the right to a private live, to a good reputation, to liberty or even to neighbourly relations.

The French doctrine[7] mentioned that, starting from fundamental rights presented in a general manner by the Convention, the dynamic case law of the Court gradually enlarged the sphere of these fundamental values, stating the need for the right to action in order to entail civil liability in various situations of illicit deeds, in an analysis that the Court does from case to case, transforming the Convention into a " living body", adapted to nowadays society and situation.

For example, starting from the regulation mentioned in the article 8 of the Convention that guarantees the right every person has to a private and family life, also stating the negative requirement for the State not to intervene in a manner meant to violate this fundamental value, the case—law of the Court imposed more and more positive obligations for the State, like the one to protect the good reputation and to sanction its violation[8], the possibility for the spouse to obtain legal separation[9], the

[5] *Idem*, p 116-117.
[6] *Idem*, p 116.
[7] *Idem*, p 127-130.
[8] CEDO, Cauza Petrina contra României, hotărârea din 14 octombrie 2008, numărul 36.

possibility to obtain the cessation of the damage caused by the neighbourly relations[10] or even the possibility to live in a traditional way.

Nevertheless, it has been stated [11] that, for example, enlarging the autonomous notion of private and family life in the Court's case-law, that stated Article 8 of the Convention refers also to aspects regarding the physical and social identity of the person, the right to the personal autonomy and self improvement exceeds the vision of the authors of the Convention and also confer the ECHR judges the option to state in an unlimited manner the application sphere of this article.

We consider these critics as being unfounded as long as, according to the jurisprudence of the Court, the Convention is a living instrument and the constant evolution of the society forces the European judges to keep up with the imperative of protecting the new factual situations that manifest in the society, and extending the notion of the fundamental rights is necessary in order to guarantee the efficiency of this protection conferred by the Convention to these new situations.

Strictly interpreting the regulations of the Convention creates, in our opinion, a higher risk, that is the refusal to confer protection to the fundamental values to which the authors of the Convention committed when these values manifest in a different form than the one known before, as the society and its mentalities are permanently evolving, and therefore, by denying the Convention the character of a " living body", one could deny its main function, that is the effective protection of the fundamental rights and freedoms.

Of course that the criticism originated in the doctrine[12] and referring to the shortcomings of the extensive interpretation of the notion of fundamental rights cannot be ignored. These criticism are mainly about: the use of autonomous notions in the Court's case-law (like " private life", "asset", " civil right") and which have a different meaning that the one currently utilized in the judicial field of each member State, situation that could generate multiple confusions; the enlargement of the protection sphere of the fundamental rights could lead to a degradation of their importance; the judicial insecurity the new types of fundamental rights generate in the member States' regulations, that must be permanently adjusted accordingly.

Also, the case-law of the Court related to the right the injured party has to promote a judicial action in order to entail the tort liability and to obtain the repair of the damage caused, and the continuous extension of its scope could lead to a control exercised by the European Court over the regulations regarding to tort liability in the member States; it has been proposed that such a right is to be admitted only in the situations when the necessity to protect the fundamental value and repair the prejudice caused is largely applicable in the member States.[13]

Of course that these critics, meant to draw attention upon a necessary predictability of the Courts case-law regarding the notion of fundamental rights and the right to a judiciary action based upon the regulations related to tort liability represent a clue about

[9] CEDO, Cauza Airey contra Irlandei, hotărârea din 9 octombrie 1979, numărul 33.
[10] CEDO, Cauza Powell şi Rayner contra Regatului Unit, hotărârea din 21 februarie 1990, numărul 40.
[11] B. Girard, *op. cit.*, p 128.
[12] B. Girard, *op. cit.*, p 129.
[13] *Idem*, p. 130.

the necessity to establish some general principles on the set of the fundamental rights that can be protected using the instruments offered by the Convention, assumed and applied in every member States, by taking into consideration of their margin of discretion and the specific of each judicial culture of the member States.

Not only the categories of the fundamental rights that can be protected by the Convention generated disputes in the doctrine, but also the deeds that could cause a prejudice and also that could entail the civil liability[14].

Thus, according to the source mentioned above, although in the vast majority of the Courts decisions it was stated that the right to a judicial action is necessary when the prejudice was caused by a culpable action, expressly mentioning it[15], it is also true that in some other decisions the Court stated that the regulations regarding the tort liability are to be applied even in the absence of any blame.

The Court asked that this kind of liability should be entailed against the institutions or the persons who failed to comply their duties[16], and thus the idea of blame appears as prevailing when taking the decision to sanction the disrespect of the fundamental rights.

Also, decisions have been taken when the Court did not mention the idea of a blame, stating, for instance, in the case *Sindicato dos pilotos do aviacao civil against Portugal* (Decision of January 29, 2004) that the State has the positive duty to offer its citizens the means to obtain the necessary fulfillment of the non pecuniary prejudice suffered by harming the right to a good reputation, and also, in the case *Anno Todorva against Bulgaria* (Decision of May 24, 2011) it stated that a right to the judicial action must be conferred to entail the civil liability when the right to life is injured.[17]

Moreover, in the case *Codarcea against Romania* (Decision of June 2, 2009), involving the entailing of the medical liability, the State has been condemned for not complying to the positive duty of offering a right to a judicial action for the person who suffered the prejudice of the disrespect of the values protected by article 8 of the Convention and thus obtaining a compensation from the medical institution where the medical personnel activated and committed gross misconduct. The Court sanctioned the State for failing to regulate mechanisms in order to entail the civil liability for the deed of another person (principal – servant), a manifestation of entailing civil liability even in the absence of blame.[18]

Thus we can observe, in this case-law framework of the European Courts decisions, that a distinct regulation on the objective civil liability of the State for the

[14] *Idem*, p. 130-133.
[15] For example, the severe medical misconduct (according to the Decision of May 4, 2000 in the case William and Anita Powell against the UK when the medical personel, although they suspected a severe and rare pathology of the child, did not take imediat measures for an adequate treatement and did not inform the parents about the childs death, also forging the medical documents of the case in order to exonerate themselves about the responsability) or the disrespect of the speed limits that caused a severe accident (case Anna Todorova against Bulgaria, the Decision of May 24, 2011), *apud* B. Giurard, *op. cit.*, p 130.
[16] CEDO, Case Dodov against Bulgaria, Decision of January 18, 2008, number 94, apud B. Girard, *op. cit.,* p. 131.
[17] B. Girard, *op. cit.*, p 132.
[18] *Idem*, p. 132.

prejudice (including the non pecuniary one, by harming a fundamental right protected by the Convention) caused by a judicial error is conforming to the Courts view about the necessity to create a right to a judicial action in order to obtain the compensation for the harm caused, even if no guilt is established. As we mentioned before, not all the situations that could cause a judicial error imply a professional misconduct and also this aspect is to be analyzed, according to the regulations of article 96 of the Law number 303 of 2004, only in the subsidiary recourse proceedings promoted by the State against the magistrate suspected to have acted with bad faith or gross negligence.

The law number 242 of 2018 modifying the law regarding the statute of the judges and prosecutors (law number 303 of 2004) establishes two hypotheses on the judicial error.

First appears in the situation when a judicial action was taken with the notable breach of the substantial or procedural regulations, and this action harmed in a severe manner the rights, freedoms and legitimate interests of a person and this prejudice could not repaired by promoting an ordinary or extraordinary appeal.

Also, there is a judicial error when, by pronouncing a final decision that does not comply to the law or the factual situation that results from the evidentiary, a severe harm to the rights, freedoms or legitimate interests of the person has been caused, and it could not be repaired by promoting an appeal.

We consider that, starting from the legal definition of the judicial error, and also regarding the case law of the Constitutional Court, the judicial error implies, by its own nature, a harm caused to the right to a fair trial, and thus proving the nature and the limits of the prejudice caused should be simpler.

The State has the positive obligation to take every measure necessary in order to ensure the compliance with the conventional standards of a fair trial, and the case-law of the European Court has drawn the lines regarding this autonomous notion (which includes the complaints regarding the civil rights and obligations and also regarding the validity of a criminal charge) which states, as we mentioned, one of the fundamental rights of a person, regulated by article 6 of the Convention, and in respect of which the member States have a diminished margin of discretion.[19]

The *Ruiz Mateos* decision[20] even stated the appliance of the guarantees offered by article 6 in the matters related to the constitutional litigation, with the necessary mention that the decision relates to direct constitutional actions promoted on the role of the constitutional court.[21]

Also, even though the situation regarding the appliance of the guarantees regulated by article 6 in matters related to disciplinary litigation against magistrates has not been settled by the Court yet, it has been said[22] that a positive answer must be naturally given, as long as reasons in order to consider this type of guarantees not applicable in this procedure are lacking.

[19] *Idem*, p 379.
[20] Hotărârea din 23 iunie 1993, din cauza *Ruis Mateos contra Spaniei.*
[21] *Idem*, p 395.
[22] *Idem*, p 399.

It has been said[23] that the rule of law, as a fundament of a democratic society, would be useless if justice is not made, and this transforms the right to justice into one of the most important ones.

So, we can conclude that the civil liability should be entailed by a judicial action started by the person that suffered a prejudice, when it has been caused by a blameful deed, and the situations when the civil liability is entailed even in the absence of guilt are, according to the Courts case-law, exceptional.

This is rather the case when analyzing the regulations concerning the civil liability for the prejudice caused by a judicial error, which is an objective type of liability, taking into consideration the specific of the judicial activity, which does not allow for the magistrate suspected of professional misconduct to be directly brought before justice, as long as the State is the guarantor of respecting the fair trial rules.

Conclusions

The fundamental rights of the human being enjoy the protection offered by the case-law of the European Court of Human Rights, which has created a constant jurisprudence affirming that the injured party must have the right to obtain the damage repair through a legal action.

The Court also protects the fundamental rights even when they were damaged in the absence of a blame of the author of the deed, thus in the case of an objective civil liability.

A distinct regulation on the objective civil liability of the State for the prejudice (including the non pecuniary one, by harming a fundamental right protected by the Convention) caused by a judicial error is conforming to the Courts view about the necessity to create a right to a judicial action in order to obtain the compensation for the harm caused, even in the absence of any blame.

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IMPROVING THE EUROPEAN CITIZENS' INITIATIVE FROM THE GOOD ADMINISTRATION PERSPECTIVE

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Abstract: *This article first examines the current and future regulations of the European Instrument entitled "European Citizenship Initiative", established by the Constitutive Treaties and by Regulation (EU) No 211/2011 recently replaced by a new regulation, Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European Citizens' Initiative, which will apply from 1 January 2020. The new EU citizenship regulations are the EU's efforts to make this European instrument a real contribution to improving the quality of democracy in the EU and by witch the Commission can ensure that its decisions on legislative proposals are taken as closely as possible to citizens, giving European citizens the opportunity to express their views on the Union and its future in order to strengthen participatory democracy, not only by exercising the right to vote conferred by the Treaties, but also by cooperating and participating in the application of ideas of good governance and good administration.*

The analysis of the impact of the European Citizens' Initiative since its regulation has allowed us to identify the challenges it faced and, last but not least, the need to improve it, which is reflected in the new Regulation (EU) 2019/788. Looking ahead, it remains to be seen from the moment of its entry into force what will be the effects of these European citizenship initiatives if there are significant positive effects that will make this instrument more visible, credible, accessible and more effective for in time for the EU and its citizens, or whether it will retain the minimum legislative impact on the EU.

Keywords: *European Citizens Initiative, European Commission, participatory democracy, citizens, good administration.*

I. General considerations

The European Union is a global player in the defense and promotion of human rights at international level and is acting on a permanent basis to support democracy and the rule of law.

Of course, ”in order to be considered democratic, the European Union must be characterized by representativeness, transparency, accountability and, consequently, legitimacy and authority. The way in which democracy is understood in the European Union derives from the involvement of civil society in the different stages of European policy-making, from the way in which public interest is favoured over private interest and also from the transparency that it is trying to manifest.”[1]

The idea of participatory democracy was born long before the Treaty of Lisbon, but an important role in this ample process is played by the regulation of European

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[1] Marinică, E., *European Union issues – protecting democracy, human rights and the rule of law,* revista Fiat Justitia nr.2/2018, Cluj, p.166.

citizenship as a result of a long-lasting process[2], as well as of the citizens' initiative as a complement to the forms of democracy representative in the European Union.

It should be noted that in a modern democracy, such as that of the European Union and its constituent states, participatory democracy must not and does not replace representative democracy, and it is a way of completing it. In practice, the Treaty of Lisbon has added a new dimension, that of European participatory democracy, in addition to that of the representative democracy, on which the Union is founded.

In this context, the regulation of the citizens' initiative was a necessity for participatory democracy at the level of the European Union, a need to promote the same values and demonstrate the role of citizens in the development of society, and thus Article 11 of the Treaty on European Union (hereinafter referred to as "TEU ") aims to establish the legal framework for its application and to regulate:

"Art.11. – 1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union."

It should be noted that the TEU "strengthens the citizenship of the Union and further enhances the democratic functioning of the Union, inter alia to ensure that every citizen has the right to participate in the democratic life of the Union through an initiative of the European citizens."[3]

Furthermore, Article 24 of the Treaty on the Functioning of the European Union (TFEU) states that it is for the European Parliament and the Council to regulate the provisions on the procedures and conditions to be considered for the support and presentation of a citizens' initiative, as defined in Article 11 of the TEU, including the minimum number of Member States from which citizens presenting such an initiative must come.

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[2] Moroianu Zlătescu, I., Marinică E., *Dreptul Uniunii Europene*, Editura Universul Academic şi Editura Universitară, Bucureşti, 2017, p. 280.

[3] Carausan, Mihaela V., *The European Citizens' Initiative – Participatory Democracy in the European Union (2011)*. Proceedings of the 6th Edition of the International Conference on European Integration – Realities and Perspectives, p. 22, 2011. Available at SSRN: https://ssrn.com/abstract=1987151 [accesed on 2 may 2019].

And so, Regulation (EU) no. No 211/2011 of the European Parliament and of the Council[4] which came to complete the legal framework established by the Treaties establishing the rules and procedures for the European Citizens' Initiative, which was subsequently supplemented by Implementing Regulation (EU) No 1179/2011 of the European Parliament and of the Council laying down technical specifications for electronic collection systems in accordance with Regulation (EU) 211/2011 of the European Parliament and of the Council on the Citizens' Initiative.[5]

According to European regulations, the European Citizens' Initiative becomes "the first supranational instrument of direct democracy and creates an additional direct link between the citizens of the European Union and the institutions of the Union. As one of the most innovative elements introduced by the Treaty of Lisbon, the European Citizens' Initiative is often considered to have great potential for the further development of transnational democracy. However, this also involves a range of (potential) challenges for the EU institutions and for politically active citizens – and, in the longer term, it can also be for the institutions and political actors of the Member States of the Union."[6]

One of the current criticises of the European Union concerns the fact that it lacks democracy in certain respects and that, despite the fact that "the European institutions that make up it are representative of the exemplification of democratic character, they are not a sufficient premise to be considered democratic"[7]."In this context, the active participation of citizens and their contribution to the life of the Union may represent measures to mitigate this problem, provided that they are not only elaborated, adopted and implemented, but also characterized by efficiency.

II. Citizens' Initiative. From 2011 until now

The applicability of the regulations provided for by the Treaties and by Regulation (EU) 211/2011, since its entry into force[8] until now[9], confers all EU citizens the right to have a legislative initiative within the EU, to participate actively in the European decision-making process on matters falling within the EU's sphere of competence, as "even if the citizens' initiative only aims to invite the Commission to submit proposal, the European citizen becomes, through this mechanism, an enthusiastic European law. From the passive receptacle of a predefined set of rights, the citizen of the European Union becomes the initiator of any rights that will shape his status in the European Union. The significance of the indirect legislative initiative is to stimulate public

[4] Published in Official Journal of the European Union L 65, 11.3.2011, p. 1.
[5] Published in Official Journal of the European Union L 301, 18.11.2011, p. 3.
[6] Bouza García, L., Cuesta-López, V., Mincheva, E., Szeligowska, D., *Papers prepared for the workshop —The European Citizens' Initiative – A First Assessment*, organised by the European General Studies' programme of the College of Europe, Bruges, Belgium 25 January 2011, p. 2.
[7] Marinică, E., *op. cit.,* p.168.
[8] April 2012.
[9] By "present" it will be understood until the entry into force of the new Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European Citizens' Initiative, published in the Official Journal of the European Union L 130/55 5/17/2019, pp.55-82.

debate around European policies that contribute to shaping European consciousness and creating a genuine European public space."[10]

According to Regulation (EU) No 211/2011, the minimum age for the support of a citizens' initiative is the age for the exercise of the voting right in the European Parliament elections, determined according to each national regulation (most of the Member States EU, age 18, including Romania). The organizers must also set up a citizens' committee, consisting of at least seven people, from at least seven EU Member States. and collecting statements of support, both on paper and online, within a specified time frame of 12 months from the date of registration of the initiative. As a first step, the citizens 'committee must register the proposal for a citizens' initiative in the European Commission's register, which confirms or refuses to register it within 2 months if the conditions set out in the Regulation are not met. After collecting and verifying the statements of support, the Citizens' Committee will formally submit to the European Commission the proposal for a citizens' initiative, followed by a 3-month period in which it must make a decision and then it will communicate to them the "legal and political conclusions regarding the citizens' initiative, the actions it intends to take, if any, and the reasons for the actions or the refusal to act".[11]

In order to have long-term effects, this participatory democratic procedure must be known to EU citizens, in particular through public debates, recognized as being effective in terms of its outcomes (since it allows citizens to participate directly in decision-making processes, proposed decisions subsequently to the European Commission, but not including the vote on the issues covered by the initiative).

Since its introduction, various citizens' initiatives have been launched, which have collected millions of signatures, but so far only four such initiatives have succeeded, as follows: *ECI (2012) 000003 – "Water and sanitation are a human right! Water is a good public and not a commodity!*"[12], *ECI (2012) 000005 -"One of us", ECI (2012) 000007 – "Stop vivisection, ECI (2017) 000002 – toxic pesticides*".

As early as 2013, the European Ombudsman's Institution, whose role is to provide any citizen of the Union and any natural or legal person residing or having its registered office in a Member State the right to refer to cases of administration defective in the work of the Union's institutions, bodies, offices or agencies, has made some proposals to strengthen the role of European citizens' initiatives, calling for better orientation for the organizers, stronger involvement of the European Parliament and the

[10] Mătuşescu C., *Drept instituțional al Uniunii Europene. Curs universitar*, Editura Pro Universitaria, 2013, p. 131.

[11] Article 10 par. (1) din Regulation (EU) 211/2011 on the European Citizens' Initiative.

[12] "Right2Water" is the first European Citizenship initiative to meet the requirements of EU Citizenship Initiative Regulation (EU) No 211/2011, which was supported by more than 1.6 million European citizens and aimed at supporting safe access to safe drinking water and sanitation, both in Europe and globally, especially in the context of its relation to human rights; the Commission has therefore committed itself to taking concrete measures, through the implementation of water quality legislation, launching a public consultation at the EU level. on the Drinking Water Directive, improving the transparency of urban waste water and drinking water data management, establishing a more structured stakeholder dialogue on transparency in the water sector, protecting universal access to safe drinking water and sanitation as a domain priority for future sustainable development objectives, etc.

Council, with organizers in different stages of an initiative, as well as a more transparent decision-making process as to what action the Commission has on the citizens' initiative.

In order to this[13], in December 2013, the Ombudsman launched an own-initiative inquiry, including a public consultation, to find out how the functioning of the European Citizens' Initiative could be improved by formulating eleven proposals after a prior analysis of the Commission's opinion, "requesting the Commission if it rejects the initiative, explain these decisions in a consistent and understandable way and explain its political choices in pursuing CEIs that have received one million signatures in a detailed and transparent manner." The Ombudsman also urged the European Commission "to re-propose the legislative requirements that are simpler and more uniform for all Member States."

All the measures taken by the European Ombudsman help EU citizens to deal with individual complaints on matters relating to the application of the European Citizenship Initiative Regulation in order to improve it from a good governance perspective by providing recommendations and guidance based on the principles of good administration which can guide the European Commission in the application of the Regulation.

In March 2015, the European Commission adopted the first Report to the European Parliament and the Council on the application of Regulation (EU) 211/2011 on the Citizens 'Initiative[14], according to which from April 2012 until March 2015 the Commission received 51 applications for registration of citizens' initiatives, of which 31 were registered (16 entries in 2012, nine in 2013, five in 2014 and one in 2015). 18 initiatives have reached the end of the collection period and three of these have gathered the necessary number of statements of support and have been submitted to the Commission. At the time of the Report, two of these initiatives had been successful ("Right2Water" and "One of us"), and the third ”Stop Vivisection” initiative, although under consideration at that time, from the European Commission, came up with the report. These are, in fact, three of the four citizenship initiatives that have been achieved so far.

As a conclusion to this report, the Commission considered that "the ECI was fully implemented. The fact that two initiatives have managed to go through the entire life cycle of the CEI, from the registration stage to the successful collection of the necessary statements of support and the official reply from the Commission, the expectation of the official reply for the third initiative and that the "Right2Water" actions are in progress confirms that there are procedures and mechanisms to ensure that the ECI is operational.”[15] Among these, the Commission

[13] Press release. *Ombudsman calls on Commission to make European Citizens' Initiative politically relevant.* For more details: https://www.ombudsman.europa.eu/en/press-release/en/59208, [accessed on 10 may 2019]

[14] Under Article 22 of the Regulation, by 1 April 2015 and every three years thereafter, the Commission is required to report to the European Parliament and the Council on the application of the Regulation. For more details on report content: http://ec.europa.eu/transparency/regdoc/rep/1/2015/RO/1-2015-145-RO-F1-1.PDF [accessed on 10 may 2019]

[15] *Ibidem,* p.15

highlighted, on the one hand, the lack of legal personality of citizens' committees, the impossibility of registering ECI proposals as they clearly fall outside the Commission's sphere of competence, the requirements for signatories that need to be uniform and simplified so that CEIs becomes a more accessible tool, the need to remedy the calendar of the CEI's life cycle, ensure the correctness of translations of proposals for initiatives by their organizers, the organization of public hearings so as to ensure the participation of stakeholders and, last but not least, dialogue and the interaction to grow.

From 2015 to 2017, an ample process of revising the Regulation has begun, considering that the European Citizens' Initiative, although capable of contributing to the reduction of the democratic deficit by supporting active citizenship and participatory democracy, has not fully realized potential due to certain technical, legal and bureaucratic provisions established by the Regulation. Thus, although up to 2016, 56 initiatives were presented, only 36 of them were registered with the Commission and only three managed to collect at least one million signatures. In September 2017, there were 47 initiatives, about eight million statements of support, but only three initiatives managed to reach the one million signatures threshold, and a fourth initiative had at that time reached this threshold and accepted by the Commission. However, it should be noted that only two of the three successful initiatives – "Right2Water" and "Stop Vivisection" – have been favored by the European Commission.

In May 2019, there were 63 registered initiatives, 9 million statements of support, 4 successful citizens 'initiatives that managed to raise over 1 million signatures and 3 out of 4 citizens' initiatives to which the European Commission has gone, have resulted in legislative action,[16] by the European Commission, which has decided not to propose political objectives to the Council and the European Parliament, which is why the Commission's attitude and lack of results have called into question the effectiveness of the instrument.

Thus, if we relate to the success of European citizens' initiatives, to their minimal effects consisting of a change of attitude at national or local level, we can easily see that they have given rise to a minimal legislative impact on the EU, on the Member States, including on European citizens and, why not, has considerably affected the credibility of this European instrument, which in turn has led to a significant decrease in the number of European citizenship initiatives registered[17], in parallel with the decrease in the number of statements of support collected.

It seems that throughout this period both those involved in organizing citizens' initiatives projects and members of civil society have found some rigidity of this instrument, which is also complemented by some gaps in its legislative regulation or even some problems or dysfunctions raised by the legislation concerned. We agree

[16] The success of these citizens' initiatives is due to their support through social movement networks, but the initiatives mainly had each of them the most support in a particular EU member state. (e.g. "Right2Water" in Germany and "Stop Vivisection" in Italy).

[17] In 2012, 16 citizens' initiatives were registered, and only 5 such initiatives in 2015.

with the opinion of some[18], according to which ”the EU invites citizens to participate via the ECI, but representative institutions remain in control of the process. Unlike the system existing in the USA, Switzerland or Italy, the signatories of a citizens' initiative have no mechanisms to change the decision of the institutions, other than to vote office holders out in the next elections. [...]. The ECI thus remains fully coherent with a representative democracy framework.”

The dialogue with civil society is undoubtedly a valuable tool from the democratic point of view in that it contributes to a fairer representation of different types of interests and to better policy-making due to the provision of broader and specific expertise to EU institutions.[19]

One of the problems identified is the low degree of knowledge and awareness of the ECI instrument among citizens and institutions at national level, although various measures have been taken in this respect (e.g. ”European Citizens' Initiative Day", which is organized annually to assess the state of play of the ECI's implementation and effectiveness and also to share good practice among stakeholders, to set up an ECI helpdesk, a practical guide by the Economic and Social Committee to raise awareness of EU media and citizens with regard to CEI and its promotion etc.). Certainly, the registration process needs to be more transparent and more effective, and information and awareness-raising initiatives with regard to the consolidated citizens 'initiative, through various information campaigns, by broadly promoting the stages of the process of citizens' initiatives, to the Commission, by guaranteeing multilingualism, so that the number of participants is high.

Identifying the challenges and dysfunctions created by this European tool gave rise to questions about the perspective of participatory democracy at European level and whether the deficits created can be remedied. There were many voices and answers in the literature, some authors[20] responding to these questions, so it can be said that "the European Citizenship Initiative is an instrument that can mobilize citizens for a certain purpose and channel their contribution to the political process. If this proves to be significant, it will depend, as I have pointed out, on whether the Commission will be able to strike a balance between the requirements of the ECI and other legitimate objectives. The situation seems much more complicated in terms of open consultations and dialogues with civil society and representative organizations. Some aspects could be slightly improved."

Therefore, in September 2017, the European Commission adopted the Proposal for a Regulation of the European Parliament and of the Council on the European Citizens' Initiative, so that this democratic instrument offered to EU citizens. to enable them to launch and support such initiatives more easily.

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[18] Luis Bouza García, *The Significance of the European Citizens' Initiative for Pan-European Participatory Democracy*, International Institute for Democracy and Electoral Assistance (International IDEA), 2013, p. 14.

[19] *Ibidem,* p.16.

[20] Marxsen, Christian, *Participatory Democracy in Europe Article 11 TEU and the Legitimacy of the European Union*, in: Federico Fabbrini / Ernst Hirsch Ballin / Han Somsen (eds), What Form of Government for the European Union and the Eurozone?, Hart Publishing, Oxford 2015, pp. 151-169.

Thus, in March 2018, the Commission adopted a second report on the application of the Regulation, because, following the political agreement[21] reached in December 2018, the European Parliament and the Council formally adopted the new Regulation on the European Citizens' Initiative[22].

III. The new Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European Citizens' Initiative

This new regulation complements the reform proposals that the European Commission, through the voice of its president, Jean-Claude Juncker, presented to them so that EU to make a leap forward democratically, because according to him European democracy deserves more. It should be noted that the new Regulation will enter into force on the twentieth day following its publication in the Official Journal of the European Union[23], but will apply from 1 January 2020.[24]

Its *objective* is "to make the European Citizens 'Initiative more accessible, less burdensome, easier to use for organizers and supporters, and to reinforce actions taken by citizens' initiatives to fully exploit their potential as a instrument to stimulate debate. The regulation should also facilitate the participation of as many citizens as possible in the democratic decision-making process of the Union."[25] Thus, "the procedures and conditions required for the European citizens' initiative should be effective, transparent, clear, simple, user-friendly, accessible for persons with disabilities and proportionate to the nature of this instrument. They should strike a judicious balance between rights and obligations and should ensure that valid initiatives receive an appropriate examination and response by the Commission."[26]

What does this Regulation do? In brief, starting with assistance and more information, creating an option for organizers to set up a legal entity, registering through a two-stage procedure to allow organizers to review their proposal if it initially does not meet all the requirements (2 months + 2 months), even clarifying aspects of partial registration, flexibility of start date (within 6 months of registration), a centralized online collection system provided

[21] The political agreement of 12 December 2018 in Strasbourg whereby the European Parliament and the Council reached a political agreement on the Commission's proposal to revise the European Citizens' Initiative. According to the agreement, "a political priority of the Juncker Commission, the reformed citizens' initiative will be easier to use, facilitating the participation of Europeans in the democratic process." European Commission First Vice President Frans Timmermans was of the opinion that: "9 million Europeans from all 28 Member States have already spoken up through the European Citizens Initiative. But we can do better if more citizens use this instrument for democratic participation at EU level. [The simplified] rules […] make it easier for European citizens to make themselves heard. They will now have an easily accessible and user-friendly tool at their disposal to ask the EU institutions directly to act on the issues they really care about." .

[22] Published in Official Journal of the European Union L 130/55, 17.5.2019, pp.55-82.

[23] Date of publishing is 17 may 2019.

[24] except Articles 9 (4), 10, 11 (5) and 20-24, which shall apply from the date of entry into force. After 1 January 2020, Regulation (EU) 211/2011 is hereby repealed.

[25] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European Citizens' Initiative, published in the Official Journal of the European Union L 130/55, 17.5.2019, p.55

[26] Ibidem, p.56

by the Commission, minimum age to be reduced to 16 years (choice belongs to Member States), signatories need to provide simplified personal data,[27] support from all EU citizens, regardless of their place of residence, and statements of support to be submitted to the Member States within 3 months after the end of the collection, improved IT support and a 6-month period allowing for a more public hearing comprehensive and longer time available to the Commission to analyze the citizens' initiative and prepare its response.

Practically, through the improvements made by the new Regulation, the European Citizens' Initiative should become a more user-friendly tool for all EU citizens by launching and much easier to support such initiatives through close collaboration with the organizers of such initiative initiatives by providing a free online data collection service to organizers and ensuring translation of all initiatives into all EU languages by reducing the amount of data requested and using only two types of support forms (instead of the 13 models currently used due to differences in national rules).

Considering that in the future the Commission will periodically evaluate the functioning of the European Citizens' Initiative, Member States are encouraged to consider setting the minimum age to 16 years in accordance with their national law, reducing the age thus giving the opportunity to another 10 million new potential supporters[28], and "in order to increase the impact of successful initiatives, the process of pursuing the way in which initiatives are being pursued will be improved, by favoring useful debates before a Commission response. If they so wish, citizens will also be informed of the outcome of the initiatives they have supported."[29]

In support of U.E. and in order to ensure greater visibility of citizens' initiatives, which should come to complete the idea of good governance and good governance that

[27] According to the European Parliament's legislative resolution of 12 March 2019 on the proposal for a regulation of the European Parliament and of the Council on the European Citizens' Initiative adopted on 12 March 2019 in Strasbourg, Regulation (EU) 2016/679 applies to the processing of personal data carried out under this Regulation. In that respect, for the sake of legal certainty, it is appropriate to clarify that the representative of the group of organisers or, where applicable, the legal entity created for the purpose of managing the initiative, and the competent authorities of the Member States are to be considered to be the data controllers within the meaning of Regulation (EU) 2016/679 in relation to the processing of personal data when collecting statements of support, email addresses and data on the sponsors of the initiatives, and for the purposes of verification and certification of statements of support, and to specify the maximum period within which the personal data collected for the purposes of an initiative can be retained. In their capacity as data controllers, the representative of the group of organisers or, where applicable, the legal entity created for the purpose of managing the initiative, and the competent authorities of the Member States should take all appropriate measures to comply with the obligations imposed by Regulation (EU) 2016/679, in particular those relating to the lawfulness of the processing and the security of the processing activities, the provision of information and the rights of data subjects." Available at http://www.europarl.europa.eu/doceo/document/TA-8-2019-0153_RO.html, [accesed on 10 may 2019].

[28] Article 2 of Regulation (EU) 2019/788 states that: "(1) Every citizen of the Union who is at least of the age to be entitled to vote in elections to the European Parliament shall have the right to support an initiative by signing a statement of support, in accordance with this Regulation. Member States may set the minimum age entitling to support an initiative at 16 years, in accordance with their national laws, and in such a case they shall inform the Commission accordingly.

(2) In accordance with the applicable law, Member States and the Commission shall ensure that persons with disabilities can exercise their right to support initiatives and can access all relevant sources of information on initiatives, on an equal basis with other citizens."

[29] European Commission, *Press release. State of the Union 2017 – Democracy Package: Reform of the Citizens' Initiative and Funding of Political Parties*, Brussels, 15 September 2017, available at http://europa.eu/rapid/press-release_IP-17-3187_en.htm, [accessed on 25 April 2019]

the EU assumed it to all its citizens[30], in the preamble of the New Regulation it is stated that, "in order to make the European citizens' initiative more accessible, the Commission should provide information, assistance and practical support to citizens and groups of organisers, in particular on those aspects of this Regulation within its competence", and in order to strengthen this information and assistance, " the Commission should also make an online collaborative platform available that provides a dedicated discussion forum and independent support, information and legal advice about the European citizens' initiative. The platform should be open to citizens, groups of organisers, organisations and external experts with experience in organising European citizens' initiatives. The platform should be accessible for persons with disabilities."

In order to manage the initiative throughout the procedure, provide an online register for the European Citizens' Initiative which " to raise awareness and ensure transparency on all the initiatives, should comprise a public website providing comprehensive information on the European citizens' initiative in general, as well as up-to-date information on individual initiatives, their status and the declared sources of support and funding on the basis of the information submitted by the group of organisers."

Obviously "to ensure proximity to citizens and to raise awareness about the European citizens' initiative, Member States should establish one or more contact points in their respective territories to provide citizens with information and assistance regarding the European citizens' initiative."

Furthermore, ensuring consistency and transparency of initiatives, those meeting the conditions of the Regulation will be registered by the European Commission before the start of the collection period of citizens 'statements of support, and in order for the European Citizens' Initiative to be more efficient and accessible, and the conditions will be clearer, simpler, easier to apply and proportionate.

It is common knowledge that, in order to promote good governance and ensure the participation of civil society, the institutions, bodies, offices and agencies of the Union act with the highest degree of respect for the principle of transparency[31]. For this reason, in order to pay due attention to issues related to the clarity and transparency of the citizens' initiative, potential signatories will be informed "on the registered part of the initiative and on the fact that only statements of support are collected in relation to the registered party. The Commission should inform the group of organizers in sufficient detail of the reasons for the decision not to register the initiative or to register it in part, as well as all judicial and extrajudicial remedies available to it at your service."

In fact, transparency is addressed in the context of Article 17 of the new Regulation, which states that " the group of organisers shall provide, for the publication in the register and, where appropriate, on its campaign website, clear, accurate and comprehensive information on the sources of funding for the initiative exceeding EUR 500 per sponsor. The declared sources of funding and support, including the sponsors, and corresponding amounts shall be clearly identifiable. The group of organisers shall

[30] Transparency in all its phases, legislative acts and rules established by them are clear, predictable and respect the rights of EU citizens, and they have access to any information about them, the efficiency and effectiveness of decisions taken by the European institutions and, last but not least, , objectives to be clearly formulated, measurable and, at the end, evaluated under conditions of public transparency.

[31] Article 15 (1) TFEU

also provide information on the organisations assisting it on a voluntary basis, where such support is not economically quantifiable. That information shall be updated at least every two months during the period from the date of registration to the date on which the initiative is submitted to the Commission in accordance with Article 13. It shall be made publicly available by the Commission in a clear and accessible manner in the register and on the public website on the European citizens' initiative."

At the same time, paragraph 3 mentions the possibility for citizens to submit a complaint to the Commission, a complaint about the completeness and correctness of information on sources of funding and support, by making available in the register and on the public Internet site of the European Citizens' Initiative a contact form.

IV. Conclusions

It is obvious that the new Regulation seeks to improve the European Citizens' Initiative to strengthen participatory democracy, and this European tool through which the voice of EU citizens to be heard is a very important aspect, by encouraging citizens to become active citizens, to become more involved in the life of the EU not only by exercising the right to vote conferred by the Treaties but also by cooperating and participating in applying the ideas of good governance, which together with the principles underpinning the functioning of the EU contribute to improving the idea of democracy in the EU.

We feel that there is no need to delineate the actions taken by the EU. to support democracy representative of participatory democracy, as these are already two fundamental concepts that have strengthened each other in the democratic life of the United States.

At the same time, we consider that participatory democracy, based on the principles of equality and transparency, contributes to improving the confidence of European citizens in the EU. and in the EU administration which, in turn, determines the efficiency of EU and its administration.

With regard to the new regulation, it is important to look closely at whether the European Citizens' Initiative will become more attractive, more familiar to EU citizens and whether it will be a step forward in participative democracy in the EU, in getting together the EU and its citizens. We believe that the proper implementation of the provisions of this new regulation will benefit both the EU and all European citizens who cooperate and act as partners in the European legislative process alongside the EU institutions. with attributions in this respect.

Although the democratic deficit of the EU is increasingly perceptible both internally and externally, we could not say that, despite all its challenges and dysfunctions, it was not and is always present in the functioning of the EU, but the way in which it is viewed and analyzed shows that " the desirability of an active involvement of the media as much as possible, as well as the involvement of citizens, both at national and at European level, in domestic and national issues and, on the other hand, in the matters regarding the European Union, so that their will can take effect, through the European Commission, in the European Parliament and, last but not least, through the European Ombudsman elected to assist them in settling complaints against the mismanagement of EU institutions. As far as civil society is concerned, in order to be able to have real and effective engagement and

activities, it is necessary to strengthen and protect rigorously the freedom of expression, the freedom of participation and the right to information."[32]

It is therefore obvious that this new regulation will not solve the democratic deficit with which the EU is currently facing, but it can be a step forward in making participatory democracy more efficient, in increasing the active role of civil society in the life of the EU, in improving good practices at the level of the European administration.

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[32] Marinică, E., *European Union issues – protecting democracy, human rights and the rule of law*, revista Fiat Justitia nr.2/2018, Cluj, p. 169.

THE IMMOVABILITY – A GUARANTEE OF JUDGE'S INDEPENDENCE

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Abstract: *The current paper starts from the analysis of the independence of judges as fundamental principle for the state of law, of the guarantees of this principles, emphasizing the particularities of one of the guarantees, namely the immovability of the judge.*

The immovability represents a means of protection offering the judge a certain stability, this contributing to the insurance of the independence of justice, essential feature of the state of law.

Keywords: *independence, judge, principle, guarantee, right, protection measure*

1. General provisions

A judge's independence must be insured in relation to the legislative and executive powers, an important factor for the establishment of the extent of the judge's independence being the jurisprudence of the European Court of Human Rights.

The principle of the independence of justice, reflected by the jurisprudence of the Romanian Constitutional Court leads to the conclusion that it cannot be limited only to financial aspects, but also refers to a series of guarantees which give effect to the principle stated by constitutional provisions, among them being the immovability of judges.

The Constitution achieves, regarding the judicial authority, a symmetry between the independence of judges, their immovability and their judicial liability[1].

The independence of justice is essential for the state of law, for maintaining the stability of the judicial relations, for the rule of law and constitutional order[2].

The immovability of judges represents the rule according to which the judges appointed by the President of Romania can be transferred, delegated, posted or promoted only with their consent and may be suspended or dismissed only under the conditions laid down by law.

It can be fully stated that the immovability of judges is one of the principles of the organization and functioning of the judiciary, as well as a guarantee of the independence of the judiciary and the impartiality of judges and gives some stability in the sense that it provides as an essential condition the written agreement of the judge, transfer, delegation, posting or promotion thereof.

Regarding the evolution of this principle in Romania, the immovability of judges was first stated by the Constitution of 1923 (Art 104), subsequently being stated by the Constitution of 1938 (Art 76) and the Constitution of 1991 (Art 125 Para 1), and also by the Law No 303/2004 (Art 2 Para 1).

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[1] Decision No 53/21 March 2000, published in the Official Gazette of Romania, Part 1, No 366 of 7 August 2000.

[2] Constantinescu Mihai, Muraru Ioan and Iorgovan Antonie, *Revizuirea Constituţiei României. Explicaţii şi comentarii*, Rosetti Publ.-house, Bucharest, 2003, p.112.

2. The reflection of the principle of immovability in doctrine and jurisprudence

The immovability represents the guarantee of the independence of judiciary and in the same time a means of protection for the judges, on whose base the judges appointed by the President of Romania cannot be transferred, delegated, detached or promoted without their written consent, unlike the debutant judges who shall enjoy stability (Art 21 Para 3 of the Law No 303/2004).

It is important to mention the fact that the immovability refers to the quality as judge, and not the positions of top management of the courts.

Mainly, the immovability lasts during the performance of the position as judge, having as starting point the appointment by the President of Romania and as ending point the removal from office.

The above-mentioned guarantee does not exonerate the judge from disciplinary or other form of liability.

By the statement in the fundamental law of the principle of immovability, the judge cannot violate this principle because justice would be deprived of constitutional guarantees.

The purpose of establishing such constitutional guarantees emerged from the need to insure the independence of the judiciary and the express regulation of the principle of immovability has the essence of a good and efficient organization of the judicial system.

In the above meaning, the legislator has stated expressly (Art 47^1 Para 1-2 of the Law 303/2004) the interdiction of delegation, detachment or transfer, for at least 2 years from their promotion to superior courts, as well as the interdiction of being appointed as judges for at least 2 years from the promotion of the prosecutors into the superior prosecutor's offices.

Also, the legislator stated the interdiction of delegation and detachment to superior level courts than the ones in which the judges have the right to perform.

Moreover, the legislator has stated the interdiction of transfer, delegation, detachment or promotion of the judges for 3 years from their appointment based on Art 33 Para 1 of the Law No 303/2004.

The immovability does not exonerate from disciplinary liability for the illicit action, but it represents a procedural guarantee in the meaning that the measures stated by the law could be taken only after certain authorities censure the imputable facts about their existence and the involvement of the judge in the case.

The term of immovability refers to a legal regime of protection for the owner of a public position or of an appointment, in whose virtue he cannot be neither removed, nor revoked or transferred against his will, except the cases in which that person was legal subjected to a disciplinary procedure followed by a sanction stated by the law[3]. The judicial literature stated that the immovability is a guarantee of the constitutional judge's independence, basically a means of protection[4].

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[3] Chelaru Ioan, Ionescu Cristian, *Unele aspecte teoretice privind independența şi inamovibilitatea judecătorilor Curții Constituționale*, in Dreptul nr. 8/2015, p.66.

[4] Muraru Ioan, Constantinescu Mihai, *Curtea Constituțională a României*, Albatros Publ.-house, Bucharest, 1997, p. 67.

The effective insurance and guarantee of the independence of the judiciary represents the essence of each judicial organization, in a democratic society.

According to Art 125 Para 2 of the Constitution, the promotion, transfer and sanction of the judges may be ordered by the Superior Council of Magistracy, under the terms of its organic law. This text shall be interpreted in the broadest sense possible, namely the protection of judges. The law may detail the constitutional provision but cannot exclude the right to decision of the Superior Council of Magistracy.

The constitutional rules state guarantees for the independence of the judges, a special interested being presented by their immovability.

The immovability of judges, also stated by the Constitution, represents in fact a constitutional guarantee, developed by a legal norm, of the good administration of justice and a means of protection against any interference.

Also, the immovability represents a situation generated by the law on judicial organization, under the constitutional principle, based on which the judges cannot be moved, denounced or sanctioned without the protection of certain guarantees enshrined in the law. Both the independence of judges, as well as their immovability, are the conditions of a good functioning of judiciary.

Because the judge is independent and immovable, his position differs from that of the administrative body. That is why, in the spirit of this principle, the judge must be in real protected against any political or administrative interference. This is also the spirit of the solutions promoted by the European Court of Human Rights, which, in many cases, emphasized the need for sufficient guarantees of independence of the judge against the executive[5].

The immovability is a strong guarantee of the judge's independence, being a measure for his protection. According to this principle the judge cannot be revoked, downgraded or promoted without his consent. The immovability places the magistrates under protection against any revoking or transfer imposed in addition to very serious misconduct and after a judicial procedure[6].

According to another opinion, by immovability it is defined the right of the persons holding such position to be protected against any arbitrary measure regarding the removal from their position, suspension, downgrading, transfer or even promotion without their consent[7].

In its jurisprudence, the Constitutional Court has stated that: "The immovability is a guarantee of a good administration of justice and of the independence and impartiality of the judges. It is not stated only for the interest of the judge, but also for that of justice. This is why the legislator chose to establish special conditions for the appointment of magistrates. This system of exigences established for the appointment of magistrates has

[5] Decision No 53/21 March 2000, published in the Official Gazette of Romania, Part 1, No 366 of 7 August 2000.

[6] Muraru Ioan, Tănăsescu Elena-Simina, *Drept constituțional şi instituții politice*, 13th Ed., 2nd Vol., C. H. Beck Publ.-house, Bucharest, pp.282-283.

[7] Constantinescu Mihai, Deleanu Ioan, Iorgovan Antonie, Muraru Ioan, Bucur-Vasilescu Florin and Vida Ioan, *Constituția României – comentată şi adnotată*, Official Gazette Press house, Bucharest, 1992, p.282; see also Constantinescu Mihai, Iorgovan Antonie, Muraru Ioan and Tănăsescu Elena-Simina, *Constituția României revizuită – comentarii şi explicații*, All Beck Publ.-house, Bucharest, 2004, pp.267-268.

the purpose of effectively insure the principle of independence of judges simultaneously with the insurance of professionalism and prestige of justice. The immovability refers to the statute of the judge, not his skills of being part of the panel of judges"[8].

The fact that certain judges were not appointed, according to the above-mentioned conditions, by the President of Romania, and, therefore, they are not immovable, does not attract their inability of being part of the panel[9].

The Court has stated that the option of the legislator for the involvement of judges in other activities which are not exclusively related to the performance of justice, also results from other regulations, which are, for example, those regarding componence of the Central Electoral Bureau and of the constituency electoral bureaus[10].

Really, the Constitution states the role of the Superior Council of Magistracy as warrant of the independence of the judiciary but, in the same time, it leaves in the task of the special law the regulation of the division of attributions between the plenum and the sections of the Superior Council of Magistracy.

The new approach enlists perfectly within this constitutional pattern which does not establish which are the attributions of the plenum and those of the sections by referring to the special law governing this authority[11].

3. Aspects on the appointment, transfer, delegation, detachment and promotion of judges.

The rules of application of the principle of immovability are established by the law, being ordered by the Superior Council of Magistracy.

According to Art 125 Para 2 of the Constitution, the proposal for appointment of judges, their promotion, transfer and sanction are within the competence of the Superior Council of Magistracy, according to the rules stated by the organic law.

The constitutional text refers only to the competence of the Superior Council of Magistracy on the appointment, promotion, transfer and sanction of judges, while Law No 317/2004 refers to the attributions of the Superior Council of Magistracy, the conditions for the appointment, transfer, delegation, detachment, suspension and removal from the office of judges being mentioned by the Law No 304/2004.

The attributions stated by Art 125 Para 2 of the Constitution represent guarantees of immovability.

Regarding the proposals for the appointment as judge, they shall be decided by the plenum of the Superior Council of Magistracy and refer to the judges who have promoted the admission examination or who were admitted as result of the examination held based on Art 33 Para 1 of the Law No 303/2004 or to those who were admitted without examination, based on Art 33^1 of the Law No 303/2004.

[8] Decision No 39/10 April 1996, published in the Official Gazette of Romania, Part 1, No 174 of 2 August 1996.
[9] Decision No 67/21 May 1996, published in the Official Gazette of Romania, Part 1, No 174 of 2 August 1996.
[10] Decision No 596/20 September 1996, published in the Official Gazette of Romania, Part 1, No 936 of 28 November 2016.
[11] Decision No 375/6 July 2005, published in the Official Gazette of Romania, Part 1, No 591 of 9 July 2015.

The appointment shall be made upon the proposal of the Superior Council of Magistracy, by the President of Romania, as stated by Art 134 Para 1 of the Constitution.

For the application of such provisions, the legislator has the freedom the state the competence of the President of Romania to appoint them, including in positions of top management, to revoke all the magistrates to whom the constitutional text refers to. The participation of the President of Romania in the establishment of this settlement of the judicial authority totally agrees with the principle of balance of state powers, stated by Art 1 Para 4 of the Constitution and does not affect in any way the independence of judges stated by Art 124 Para 3 of the Constitution and the performance by the prosecutors of their attributions in compliance with the principle of legality and impartiality stated by Art 132 Para 1 of the fundamental law[12].

The appointment of judges by the head of state is related to the Romanian tradition and it is a solution also found in other European democratic states (for instance, Art 151 Para 1 of the Belgian Constitution, Art 117 Para 1 of the Dutch Constitution, Art 88 Para 1 of the Greek Constitution etc.).

The inserted new paragraph aims to shape the basic principles, of constitutional order of the regime of the immovability of judges, expressly pointing out that in this respect the competent authority is exclusively the Superior Council of Magistracy, body, ... which is essentially constituted by the will of the magistrates themselves[13].

The immovability does not refer to stagiaires, but only to the judges appointed by the President of Romania. The stagiaire judges are the only ones who are not appointed by the President, but according to the law on the organization of judiciary they enjoy stability, such as the prosecutors.

As far as the promotion of magistrates is concerned, so as not to depend on the executive, two rules must be considered, namely, that it should only be returned to the body of magistrates (i.e. the Superior Council of Magistracy); the limitation of the degrees (thresholds) and the consequences of the promotion, in the meaning of making fewer career differentiations. … In order to prevent unwanted situations from advancing, promotion is also practiced on the spot[14].

The transfer of judges shall be performed upon the request of the interested persons, the decision belonging to the section for judges of the Superior Council of Magistracy [Art 40 Let i) of the Law No 316/2004]. According to Art 61 of the Law No 303/2004, the judges may be appointed as prosecutors and prosecutors in the position of judge, upon the decision of the sections of the Superior Council of Magistracy, which, in case of approval, makes a new proposal to the President of Romania. The President cannot decline the appointed in the new position other than reasoned. The same law states, beside the transfer, the delegation and detachment of judges (Art 57-59), which shall be ordered by the section for judges of the Superior Council of Magistracy [Art 40 Let a) of the Law No 303/2004]. The

[12] Decision No 551/10 June 2009, published in the Official Gazette of Romania, Part 1, No 399 of 12 June 2009.
[13] Constantinescu Mihai, Muraru Ioan and Iorgovan Antonie, *op. cit.*, p.114.
[14] Muraru Ioan, Tănăsescu Elena-Simina, *op. cit.*, pp.282-283.

delegation and detachment shall be made upon the written consent of the judge concerned[15].

An element of novelty is represented by the transitory norm stated by Art 110 of the Law No 303/2004, which states the possibility of the judges who have received a superior professional degree as result of the examination for promotion until the entrance into force of the Law No 242/2018[16] to be transferred to the superior courts.

The Romanian Constitution does not state about the delegation, detachment, suspension or cessation of the position as judges, all these being stated by the law on the organization of the judiciary.

Though the Romanian Constitution does not mention *expressis verbis* the Superior Council of Magistracy as having attributions related to the delegation and detachment of judges, they are deduced from the provisions of the Law No 303/2004, stating that the legislator has entrusted the Superior Council of Magistracy with a very important role regarding the delegation and detachment of judges.

According to Art 10 of the Decision of the Superior Council of Magistracy No 163/2009, the delegation of judges in executive positions at the courts of appeal, tribunals, specialized tribunals or courts of first instance within the jurisdiction of the same court of appeal shall be ordered with the consent of the judge, by the President of the Court of Appeal, while Art 11 states that the delegation of judges in executive positions at the courts of appeal, tribunals, specialized tribunals or courts of first instance within the jurisdiction of another court of appeal shall be ordered with the consent of the judge, by the section for judges of the Superior Council of Magistracy, upon the request of the President of the court of appeal from where the delegation is requested.

The delegation can only be granted with the written consent of the judge, for maximum 6 months and can be prolongated, under the same conditions, also with the written consent of the judge, by the section for judges of the Superior Council of Magistracy, for the delegation to another court or by the President of the court of appeal for the delegation to a court within the jurisdiction of the same court of appeal.

Regarding the detachment of judges, the Superior Court of Magistracy has decided that the detachment of judges and prosecutors, with their written consent, to other courts, to the Superior Council of Magistracy, to the National Institute for Magistracy, to the Ministry of Justice or to one of the units subordinated to it or to other public authorities, in any position, including those of appointed public dignity, upon the request of these institutions, as well as to institutions of the European Union or international organizations[17].

In case of detachment, the judge shall maintain his quality as judge, as stated by Art 58 Para 3 of the Law No 303/2004, which leads to the conclusion that the guarantee of immovability shall be preserved throughout this period.

According to Art 7 Para 1 of the Decision of the SCM No 163/2009, the detachment shall be ordered upon the reasoned request of the institution requesting it

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[15] Ciobanu Viorel-Mihai in *Constituția României. Comentariu pe articole*, coord.: Muraru Ioan, Tănăsescu Elena-Simina, C. H. Beck Publ.-house, Bucharest, 2008, p.1230.

[16] Published in the Official Gazette of Romania, Part 1, No 868 of 15 October 2018.

[17] Măgureanu Florin, Măgureanu-Poptean George, *Organizarea sistemului judiciar*, 5th Edition revised and amended, Universul Juridic Publ.-house, Bucharest, 2009, p.168.

but shall always be approved with the written consent of the judge whose detachment is being requested.

The cessation of the detachment may take place prior to the duration for which it has initially been ordered, by the decision of the section for judges of the Superior Council of Magistracy, upon the request of the one who requested it initially or of the detached judge.

The suspension of judges, though it is not stated by the constitutional text, is still a guarantee of immovability. It is the reason for which this measure is being ordered according to the conditions stated by Art 62-64 of the Law No 303/2004, by the section for judges of the Superior Council of Magistracy.

Regarding the suspension from the position as judge who is being trialed for the commission of an offence, the Court mentions that the main purpose of this measure is to protect the prestige of the profession and to maintain the trust of citizens in justice. Even if, in the application of Art 23 Para 1 of the Constitution, the presumption of innocence maintains its values throughout the criminal trial, until a definitive decision is being issued, though the temporary removal of the magistrate from his position is justified based on the argument of preserving the image of moral and professional probity which is a feature of the judicial system, in its ensemble, thus eliminating any form of suspicions which could shade the idea of moral verticality of their career[18].

Art 95 of the Law No 303/2004 states that the judges may be searched, arrested or preventively detained only with the approval of the section for judges of the Superior Council of Magistracy. Only for flagrant offences the judges shall be detained and subjected to search, according to the law, the Superior Court of Magistracy being informed immediately by the authority who ordered the detainment or the search.

The legal norm expresses, at an infra-constitutional level, the provisions of Art 124 Para 3 which states that "The judges are independent and shall be subjected only to the law, stating within the attributions of the Superior Court of Magistracy, the competence to decide upon the procedural measures against judges, prosecutors and assistant magistrates, including for judges and prosecutors members of the SCM, in the virtue of the role that Art 133 Para 1 of the Constitution states for this authority – that of guarantor of the independence of justice"[19].

Also in the above-mentioned meaning, Art 66 of the Law No 47/1992 states that the judges from the Constitutional Court cannot be arrested or subjected to a criminal trial, unless this is approved by the Permanent Bureau of the Chamber of Deputies, of the Senate or of the President of Romania, with the prior approval of certain public authorities and, where appropriate, upon the request of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Decision No 136/20 March 2018[20] of the H.C.C.J states that the legal immunity aiming the judges or constitutional judges shall not condition the beginning of the criminal investigation. Under these conditions, the H.C.C.J states that, through the

[18] Decision No 492/6 July 2005, published in the Official Gazette of Romania, Part 1, No 920 of 31 October 2018.
[19] Decision No 136/20 March 2018, published in the Official Gazette of Romania, Part 1, No 383 of 9 May 2018.
[20] Published in the Official Gazette of Romania, Part 1, No 383 of 4 May 2018.

criticized provisions of Art 66 Para 1 of the Law No 47/1992, regarding the completion of the objective of inviolability invoked for the constitutional judge with the procedural measure of the initiation of the criminal investigation, this public position becomes the beneficiary of an inviolability exceeding the constitutional framework. The quality as judge of the Constitutional Court cannot represent, though itself, an objective criterion of differentiation in the area of inviolabilities. Because the equality in front of the law refers to an equal treatment for cases which, depending on the aimed purpose, are not different, the application of a different treatment cannot only be the appreciation of the legislator, but must be rationally justified, with the compliance of the principle of equality of citizens in front of the law and public authorities. Or, for this situation, the legislator's option for the enlargement of the area of incidence of criminal inviolability emerges as an arbitrary approach, without a rational, objective and reasonable justification and which gives birth to a privilege. The constitutional statute of this public position and the independence of the judges of the Constitutional Court cannot be invoked as objective and reasonable criteria to justify the establishment of a privileged legal regime of this magistracy, under the aspect of immunity, but, on the contrary, its rank and constitutional place forces to the just and fair application of the forms of protection of the constitutional mandate. Because this privilege aims the performance of a judicial procedure, the Court considers that, in this way, it is violated Art 124 Para 1-2 of the Constitution, which state a unique, impartial and equal justice for all, performed in the name of the law.

Sanctioning the judges may be ordered under the conditions of Art 98-100 of the Law No 303/2004, by the section for judges of the Superior Council of Magistracy, following a procedure stated by the organic law, the decision of the court being subjected to the means of appeal at the panel of 5 judges of the H.C.C.J.

The requirements of the principle of the rule of law out the major purposes of state activity, prefigured in what is commonly referred to as the rule of law, wording involving the subordination of the state to the law, the provisions of those means allowing the law to censure the possible abusive and discretionary tendencies of the state structure. The rule of law insures the supremacy of the Constitution, the correlation of the laws and all normative acts, the existence of the regime of the separation of public powers, who must act within the limits of a law expressing the general will. The rule of law states a series of guarantees, including jurisdictional, insuring the compliance with the rights and freedoms of the citizens by self-eliminating the state, namely the assignment of public authorities to the coordinates of the law[21].

By stating the immovability as guarantee of the independence of magistrates it is insured an efficient functioning and administration of the judiciary, being both in the interest of the magistrates, as well as of society, in general.

The constitutional principle of the immovability of judges represents the guarantee of their independence and impartiality in the performance of justice, and not in that of the positions of management at the courts.

[21] Decision No 70/18 April 2000, published in the Official Gazette of Romania, Part 1, No 334 of 19 July 2000; Decision No 17/21 January 2015, published in the Official Gazette of Romania, Part 1, No 591 of 9 July 2015.

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CONSIDERATIONS REGARDING THE TERMINATION OF THE SALE AGREEMENT

Livia MOCANU*

Abstract: *Termination represents a cessation cause of an agreement even though in the Civil Code we find it regulated in Book V, Title V, Chapter II, intended for "foreclosure of obligations". To the general regulation there are added specific texts regarding this institution in the field of named agreements, including those dedicated to the sale agreement, the Civil Code bringing substantial changes in this matter.*

Keywords: *termination, sale agreement, contractual obligation.*

1. Introduction

„The termination of an agreement for the cause of non-execution represents an universal institution [1].

As it is well known, termination is defined as a sanction that intervenes in case of a guilty non-performance of the obligations arising from the agreement with a single execution, which has the effect its retroactive cancellation[2].

Termination represents a remedy for the non-fulfillment of the obligations, based on the imperative of the mandatory force of the agreement (art. 1270 and art. 1350 par. (1) Civil Code), and the reciprocity and interdependence of obligations (art. 1171 Civil Code.).

Termination is a cessation cause of an agreement as it results from the logical interpretation of the provisions of art. 1321 Civil Code. according to which the agreement ceases, according to the law, by execution, the will of the parties, unilateral cancellation, the expiry of its deadline, the fulfillment or, as the case may be, the non-fulfillment of its obligations, the fortuitous impossibility to execute, and any other causes provided by the law.

As termination has always been associated with the execution of an agreement, it may be included in "any cases provided by law", which entail the cessation of the agreement.

As it is also noted in the doctrine[3], although the Civil Code does not provide us with a definition of the termination, from the interpretation of the provisions art. 1527 par. (2) Civil Code result a new concept of the legislator on the termination now regarded as a remedy and less as a sanction.

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[1] Ph. Malaurie, L. Aynes, Ph. Stoffel – Munk, *Obligations,* Wolters Kluwer Publishing House, Bucharest, 2010, p. 477, apud Doina Anghel, *Comments on the CIVIL CODE,* Hamangiu Publishing House, Bucharest, 2012, p.152.

[2] See, Gabriel Boroi, Liviu Stănciulescu, *Civil Law Institutions in the regulation of the New Civil Code,* Hamangiu Publishing House, Bucharest, 2012, p. 181; Monna – Lisa Belu Magdo, *Sale agreement in the New Civil Code,* Hamangiu Publishing House, Bucharest, 2014, p. 326.

[3] Doina Anghel, *quoted work*, p 153

According to the Civil Code, termination is of several kinds.

Thus, depending on its source, termination is legal and conventional and, depending on the operation mode, the code distinguishes between the judicial termination which is ruled by the court, the unilateral cancellation resulting from the statement of termination of the party concerned and rightful termination which intervenes in cases expressly provided by the law (art. 1725 Civil Code) or when the Contracting Parties have so agreed.

The absolute novelty consists in the unilateral cancellation that can be invoked if certain substantive and formal conditions are met.

According to art. 1549 par. (1) Civil Code, in the absence of the foreclosure of the contractual obligations, the creditor has the right to termination or, as the case may be, the rescission of the agreement, as well as damages, if any due to him. Thus, termination is not mandatory for the creditor, who may choose for the execution of the obligation concerned by the debtor and the termination of the agreement. The creditor's right of choice is expressly regulated by the provisions of art. 1516 Civil Code, being the most able to assess whether the foreclosure of the obligation or, on the contrary, termination/rescission ensures the right to full, accurate and timely fulfillment of the obligation concerned.

As it results from the provisions of art. 1551 Civil Code, termination is a limiting solution, being conditioned by the decisive nature of the non-execution or the repeated non-execution of less significance[4].

The Civil Code brings new elements to the termination operation procedure, stipulating that the conventional termination, also called unilateral termination, regulated by art. 1552, is the rule, while the judicial termination is the exception.

According to art. 3 of Law no. 71/2011, the termination from the current regulation, shall apply to the agreements concluded after the entry into force of the Civil Code, being governed by art. 102 of Law no. 71/2011, by the law in force when concluding the agreements. From this rule, the provisions of art. 102 par. (2) of the Law no. 71/2011 provide an exception, the parties being able to amend the agreement after the entry into force of the Civil Code in order to apply the new legal provisions regarding the termination / rescission of the agreement concluded according to the old Code in order to show the effects granted to the agreement in the new Civil Code.

2. Termination of the sale agreement

When talking about the termination of the sale agreement we take into consideration the special cases of non-execution determining its applicability, regulated by the own provisions of the sale agreement, provisions which are complementary to the provisions of art. 1549-1554 Civil Code, which constitute the common law in the matter.

Thus, in relation to the type of non-execution provided in the special provisions are manifested the consequences and conditions of the termination, the right of choice of the creditor, the consideration level of the necessity of the termination, or the judicial or extrajudicial nature of the termination.

[4] Over the substantial conditions of termination, see Monna – Lisa Belu Magdo, *quoted work*., pp. 331 – 342.

In the matter of the sale agreement, there are many articles regulating the termination, and about the specific cases of non-execution and the peculiarities that they impose on the termination of the sale agreement, we will speak in the following.

I. To the first situation relate the provisions of art. 1683 Civil Code, which regulate expressly and in a new concept the rules applicable to the sale of an asset of another person and the sale of the property found in joint ownership[5]. In our analysis, we are concerned about the provisions of art. 1683 par. (4) and (5) Civil Code, which regard the non-fulfillment of the seller's obligation to transfer the ownership of the asset sold, a transfer that is one of the essential elements of the sale agreement.

In this sense, according to art. 1683 par. (4) Civil Code, if the seller fails to fulfill his obligation in the sense that he fails to secure the transfer of the property to the buyer, as stipulated by the agreement, the buyer is entitled to request the court the termination of the agreement, the refund of the price, as well as damages. Thus, we observe that the legal text explicitly governs the fact that the problem of selling the asset of another person is no longer an aspect regarding the valid conclusion of the agreement, but rathe its execution. Therefore, if the seller's obligation is not fulfilled, the buyer cannot file an action for cancellation, but only an action for the termination concluded with the seller.

The same approach, reflected in the provisions of art. 1683 par. (5) Civil Code, we also meet when an asset found in co-ownerhip is sold entirely by one co-owner without the the others' consent.

According to the legal text, if the owner does not ensure the full ownership of the property, the buyer has a right of choice. Thus, he can choose either to maintain the agreement and to decrease its price proportionally to the share he did not acquire or to terminate the agreement if he had not bought if he had known that he would not acquire the asset in its entirety. Therefore, only if he had not bought if he had known he would not acquire the property over the entire asset, the buyer would be able to request the termination of the agreement. Thus, this regulation correlates with the provisions of the sale of an asset of another.

In all cases, according to the final paragraph of art. 1683 Civil Code, the buyer may claim damages, unless he knew, at the time of concluding the agreement, that the property does not belong exclusively to the seller.

Damages shall be determined in accordance with the rules established by art. 1702 and 1703 Civil Code.

II. A second situation is identified in the case of non-performance of the seller's warranty obligation and may entail the termination of the sale agreement.

Thus, article 1700 of the Civil Code regulates the buyer's possibility to request the termination of the sale agreement in case of eviction. From the writing of art. 1700 par. (1) Civil Code we can clearly deduce that termination can be requested both in the case of total eviction and in the case of partial eviction if the loss is so significant that the buyer, if he knew the extent of the eviction, would no longer have concluded the agreement.

[5] Art 1683 para (1) Civil Code, establishes, as novelty, the rule contrary to the previous majority doctrine, according to which the sale of an asset of another is mainly a valid agreement concluded

As a result of the termination, the buyer is entitled to demand the return of the price, but also the repair of the damage suffered through the eviction produced (art. 1700 par. (2)].

In accordance with the provision. art. 1705 Civil Code. which reiterates the effects of the "badly managed trial", the seller's liability for non-performance of the warranty obligation for eviction occurs unless he proves that if he had been sued by the buyer in the trial initiated by the evading third party, he would have sufficient means and reasons for the court to reject the third party's action. Please note that the seller is not automatically exempted of liability solely for the single reason that he was not brought in court by the buyer but only if he proves that there were sufficient defenses that would have led to the rejection of the third party's request.

The non-fulfillment of the warranty obligation of the seller is manifested also in the context of the transfer of an asset affected by defects, lacked of the agreed qualities or which good functioning is not ensured for the time determined.

If the conditions of the seller's liability for hidden defects are met, art. 1710 Civil Code regulates, in a broader manner than the old regulation, the possibilities that the buyer has.

Thus, according to art. 1710 par. (1) Civil Code: "Based on the seller's obligation to guarantee against defects, the buyer may obtain, as appropriate:

a) the removal of defects by the seller or on his expense;

b) the replacement of the asset sold with an asset of the same kind, but free from defects;

c) the appropriate decrease in the price;

d) the sale termination.

As it can be seen it is maintained both the estimation action [par. (1) letter c)], as well as the redhibition action [para. (1) letter d), however, two other possibilities have been provided, which have so far been recognized only by the judicial practice, namely the possibility to request in court to remove the defects by the seller or on his expense (para. (1) letter a)] or the replacement of the asset sold with an asset of the same kind, but free from any defects (par. (1) letter b)].

Although not expressly provided by the drafting of the legal text, it results that the possibilities made available to the buyer in case of the asset affected by hidden defects, listed by the legislator in para. (1), are regulated in a gradual manner, precisely in the idea of rescuing the agreement.

Termination of the agreement thus appears as the last solution agreed by the legislator.

Termination may be partial in case of defects affecting a part of the assets subject to the sale agreement if these assets can be separated from the others without prejudice to the buyer.

An exception makes the case when the termination was ordered in respect of the main asset, thus resulting in the cancellation of the agreement and in respect of the accessory assets. The text reflects here the rule established by art. 546 par. (3) Civil Code., which enshrines in a normative way the adage *accessorium sequitur principalem*.

Rules established in the matter of liability for hidden defects are applicable according to the Civil Code also to the lack of agreed qualities.

Articles 1716-1718 of the Civil Code establish a new type of guarantee in the seller's charge, namely the guarantee for the good operation of the asset purchased. It should be noted that, according to art. 1716 par. (1) Civil Code, the guarantee for the

good operation of the asset does not exclude the seller's liability for hidden defects, this operating in parallel, but being triggered under meeting different conditions.

At the same time, being specific to those agreements having as object goods intended for daily consumption, the liability for the good operation is applicable only to the situation where the seller has expressly guaranteed by agreement the good operation of the asset for a certain period of time[6].

Under this warranty, the seller has the obligation to provide the repair for any defect occurring during the warranty period agreed by the parties. Also, the law provides for the seller also the obligation to replace the defect asset when the repair is impossible or requires a longer duration than the one specified in the agreement or by special law or when it exceeds 15 days, in the absence of a deadline provided in this regard, art. 1716 par. (2)].

To this is added the obligation of the seller to refund the price received in return for the defect asset, if he does not replace it within a reasonable deadline (art. 1716 par. (3)]. As it is shown in the literature, although we do not identify an express provision referring to the termination, through the refund of the price and the return of the asset, one comes precisely to this way of cancelling the agreement[7].

III. A third special situation of non-performance of the agreement leading to termination is provided by the provisions of art. 1727 Civil Code.

According to the legal text: "When the sale was made without a payment deadline and the buyer did not pay the price, the seller may, within maximum 15 days from the date of handing over, state the termination without putting in default and request the return of the mobile asset sold, while the asset is still in the possession of the buyer and has not undergone any changes [art. 1727 par. (2)]".

Thus, in a more comprehensive regulation than art.1365 of the Civil Code from 1864, it is reiterated, in principle, in the matter of movable assets, the possibility for the seller to state the termination without putting in default and to request in court the return of the asset, if the buyer has not paid the price and no payment deadline is provided. Return may be required as long as the asset is still in the possession of the buyer and has not undergone any changes.

The seller may exercise this right within 15 days of the date of delivery of the asset, compared to the old regulation, where was mentioned a 8 days period.

IV. We can also speak of a special termination in the situation regulated by art. 1728 Civil Code according to which: "Where the sale relates to an immovable asset and it has been stipulated that if the price is not paid on the deadline agreed, the buyer is rightfully in default, the latter may also pay after the expiry of the deadline as long as he has not received the statement of termination in behalf of the seller. "

The text resumes in a new wording, the hypothesis previously regulated by art. 1367 Civil Code from 1864, regarding the situation in which the parties to the sale

[6] Sache Neculaescu, Livia Mocanu, Ilioara Genoiu, Gheorghe Gheorghiu, Adrian Țuțuianu, *Civil law institutions,* III-rd edition, reviewed and added, Universul Juridic Publishing House, Bucharest, 2016, p. 362.
[7] Monna – Lisa Belu Magdo, *quoted work.*, p. 371.

agreement could stipulate through an express commissary pact the rightful termination of the agreement for the non-payment of the price but provided the putting in default[8].

The current regulation derogates from the common law rules, meaning that the payment made by the buyer, even after the expiry of the payment deadline, but before the seller states the termination, will be taken into account, provided the termination can no longer be ordered by the court.

V. The following situation is not suggested by the provisions of art. 1741-1743 Civil Code which establishes special rules applicable to the sale of real estates.

Here we identify a particular form of the delivery obligation we are referring to in relation to the failure to perform the obligations of the seller and which relates to the sale of real estates, especially lands, with an indication of the area and price per unit of measurement, as regulated by art. 1743 Civil Code.

Thus, according to 1743 para. (1) Civil Code: "If, in the sale of a real estate with an indication of the area and price per unit of measurement, the actual area is lower than the one indicated in the agreement, the buyer may require the seller to give him the area agreed. When the buyer does not ask or the seller cannot transfer this area, the buyer can either get the appropriate price decrease or the contract termination if, due to the difference in area, the asset can no longer be used for the purpose for which it was purchased. "

In the first paragraph of art. 1743 we find the provisions of art. 1327 Civil Code from 1864, regarding the situation where a land is sold "with showing its contents and to what extent", that is, as it is more clearly provided in the current regulation, *with the indication* of both the *area and the price per unit of measurement.*

Under the law, if the actual area is lower than the one agreed by agreement, the buyer has the right to request the seller to hand over the area ageed. If the buyer does not request this or the seller is unable to transfer him this area, the buyer has two possibilities:

– either to obtain a price decrease corresponding to the part of land not delivered;

– either to request the termination of the agreement if, due to the difference in area, the asset can no longer be used for the purpose for which it was purchased.

Therefore, the buyer can only request the termination of the agreement if, due to the difference in area, he can no longer use the asset for the purpose for which it was purchased and only if such purpose was brought to the seller's attention or it results from the content of the agreement or from the parties' negotiations'[9].

We are talking about the non-performance of the agreement not only when there is delivered an area lower than the one stipulated in the agreement but also when delivering a larger area.

To such a situation relate the provisions of 1743 par. (2) Civil Code, according to which: "If the real area proves to be higher than the one stipulated, and the surplus exceeds the twentieth part of the area agreed, the buyer will pay the corresponding

[8] Francisc Deak, *Civil law treaty, Special agreements,* ACTAMI Publishing House, Bucharest, 1998, p.76.

[9] Monna – Lisa Belu Magdo, *quoted work.*, p. 368.

price supplement or will be able to obtain the termination of the agreement. However, when the surplus does not exceed the twentieth part of the area agreed, the buyer cannot obtain the termination, but nor he is obliged to pay the surplus price. "

Therefore, in the reverse situation, when delivering a real area larger than the one stipulated in the agreement, the buyer's possibilities are different depending on the percentage represented by the exceeding part of the land in relation to the total area covered by the agreement.

Thus, the buyer may choose between paying an additional price corresponding to the surplus, or requesting the termination of the agreement, but only if the part found in excess exceeds the twentieth part of the area specified in the agreement.

Otherwise, if the surplus does not exceed the twentieth part of the are agreed by the parties, the buyer cannot request the termination of the agreement, nor can he be forced by the seller to pay an additional price. Therefore, in case of the surplus area not exceeding the twentieth part of the area agreed by the parties, the buyer cannot request its decrease within the limits agreed by the parties, nor can he request the termination of the agreement, because it is no longer subordinated to the purpose for which the asset was purchased, but instead, he benefits from this surplus area without being obliged to pay the price difference.

Here we identify a change of the old regulation, in this case art. 1328 Civil Code from 1864, which obliged the buyer to pay the price difference, irrespective of the percentage registered by the area found as missing from the total area covered by the sale agreement.

Another is the situation regulated by art. 1741 Civil Code concerning the sale of real estates without the indication of the area.

For this purpose, according to the law: "When a real estate determined is sold, without an indication of the area, for a total price, neither the buyer, nor the seller can request the termination or the price change on the grounds that the area is lower or larger than they thought ".

The legal text therefore refers only to the situation where a land is sold for a total price, without the parties having mentioned in the agreement its exact surface, the land being merely individualized globally, by location, landmarks, neighborhoods, etc. Thus, although on the occasion of negotiations, each party has the representation of the area of the land being the sale object, the agreement is concluded without any mention to it.

In this situation, if the area is actually lower or larger than they thought or imagined, neither the buyer, nor the seller can request the termination of the agreement or the price change due to this cause.

Such a hypothesis was missing in the old legislation on which basis one could have sustained even the fact that, in such a situation, the asset that is the object of the sale agreement does not fulfill the condition of being determined or at least determinable, while the area of the land, the determining factor, is not indicated in the agreement.

However, we cannot ommit the fact that the object of the sale agreement can be represented only the part of land itself, individualized, without the precise indication of the area, which the buyer has decided to buy in considering other aspects than the exact area aiming for the land location, facilities, opportunities etc.

VI. A special case of termination results also from the interpretation *per a contrario* of the provisions of art. 1756 Civil Code. The text, regarding the sale with the payment of the price in installments and the property reserve, provides the impossibility of terminating the agreement for non-payment of a single installment of the price that does not exceed one eighth part of the price. At the same time, the buyer continues to benefit from the advantage of the payment in installments of the price.

Therefore, in the absence of a contrary agreement, the non-payment of a single installment of the price, which exceeds one eighth of the total price, determines the termination of the agreement.

If the termination occurs due to non-payment of the price, the seller is obliged to return all the amounts received, withholding from them, in addition to damages, an equitable fair compensation for the use of the asset by the buyer[10].

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SOVEREIGNTY TRANSFER IN THE CONTEXT OF PRIORITIZATION OF EUROPEAN UNION LAW TOWARD CONSTITUTIONAL LAW

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Abstract: *The purpose of this research is to demonstrate that the transfer of sovereignty in the context of prioritizing European Union law over constitutional law is achieved not by validating a legal system to the detriment of another, but by harmonizing European Union and national provisions. The theoretical aspects presented in the article are supported by highlighting practical situations, by referring to two case studies: Germany and Greece. In the case of Germany, we treated the transfer of sovereignty through the participation of the armed forces in peacekeeping operations and the transfer of sovereignty through the participation of the armed forces in peacekeeping operations and, in the case of Greece, the transfer of sovereignty by prioritizing European Union rules to domestic law. Amid those analyzed we have redefined the concept of "transfer of sovereignty".*

Keywords: *state, sovereignty, European Union law, constitutional law.*

1. Introduction

The prioritization of the European Union law over the constitutional law of states has been gradually made, as the process of integration of the Communities has advanced a set of fundamental rights that are found in the constitutional texts.

It is permissible that, after the European Court of Justice's ruling, the Constitutional Court of a State to carry out the constitutional checking when it is assessed that a rule of European Union law is relevant to national law, but cannot be applied in the interpretation of the European Court of Justice. This usually happens only if the judgment affects one or more fundamental rights provided and guaranteed by the Constitution.

Practically, although European Union law is a stand-alone legal order, it forms part of a national legal order, because in the application of national legal rules, account is taken of the established relationship between the safeguarding of constitutional fundamental rights and the application of the provisions of European Union law. Therefore, the autonomous legal source of the European Community must be harmonized with the legal systems of the States so that the application of the European Union law does not result in validating a single legal system.

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2. Sovereignty transfer by prioritizing community rules in relation to national law

Although most states do not explicitly recognize the transfer of sovereign rights from the constitutional point of view, when it comes to the applicability of a right from another source, the state can no longer enjoy the exclusive competence of the prescribed rules in the Constitution and, therefore, there is a transfer of sovereignty.

It is noteworthy, in this respect, the situation of Greece which, although stating in the Article 28 paragraphs 2 and 3 of the Constitution[1], that the Greek State freely exercises the right to restrict the exercise of national sovereignty by respecting the foundations of democratic government, limiting the sovereignty transfer operation only on the basis of the adoption of a law by the absolute majority of the members of Parliament, strongly implies the assignment of constitutional powers to certain international organizations by forming a parliamentary majority of three fifths. This regulation, which obviously establishes a preferential application in terms of the self-limitation of sovereign rights, can easily generate true hierarchical conflicts between the norms contained in the fundamental and European laws, especially since the interpretation of those provisions contained in the Constitution of the Hellenic Republic must be referred to the Article 36 of the same law[2], within the content of which it is clearly stated that the ratification of international treaties cannot be the subject of legislative delegation. Because the treaties and any other conventions enter into force only after the Parliament has ratified it by a law in which it is stipulated that their applicability is prioritized against any contrary legislation, it can be deduced that Greece is resorting to the application of a dualistic system for the ratification of international treaties, probably considering that the rules contained in the fundamental law should have a higher hierarchical position than the European ones, opinion which would certainly not be the case for the Court of Justice of the European Union. An enlightening example is highlighted by a CJEU judgment on mutual assistance of

[1] Constitution of Greece, art. 28: par. (2): "The competences provided for in the Constitution may, by treaty or agreement, be conferred on the institutions of international organizations when it serves a national interest important and promotes cooperation with other states. A majority of three-fifths of the total number of Members of the Parliament is required to vote on the law of ratification of the treaty or agreement." According to par. (3), "Greece, by a law passed by an absolute majority of its Members, freely proceeds to restrict the exercise of national sovereignty insofar as it is necessary to promote an important national interest, does not violate human rights and the foundations of democratic government and is based on the principles of equality and conditions of reciprocity."

[2] Constitution of Greece, art. 36: 1. The President of the Republic, fully respecting Article 35, paragraph 1, represents the State at international level, may declare war, conclude treaties of peace, alliance, economic cooperation and association with international organizations and unions, and shall announce to Parliament, making the necessary clarifications, whenever the interest and security of the state so permit. 2. The Treaties on Trade, on Taxation, Economic Cooperation and Participation in International Organizations and Unions, as well as any other Conventions containing concessions which, under other provisions of this Constitution, cannot be granted without a law or which may oblige Greek citizens individually, do not enter into force without being ratified by a law voted by Parliament. 3. The secret clauses of a treaty cannot in any case prevail over the public ones. 4. The ratification of international treaties may not be subject to the delegation of legislative power under Article 43, paragraphs 2 and 4."

States in recovering debts and the possibility for the requested authority to refuse recovery assistance if it has not been duly notified of the claim[3].

The application to the CJEU was made in the context of a dispute between Mr. Eamonn Donnellan and the Revenue Commissioners and sought the recovery of a debt which constituted a fine imposed by the Greek customs authorities on Donnellan and on related interest to which were added costs and other penalties. In fact, an Irish national, as a heavy-duty vehicle driver in an Irish transport company, was subject to customs control by the officials of the port of Patras in Greece after he had presented them a bill of lading for 23 pallets of olive oil. During the inspection of the goods, besides olive oil, customs officials discovered about 172,000 packets of smuggled cigarettes. As a consequence, authorities seized the goods and the vehicle, arresting Donnellan.

In July 2002, he was sentenced to imprisonment for smuggling and filing fictitious fiscal data. A few months later, however, in October 2002, he was ordered to acquit him for both counts and was immediately released. However, in 2009, the Patras customs authorities issued a notice that the driver was being subjected to an administrative penalty exceeding one million euros, arguing that this measure was imposed on smuggled cigarettes. Subsequently, in the same year, the Patras Customs Office published a decision in the Official Journal of Greece concerning the pecuniary sanction applied to Mr. Donnellan. In 2012, the Greek authorities initiated the mutual assistance procedure, invoking Directive 2010/24[4], and sent a request for recovery to the Irish authorities, stating in its report that the financial penalty imposed on the driver was increased by interest which amounted to approximately 395 thousand euros, plus penalties of almost 27 thousand euros. In an annex accompanying the document sent, the Patras customs office qualified the amounts claimed as "*various debts for smuggling with cigarettes*"[5]. Upon receipt of the letter, Mr. Donnellan initiated a procedure requesting the High Court of Ireland to dispose of a dispensation for the enforcement of the claim seeking recovery of the amounts claimed by the Greek State.

On the merits of the case, the Irish judges (the referring court) found that, according to the Irish jurisprudence, the Constitution and the fundamental rights and freedoms guaranteed by the European Convention on Human Rights cannot authorize the enforcement of the litigious decision, whereas, on the one hand, the person to which the administrative sanction was applied has not been properly notified and, on the other hand, his innocence has already been established by its acquittal by the Greek courts. In view of these considerations, it was concluded that the enforcement of the Decision would be prejudicial to public order in Ireland. The CJEU noted that the mere publication of the decision by the Greek authorities in the Official Journal is not equivalent to the procedure for proper notification to the sanctioned person and that he was deprived of the right to an effective remedy.

Analyzing all these issues, the Court (Second Chamber) ruled that, under Article 14, paragraphs (1) and (2) of Directive 2010/24/EU, in conjunction with Article 47 of

[3] C.J.E.U. judgement of 26 April 2018, Donnellan, C-34/17, EU:C:2018:282.
[4] Council Directive 2010/24/EU of 16 March 2010 on mutual assistance for the recovery of claims relating to taxes, duties and other measures.
[5] C.J.E.U. judgement of 26 April 2018, Donnellan, C-34/17, EU:C:2018:282, item 27.

the Charter of Fundamental Rights of the European Union[6], an authority of a Member State may refuse to execute an application for the recovery of a claim relating to a pecuniary sanction which another Member State has applied, if the decision imposing the sanction has not been notified to the person concerned in an appropriate manner prior to its submission to the abovementioned authorities.

This CJEU decision is in fact a derogation from the principles of Directive 2010/24, according to which it is not permissible for courts of a Member State to challenge the lawfulness of decisions of another Member State but, exceptionally, this is possible if the refusal to execute a decision concerning a recovery application is based on the Charter of Fundamental Rights of the E.U.[7]

It may be considered that the Greek authorities have resorted to an excess power and, in a manner contrary to any fundamental principle of law, not only have twice punished a person for the same deed, but have ignored the constitutional provisions which guarantees the right to an effective remedy, based on legal provisions in domestic law that were neither compatible with the fundamental state law nor with the European legislative provisions.

As regards the transfer of sovereignty, the above case demonstrates that it occurs by applying European Union law with priority over the national one, the first one imposing on the requirements of the norms developed by the legislative authority of a state.

3. Sovereignty transfer through the participation of the armed forces in peacekeeping operations

Because the Member States of the European Union recognize the primacy of the European Union law over the constitutional one, the result of the imposition of the European Union law on national law is justified. In this context, the interpretation and enforcement of mandatory constitutional law requirements is diluted, resulting in a transfer of sovereignty. An example would be the situation in which Community bodies draw up rules which the State constituent would not have the power to draw up, but which would in any case apply, and would have direct effect on the territory of that State. This situation would be harmful to the domestic legal system as it may diminish the identity of the Constitution of a state to the point where it would intervene in its constituent structures. Most of the time, however, the validity and applicability of European Union law in the territory of a state is empowered in such a way as to oblige, within certain limits, State authority to be reserved to the scope of constitutional law.

[6] Charter of Fundamental Rights of the European Union, art. 47. The right to an effective remedy and to a fair trial. "Any person whose rights and freedoms guaranteed by Union law are being breached shall have the right to an effective remedy before a court or tribunal in accordance with the conditions laid down in this Article. Everyone has the right to a fair, public trial and a reasonable period of time before an independent and impartial tribunal constituted in advance by law. Everyone has the possibility to be counseled, defended and represented. Free legal assistance is granted to those who do not have sufficient resources insofar as it is necessary to ensure effective access to justice."

[7] See CJUE Judgment of 14 January 2010 – Kyrian – C- 233/08.

The most eloquent example is a situation in which a State gives its consent to limitation of sovereignty over military command, in order to maintain peace. Referring to a practical case, we can highlight, from the case law of the German Federal Constitutional Court, a ruling aimed at the participation of the German armed forces in the peace forces sent by the North Atlantic Pact Organization (NATO) [8].

In fact, the Court was called upon to rule on a number of issues related to the German armed forces intervention: an existing conflict between state bodies that concerned both the Bundestag's participation rights in NATO and Western European Union military action, as well as the rights of federal governors to make this decision by invoking the obligation to comply with the decisions of the NATO Security Council. The first case concerned the participation of the German Army in an action by the NATO Navy and WEU, aimed at overseeing the embargo imposed by the United Nations on the Federal Republic of Yugoslavia. Two other related cases refer to the federal government's decision to approve German troops' participation in United Nations action on the flight ban for Bosnia-Herzegovina airspace.

Finally, the third issue calls into question the participation in UNOSOM II of German soldiers for peaceful relations in Somalia, at the initiative of the United Nations, which have also made this UNOSOM II combat force. In the view of federal judges, because the military means of maintaining or restoring peace also involves the use of the armed forces, by supporting the collective security system in which Germany participates, it is inevitable to grant consent to limit the sovereignty of Germany, including military command skills. Of course, this transfer of sovereignty must not be interpreted as granting any sovereign rights to certain interstate entities because they do not acquire competence to exercise authority directly over the national domain but only military command of armed forces participating to peace-keeping operations. Stressing certain rights under the NATO Treaty and the United Nations Statute, the Federal Court of Germany concludes that the German armed forces are required to participate in peace keeping or maintaining missions, and Germany is embroiled in a mutual collective security system. However, according to the Constitution, the Court points out that it is imperative for the Bundestag to give its consent in advance for any mission of the armed combatants. Although the executive enjoys foreign authority, the regulations regarding the armed forces and their missions rest with Parliament. Therefore, the army as a potential force must not be left to the exclusive competence of the government or parliament, and even a governmental power of law in the field of armed forces is established.

Thus, as the complainants noticed, the Federal Court found that the Federal Government, surpassing its powers without obtaining the Bundestag's constitutional agreement in advance, dispatched armed combatant forces on mission, based on judgments it had adopted. In this way, there was a conflict between the executive and legislative powers and, beyond that, the unconstitutionality of the use of armed forces. Sovereignty in terms of military command competence has not only been transferred to interstate entities but, undemocratically, the powers to exercise legislative authority

[8] Jürgen Schwabe, Thorsten Geissler, *Selecție de decizii ale Curții Constituționale Federale a Germaniei*, C.H.Beck, Publishing, Bucureşti, 2013, p. 587.

have been ignored. Therefore, the participation of the German Armed Forces in the abovementioned missions was illegal, operating a transfer of sovereignty directly, because the interstate entities acquired a military command competence of the Federal Armed Forces without the consent of the parliament.

4. Transfer of sovereign rights in the case of approval of interventions for nuclear weapon systems stationed in the territory of a state

The above exemplified situation is not a singular one, since the transfer of sovereignty also operates in the case of the installation of nuclear weapon systems on the territory of a sovereign state. In an individual complaint addressed to the German Federal Court, the federal government requested that the federal government ignore the Bundestag's powers provided by the Constitution and that, without requiring the issuance of a law, it authorized the arming of US troops stationed on the territory of the Federal Republic with both missiles Pershing 2 nuclear warheads, and cruise missiles[9]. Although the Court concluded that the government could have such a power, assuming political responsibility, the decision is incomprehensible, since the judges reasoned that, according to the text of the fundamental law of that time (1984), "the transfer of sovereign rights" did not imply that the transfer of German sovereign rights to an intergovernmental entity could not be revoked" [10], although it is not apparent from the same constitutional article that such a transfer would occur whenever an intergovernmental entity is granted a right to particular private intervention. The German Federal Constitutional Court found that the federal government did not violate or endanger the rights conferred on the German Parliament, even though it had approved without being authorized to install the weapon systems in question in Germany since, according to the Court, the Parliament had not adopted a special law to empower the government in this respect.

The judgment of the Court is, in its essence, an aporia, since, although the government has democratic legitimacy, it is, however, limited to the performance of acts of such importance, because if it were not to prejudice that normative system of separation of powers in the state in terms of responsibility and control.

Of course, apart from the appraisal of the relevance of the federal government's estimates of foreign policy, the executive power's intervention in the present case is manifestly arbitrary, given that the democratic legitimacy of the government, from an institutional and functional point of view, must be limited in the performance of acts of such importance.

Of course, the Parliament was obliged to allow such military action under an agreement on the North Atlantic defense system, with the legal support provided by the NATO Treaty of April 4, 1949. Even further, according to the agreement, the approval of nuclear system interventions on the territory of the German state was merely formal, because such an intervention does not require the consent or involvement of legislative

[9] Idem, p. 571.
[10] Constitution of the Federal Republic of Germany, 1984, art. 24 par. 1.

forums through federal laws. However, this approval must, undoubtedly, have to be restored to the Parliament, for the legislator has been given the power to decide to what extent sovereign rights may be transferred to an interstate entity. Even if this transfer takes place by applying an act governed by international law, the procedure for empowering the sovereignty transfer must be covered by law.

5. Conclusions

In view of all these aspects, it is necessary to make a draft to define the transfer of sovereignty. Referring to what has been said in the present study, it can be concluded that "*the transfer of sovereignty is the limitation of the right of a State to exercise the mandatory requirements of its domestic law in relation to the direct application of the rules of the European Union law, which the state itself undertakes to harmonize with the national legal provisions in order to validate both legal systems"*.

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5. CJEU, judgment of 14 January 2010, Kyrian – C 233/08 (Mutual assistance for the recovery of claims – Directive 76/308/EEC – Jurisdiction of the courts of the Member State in which the requested authority is situated – Enforceability of the title allows execution to be recovered – Appropriate character of notification of the title to the debtor – Notification in a language misunderstood by the addressee).
6. Constitution of Greece.
7. Constitution of the Federal Republic of Germany.

THEORETICAL AND PRACTICAL EXAMINATION CONCERNING THE INCOMPATIBLE LOCAL ELECTED OFFICES

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Abstract: *The regime of incompatible local elected offices, irrespective of whether we refer to local and county counselors, mayors, general mayor of Bucharest Municipality, vice-mayors, presidents and vice-presidents of county councils, represents an issue of interest from the perspective of complying with the imperative norms concerning the incompatibilities and the multitude of complaints submitted to competent bodies, as it is also subject, on several occasions, to constitutional review.*

It is worth noting and analyzing the constant concern of the legislator with regard to amendments of normative acts affecting incompatibilities, and also the reasons underlying such amendments.

This study aims to refer to both theoretical aspects governing the incompatible local elected offices and to practical examples, taking account pf the decisions rendered by the National Integrity Agency and the Courts of Appeal. We will dedicate distinct chapters to consequences brought about by incompatibility established in relation to local elected representatives, on the one hand, and some succinct analyses of the norms in this matter, as set forth by the Administrative Code, on the other hand.

Keywords*: local elected representatives, incompatibilities, National Integrity Agency*

1. Theoretical Aspects on Incompatible Local Elected Offices

1.1.Legal framework

Instituting the legal regime of incompatibilities addresses the imperative social need to ensure protection of the political interest in order to prevent potential incompatibilities and conflicts of interests, which, in their turn, would affect the observance of principles such as impartiality, integrity, transparency in making decisions and supremacy of the public interest, in exerting public positions and holding public offices (article 71, Law no. 161/2003[1]).

According to the Organization for Economic Co-operation and Development[2], incompatibilities refer to the interdiction of carrying out the activities which affect, to a significant extent, the appropriate and full exerting of prerogatives pertaining to a public office.

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[1] Law no. 161/2003 regarding measures to ensure transparency in holding public offices, in exerting public positions and positions in the business environment, to prevent and sanction corruption, published in the Official Gazette of Romania, Part I, no. 279 of 21 April 2003, as amended and completed.

[2] *Organization for Economic Co-operation and Development*, 2003, p. 66.

In Romania, the regime of incompatibilities is governed by Law no. 161/2003, mentioned above, which expressly provides the incompatibilities regarding the capacity of parliament member, the position of Government member and other public authority offices in central and local public administration, as well as positions held by local elected representatives, magistrates and other public servants.[3]

According to article 80 of Law 161/2003, "incompatibilities relating to public offices and positions are governed by the Constitution, the law applicable to the public authority or institution within which the persons exerting a public position or holding a public office carry out their activity, as well as the provisions of the present title". The law clearly stipulates incompatibilities with regard to the capacity of parliament member, incompatibilities with regard to the position of the Government member and other public authority positions in the central and local administration, incompatibilities applicable to local elected representatives, incompatibilities regarding public servants and other types of incompatibilities for persons holding public offices and exerting public authority positions within the authorities and institutions operating exclusively under the control of the parliament.

The Romanian legislator has chosen to regulate in minute detail and on a case-by-case basis the incompatibilities regarding different public offices and/or public authority positions in the central or local administration.

Furthermore, the specific incompatibilities regarding the local elected representatives are regulated thoroughly and separately, by categories, in accordance with Law no. 161/2003 regarding transparency in public offices, in relation to mayors, vice-mayors, presidents and vice-presidents of county councils, local counselors and county counselors. The incompatibilities may be regarded as instruments and means to protect the office of the local elected representatives and to avoid conflicts of interests, on the one hand, and as some of the most important instruments to defend the public interest. In terms of general desideratum as defined by Law no. 161/2003, the incompatibilities relating to local elected representatives represent a measure required to ensure neutral fulfillment of tasks by the persons holding public authority offices.[4]

The incompatibilities regarding local elected representatives: mayor/vice-mayor/general mayor of Bucharest Municipality, president and vice-president of the county council are laid down in article 87 of Law no. 161/2003, "The position of mayor and vice-mayor, general mayor and vice-mayor of Bucharest Municipality, president and vice-president of the county council is not compatible with holding the following positions or exerting the following capacities:

a) Repealed;

b) prefect or sub-prefect[5];

[3]Chiuariu Tudor, *Control of Wealth, Incompatibilities and Conflicts of Interests. Legislation, Doctrine and Jurisprudence*, Hamangiu Publishing House, 2016.

[4]*Decision of Constitutional Court no. 739 of 16 December 2014*, published in the Official Gazette of Romania no. 124 of 18 February 2015.

[5]The positions of prefect and sub-prefect are provided by Law no. 340/2004 regarding the prefect and the prefecture, as republished, amended and completed, published in the Official Gazette no. 225 of 24 March 2008.

c) public servant or person employed on the basis of an individual employment contract, irrespective of its duration;[6]

d) president, vice-president, managing director, director, manager, administrator, member of the Administration Board or censor or any other management or executive position within companies governed by Law regarding Trading Companies no. 31/1990, as republished, amended and completed, including banks and credit institutions, insurance and financial companies, autonomous administrations of national interest, national companies and enterprises, as well as public institutions, except representatives in Shareholders General Assemblies of companies governed by Law no. 31/1990, as republished, amended and completed, members of Administration Boards of state or confessional education establishments and units and Administration Boards of public hospitals under the authority of the local public administration or other representatives of public institutions under administrative territorial units or within which the administrative territorial unit managed by the former holds shares;[7]

e) chairman or secretary of Shareholders or Associates General Assemblies of trading companies;[8]

f) *** Repealed;

g) trader as natural person;[9]

h) member in a group of economic interest;[10]

i) deputy or senator[11];

j) minister, secretary of state, sub-secretary of state or any other relating position[12];

k) any other public positions or activities remunerated inside or outside the country, except the position of teaching staff or positions within some associations, foundations or other non-governmental organizations.

(1) The activity carried out by the mayor and vice-mayor, general mayor of Bucharest Municipality, president and vice-president of the county council, in capacity of member of the Administration Board of an economic entity under or within which the administrative territorial unit managed by the former holds shares, state or confessional education establishments and units and Administration Boards of public hospitals under the authority of the local public administration or other representatives of public institutions or other representatives of public institutions under administrative territorial units, is not remunerated.

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[6]Public servant defined by article 2 par 2 of Law 188/1999 "(2) Public servant means the person appointed in a public position, in accordance with the law."

[7]As defined by Law no. 31/1990 regarding Trading Companies, published in the Official Gazette no.1066 of 17 November 2004.

[8]As defined by Law no. 31/1990 regarding trading companies published in the Official Gazette no. 1066 of 17 November 2004.

[9] Who carries out by way of profession a trading activity and whose name or company is registered with the Trade Registry.

[10]The group of economic interest is defined by article 118 under Law no. 161/2003 as "a partnership between two or several natural or legal persons, established for a definite timeframe, with a view to facilitating or developing the economic activity of its members, as well as improving the results of such activity".

[11]Article 61-72 of Constitution of Romania.

[12] Article105 of Constitution of Romania (1) Holding a position as Government member is not compatible with holding another public authority position, except deputy or senator. Additionally, it is not compatible with holding a remunerated position of professional representation, within trading organizations.

(2) The mayors and the vice-mayors, the general mayor and vice-mayors of Bucharest Municipality, may not hold the position of county counselor while in office.

(3) The mayors and the vice-mayors, the general mayor and vice-mayors of Bucharest Municipality may hold positions or carry out activities in the field of education, scientific research and literary and artistic creation.

The position of local or county counselor is incompatible with the positions or the capacities enumerated at article 88 under Law no. 161/2003.

The activity carried out by the local or county counselor, in their capacity of member of Administration Boards of some economic entities under the administrative territorial unit or within which the administrative territorial unit managed by the former holds shares, state or confessional education establishments or institutions or public hospitals under the local public administration authorities or other representatives of public institutions under administrative territorial units, is not remunerated.

A person may not serve a term as both local counselor and county counselor, at the same time.

Pursuant to article 89 of Law no. 161/2003: (1) The capacity of local elected representative is not compatible with the capacity of significant shareholder within a trading company established by the local council, respectively the county council.

Pursuant to article 90 of Law 161/2003: (1) Local and county counselors holding positions of president, vice-president, managing director, director, manager, administrator, member of the Administration Board or censor or other management positions, as well as the capacity of shareholder or associate within a private company or a state-owned company where the state is majority shareholder or companies with shares held by an administrative territorial unit, may not conclude agreements for provision of services, execution of works, supply of products or partnership agreements with local public administration authorities of which they form part, institutions or autonomous administrations of local interest reporting to or under the local or county council, respectively trading companies established by such local county councils.

(2) Provisions of par (1) also apply to positions or capacities held or exerted by spouses or first-degree relatives of the local elected representative.

1.2 Jurisprudence of the Constitutional Court

To this date, the jurisprudence of the Constitutional Court has unequivocally established the constitutionality of the legal provisions instituting the regime of local elected offices.

1. Distinction between incompatibility and illegibility. When analyzing the legal regime of incompatibilities, it is important to make the distinction between incompatibilities and illegibilities. Whereas illegibilities refer to the requirements that a person should fulfill, according to the Constitution and relating legislation, in order to run for a position or an office, incompatibilities, which refer to a person's legal interdiction to hold two functions simultaneously, two capacities which are by nature

contradictory, arise only after the position or the office is actually exerted[13]. Therefore, the person elected shall opt, within the legal timeframe, for one of the two incompatible functions or capacities; once such option is made, the incompatibility is removed. Instituting incompatibility between such positions is explained by affecting the general, public interest and consequently the principles of the rule of law. According to legal provisions on local elected representatives, the state of incompatibility arises after validation of office. The local elected representative may renounce the position held prior to being appointed or elected in the position which generates the state of incompatibility or within maximum 15 days from being appointed or elected in such position.[14]

The jurisprudence of the Constitutional Court[15] lays emphasis on the principle according to which instituting the regime of local elected representatives' incompatibilities serves the purpose of the law which seeks to remove the causes and conditions which entail corruption and shows that incompatibilities are not eligibility requirements since their removal depends on the will of the local elected representative, and cessation of the office occurs, in this case, in accordance with the law, provided that the local elected representative fails to renounce one of the two incompatible positions within maximum 15 days from appointment or election. Moreover, the Decision of the Constitutional Court no. 495 of 7 October 2014 reiterates the distinction abovementioned and rules that the regime of local elected representatives' incompatibilities "does not represent an obstacle for the persons under the hypothesis of the norms to run for and be elected in offices." Consequently, the criticism on unconstitutionality which invoked the infringement of the right to be elected (article 37 of Constitution) by instituting the regime of local elected representatives' incompatibilities, was groundedly rejected by the Constitutional Court[16].

2. Incompatibilities and restriction of choosing the profession. The jurisprudence of the Constitutional Court[17] also clarifies the principle according to which instituting the regime of incompatibilities regarding the local elected representatives does not obstruct the constitutional right to work (article 41 of Constitution), since the incompatibilities are regulated by the legislator as a response to preventing the conflict of interests of the local elected representatives. Their activity has to circumscribe to the

[13]Cynthia Carmen CURT, *Standards of Integrity regarding the Local Elected Representatives. Legal regime of Incompatibilities,* Transylvania Magazine for Administrative Sciences, 2 (37)/2015, p. 64.
[14]Article 91, of Law no. 161/2003.
[15]*Decision of Constitutional Court no. 739 of 16 December 2014* published in the Official Gazette of Romania no. 124 of 18 February 2015 and Decision of Constitutional Court no. 396 of 1 October 2013 published in the Official Gazette of Romania no. 708 of 19 November 2013.
[16]*Decision no. 401 of 8 October 2013* published in the Official Gazette of Romania no. 730 of 27 November 2013 and *Decision no. 1.076 of 14 July 2011* published in the Official Gazette of Romania no. 603 of 26 August 2011.
[17]*Decision of the Constitutional Court no. 225 of 15 February 2011* published in the Official Gazette of Romania no. 294 of 28 April 2011, *Decision no. 401 of 8 October 2013* published in the Official Gazette of Romania no. 730 of 27 November 2013, *Decision no. 309 of 5 June 2014* published in the Official Gazette of Romania no. 581 of 4 August 2014 rejects all criticism on unconstitutionality regarding article 87 par 1 letter d), Law no. 161/2003; along the same lines: *Decision no. 1.076 of 14 July 2011* published in the Official Gazette of Romania no. 603 of 26 August 2011, *Decision of the Constitutional Court no. 225* of 15 February 2011 and no. 294 of 28 April 2011.

requirements imposed by the legislator, i.e. impartiality, integrity, transparency in decision-making and supremacy of the public interest. In the same context, the Constitutional Court notes that the regime of local elected representatives' incompatibilities is fully consistent with provisions of article 45 of the Constitutional text concerning the economic liberties, considering that such freedoms are guaranteed provided that the relating normative framework is complied with[18].

3. Principle of equality. The Constitutional Court established that the legal regime of the local elected representatives' incompatibilities is not such as to violate the principle of equality – due to the fact that the public offices and positions are held in accordance with the law, law which applies to all persons in such situations, to the same extent and without distinction[19]. The Court shows that, according to the jurisprudence of the European Court of Human Rights[20], instituting some incompatibilities for public elective positions is not contrary to the provisions of the Convention for the protection of human rights and fundamental freedoms. In this context, the Court rejected the exceptions of unconstitutionality regarding article 87 par 1 letter k) under Law no. 161/2003, by Decision no. 304 of 13 June 2013, and showed that the exceptions regarding the "status of teaching staff or member of some associations, foundations or other non-governmental organizations" does not bring about "affectation of neutrality, impartiality and integrity of the public positions of mayor or vice-mayor and is not such as to determine a state of legal subordination or to impose rules which may constitute obstacles to holding such public positions", as the capacities stated to be incompatible with the status of local elected representative intend to.

4. *Principle of transparency and supremacy of the public interest.* By its recent jurisprudence[21], the Constitutional Court rejected the criticism on unconstitutionality regarding article 87 par 1 letter f), as well as the article 87 par 1 letter e) of Law no. 161/2003[22]. The Court acknowledged that the incompatibilities instituted by these legal texts are completely in line with the principles of impartiality, integrity, transparency in decision-making and supremacy of the public interest, set forth by article 71 of Law 161/2003, and represent a measure required to take in order to ensure transparency in exerting public offices, public positions and positions in the business environment, to prevent and sanction corruption, the legislator instituting, in addition to specific rules and conditions to exert an office, certain incompatibilities given the need to neutrally

[18] *Decision no. 396 of 1 October 2013* published in the Official Gazette of Romania no. 708 of 19 November 2013 rejects all criticism on unconstitutionality regarding article 87 par 1 letter g), Law no. 161/2003; Decision no. 1484 of 3 November 2011 published in the Official Gazette of Romania no. 895 of 16 December 2011 rejects all criticism on unconstitutionality regarding article 88 par 1 letter c), Law no. 161/2003; Decision no. 304 of 13 June 2013 published in the Official Gazette of Romania no. 449 of 22 July 2013 rejects all criticism on unconstitutionality regarding article 87 par 1 letter k), Law no. 161/2003.

[19] *Decision no. 1.458 of 9 November 2010* published in the Official Gazette of Romania no. 58 of 24 January 2011 and Decision no. 396 of 1 October 2013 published in the Official Gazette of Romania no. 708 of 19 November 2013.

[20] *Case Lykourezos vs. Greece 2006,* par 51.

[21] *Decision no. 739 of 16 December 2014* published in the Official Gazette of Romania no. 124 of 18 February 2015 and *Decision no. 754 of 16 December 2014* published in the Official Gazette of Romania no. 123 of 17 February 2015.

[22] *Decision no. 90 of 3 March 2015* published in the Official Gazette of Romania no. 345 of 20 May 2015.

fulfill the relating tasks by the persons holding a public authority position. Regulating such incompatibilities represents the option of the legislator and is circumscribed to the goal of removing the causes and the conditions which trigger corruption. It is indicated that the texts mentioned observe the principles of accessibility, clarity and predictability in accordance with the jurisprudence of the European Court of Human Rights and consequently ensure respect for the principle of legal security. The Court judiciously emphasizes[23] that the actual establishment of the state of incompatibility in each particular situation falls under the prerogatives of the court of law, which "analyzes the peculiarities of each particular case, taking account of the relating legal provisions, so that the solution ruled should be in line with the purpose of the law to ensure impartiality, protection of the social interest and avoidance of the conflict of interest".[24]

For similar considerations, mainly circumscribed in the need to prevent the conflicts of interest and to objectively fulfill, by the persons holding a position or a exerting a public office, the relating tasks, in line with the principle of transparency in decision-making, integrity, impartiality and supremacy of the public interest, the Constitutional Court rejects all criticism on unconstitutionality regarding the legal texts to which the regime of local counselors' and county counselors' incompatibilities refer[25]. Therefore, it is held that the regime of local counselors' and county counselors' incompatibilities refer to instituting guarantees relating to holding public positions in conditions of impartiality and transparency in decision-making. This is an expression of the will of the legislator who considered that the public positions which obligatorily involve transparency in using and administering public funds are not compatible with the private positions, specific to the business environment, as cumulating them may affect the public interest and the citizens' trust in the public administration authorities, and implicitly the principles underlying the rule of law[26].

With regard to the rule of law, the contentious constitutional court held[27] that, in reference to the "rule of law", consecrated by art 1 par (3) of Constitution, it implies the capacity of the state to provide its citizens with quality public services and to create the means required to increase their trust in the public institutions and authorities[28]. In addition, this implies the state's obligation to impose ethical and professional standards, especially to those who are concerned with performing activities or providing services of

[23] *Decision no. 739 of 16 December 2014* published in the Official Gazette of Romania no. 124 of 18 February 2015.

[24] Cynthia Carmen Curt, *Standards of Integrity regarding the Local Elected Representatives. Legal regime of Incompatibilities,* Transylvania Magazine for Administrative Sciences, 2 (37)/2015, p. 66.

[25] *Decision no. 1.076 of 14 July 2011* published in the Official Gazette of Romania no. 603 of 26 august 2011; Decision no. 401 of 8 October 2013 published in the Official Gazette of Romania no. 730 of 27 November 2013; Decision no. 1.484 of 3 November 2011 published in the Official Gazette of Romania no. 895 of 16 December 2011.

[26] *Decision no. 305 of 13 June 2013* published in the Official Gazette of Romania no. 443 of 19 July 2013; Decision no. 495 of 7 October 2014 published in the Official Gazette of Romania no. 857 of 24 November 2014; Decision no. 91 of 3 March 2015 published in the Official Gazette of Romania no. 356 of 25 May 2015.

[27] *Decision no. 456 of 4 July 2018* published in the Official Gazette of Romania no. 971 of 16 November 2018.

[28] See, by way of example, *Decision no. 582 of 20 July 2016*, published in the Official Gazette of Romania, Part I, no. 731 of 21 September 2016.

public interest and, even more so, to those who conduct acts of public authority, namely to those public or private agents who have been vested and may invoke the authority of the state in conducting certain acts or fulfilling certain tasks. The state has to create all and any prerequisites – among which the legislative framework – in order for its positions to be exerted by professionals who meet professional and moral probity criteria.

The Constitutional Court has recently ruled on the provisions of Law no. 161/2003, in the section referring to local elected representatives' incompatibilities. These provisions state what is allowed, on the one hand, and what is forbidden, on the other hand. Therefore, by decision no. 456 of 4 July 2018, the Court (1) admits the unconstitutionality objection filed by the President of Romania and notes that the provisions of the sole article item 2 [referring to article 87 par (3) second thesis][29], item 3 [referring to article 88 par (3)][30] and item 5 (referring to article 116^1)[31] under Law amending and completing Law no. 161/2003 regarding some measures to ensure transparency in exerting public offices, public positions and positions in the business environment, to prevent and sanction corruption, are unconstitutional; (2) rejects as groundless the unconstitutionality objection filed and notes that the provisions of the sole article item 4 [referring to article 91 par (1^1)][32] under Law amending and completing Law no. 161/2003 regarding some measures to ensure transparency in exerting public offices, public positions and positions in the business environment, to prevent and sanction corruption, are constitutional in relation to criticism formulated.

Law 59/2019[33] was later adopted, with the following content:

- *1. Article 77 is amended as follows:*

"ARTICLE 77

The conflicts of interests for presidents and vice-presidents of county councils or local and county counselors are laid down in article 46 of Local Public Administration Law no. 215/2001, republished, as amended and completed."

- *2. At article 91, after par (1), a new paragraph is inserted i.e. par (1^1), with the following content:*

"(1^1) The state of incompatibility ceases upon lawful cessation of the office in relation to which the local elected representative held a position or exerted a capacity

[29]Sole article item 2 [referring to article 87 par (3) second thesis]:
"(3) [...] Mayors and vice-mayors, general mayor and vice-mayors of Bucharest Municipality may hold positions in other fields of activity of the private sector, which are not directly related to the tasks carried out as mayors and vice-mayors, general mayor or vice-mayors of Bucharest Municipality, in accordance with the law."

[30]Sole article item 3 [referring to article 88 par (3)]:
(3) Local counselors or county counselors may exert positions in other fields of activity in the private sector, which are not directly related to the tasks carried out as local counselors or county counselors, in accordance with the law."

[31]Sole article item 5 (referring to article 116^1): "Article 116^1. – The acts of the persons in office or the persons holding public positions, which determine an actual conflict of interests or the state of incompatibility, shall be barred three years after they were committed, in accordance with article no. 2.517 under Law no. 287/2009 regarding Civil Code, republished, as amended."

[32]Sole article item 4 [referring to article 91 par (1^1)]: "(1^1) The state of incompatibility ceases upon lawful cessation of the office in relation to which the local elected representative held a position or exerted a capacity incompatible thererewith or by the date upon which the position or the capacity which entailed the state of incompatibility ceased."

[33]Published in the Official Gazette of Romania no. 268/9.04.2019.

incompatible thererewith or by the date upon which the position or the capacity which entailed the state of incompatibility ceased."

In reference to article 116 [1] recently introduced at item 5, the Court held that a legislative parallelism is created, parallelism incompatible with the requirements imposed by provisions of article 1 par (5) of Constitution. Consequently, under all and any normative hypotheses mentioned previously, the state of incompatibility is liable to be sanctioned by virtue of Law no. 176/2010, which represents the substance of the matter for the evaluation procedure specific to conflicts of interests and incompatibilities. According to article 11 par (l) of Law no. 176/2010, "the activity involving the evaluation of the declaration of assets, data and information regarding current wealth, as well as patrimonial changes occurred while in office, as well as the declaration on conflicts of interests or incompatibilities, is conducted while in office and within three years from cessation of office". Pursuant to article (2) of the same article, "the activity conducted for the timeframe stated at paragraph (1) consists in evaluating the declaration of assets, data and information regarding current wealth, as well as patrimonial changes occurred, as well as the declaration on conflicts of interests or incompatibilities, exclusively for the timeframe of the public office held". The regulation envisaged by introduction of article 116^1 in Law no. 161/2003 makes it impossible for the National Integrity Agency – institution with sole prerogatives in this matter, followed by confirmation/rejection of courts of law – to assess and sanction the failures to observe the legal regime of incompatibilities and conflicts of interests. The text of article 116^1 was not taken over by the later amendments of Law no. 161/2003.

We may conclude that the high number of exceptions of unconstitutionality which focused on the integrity framework regarding the local elected representatives' incompatibilities was rejected by the Constitutional Court.

1.3. Jurisprudence of the High Court of Cassation and Justice

We will analyze a part of the jurisprudence of the High Court of Cassation and Justice, as it will clarify some important aspects concerning the interpretation and application of the legal framework and will render it coherent and stable. Nevertheless, it will also show the lack of interest or the failure to observe the standards of public integrity by local elected representatives.

1. The jurisprudence of the High Court of Cassation and Justice clearly emphasizes that the target of the legal regulation of incompatibilities is to prevent conflicts of interest. Therefore, it is held that in order to acknowledge and sanction the state of incompatibility, the following is not relevant: the fact that the state of incompatibility ceased prior to the date of the report drawn up by the National Integrity Agency; the short duration of this state; whether the local elected representative was remunerated or not for the positions held within trading companies or whether the local elected representative actually carried out various activities within such companies. [34]

[34] *Decision no. 7.205 of 12 November 2013 of the High Court of Cassation and Justice*; *Decision no. 7.167 of 7 November 2013 of the High Court of Cassation and Justice.*

The court shows that the criticism on the retroactivity of Law no. 176/2010 (which includes procedural norms to evaluate conflicts of interests and incompatibilities) is not acceptable either, since the state of incompatibility saw the light and is set forth by norms of substantive law in force upon the reference date (article 87 par letter d) Law no. 161/2003).[35]

2. The activity concerning the evaluation of conflicts of interests and incompatibilities is conducted while in office and also 3 years after the office has ceased (article 11 par 1, Law no. 176/2011, article 91, par 1^1of Law 161/2003).[36]

3. The actual state of incompatibility relating to the normative hypothesis shall be established in reality, depending on the particularities of the case and the set of evidence available, for each particular case.

(a) By Decision no. 553 of 5 February 2013, the High Court of Cassation and Justice considers the state of incompatibility of vice-mayor B.O., for the timeframe 24.06.2008 – 24.08.2010, when he simultaneously held both the office and the position of administrator of two trading companies (article 87 par 1 letter d) Law no. 161/2003).[37]

(b) By Decision no. 1.393 of 19 March 2014, the Supreme Court considers the effect of the normative hypothesis of article 87 par 1 letter d) under Law no. 161/2003 on the incompatibility between the capacity of mayor and the one of administrator of a trading company of G.I.L, since the resignation from the trading company was not, under the circumstances of the case, such as to remove the state of incompatibility, as "he failed to prove having submitted and actually registered his resignation with the company records, the table attached in this respect includes no element to identify the issuing legal person and was not certified as a true copy by the company representatives".

(c) On the other hand, the High Court of Cassation and Justice[38] admits B.C.A.'s appeal, annuls the Evaluation Report drawn up by the National Integrity Agency, grounded on the same hypothesis of the legal norm, and considers that the plaintiff's capacity of administrator was not incompatible with the office of mayor, as "he ceased his capacity of administrator by his revocation in accordance with the addendum, registered in the company meetings and deliberations register, including the new specimen signature of the new administrator; his withdrawal actually took effect on that date, and not on the date of

[35] *Decision no. 792 of 14 February 2013 of the High Court of Cassation and Justice.*

[36] By *Decision no. 5.930 of 25 June 2013*, the High Court of Cassation and Justice notes the state of incompatibility stated at article 87 letter g) in relation to vice-mayor P.N., for the timeframe 19 June 2008 – 26 March 2010, timeframe within which the latter held the position of administration of a Limited Liability Company. The Court rejects the criticism formulated according to which the principle "ne bis in idem" is alleged to have been breached, because on 29 March 2010 the Prefect's Order acknowledged lawful cessation of the vice-mayor's office, as this Order was, on the one hand, subsequent to 26 March, final date noted in the Evaluation Report of the National Integrity Agency for the period of incompatibility, and, on the other hand, the Prefect's Order only acknowledged the lawful cessation of office, and did not provide sanctions with regard to the state of incompatibility noted.

[37] In this case, the court considers that the mention on having suspended the activity of one company, effective 01.04.2008, represents no legal grounds in noting that the vice-mayor did not maintain the capacity of company administrator, the hypothesis of the legal norm instituted by article 87 par 1 letter d) Law 161/2003 is thus complied with, while the removal from the National Trade Register took effect on 20.08.2010. With regard to the second trading company, the court may not consider that the state of incompatibility was removed by the voice-mayor's revocation from the position of administrator, in accordance with an act bearing a certified date, as the vice-mayor was personally responsible for having the amendments to the articles of incorporation of the company registered with the National Trade Register.

[38] *Decision no. 345 of 28 January 2014.*

the registration with the Trade Registry." What is relevant for this present case, according to the court, is the fact that the revocation was registered in the company register – by the time set forth by article 91 par (1) and par (3) and represented an actual, serious revocation in relation to the other acts previously concluded by the company, acts which no longer indicate plaintiff B.C.A. as administrator, but another person.

(d) In this respect, the High Court considers the state of incompatibility, in accordance with provisions of article 87 par 1 letter d) compared to article 91 under Law no. 161/2003, as the only evidence that the plaintiff would have actually renounced his capacity of administrator are the ones registered with the Trade Registry, after the state of incompatibility was noted. [39]

4. The text of the legal norm has to be construed in consideration of the legislator's aim and the aim of the regulations, i.e. prevention of corruption; the persons in office/holding a public position are to adopt a preventive conduct such as to prevent them from reaching a point of incompatibility which would result in some conflicts of interests.[40]

The High Court of Cassation and Justice[41] holds the state of incompatibility for mayor G.E., who was simultaneously mayor and "trader – natural person" – article 87 par 1 letter g) Law no. 161/2003. In this present case, the Supreme Court shows that the legislator made no references to performance of trading activities, but to holding the capacity of trader – natural person, removing therefore mayor G.E.'s claims that he carried out no such activities.

5. In the interpretation and enforcement of provisions of article 88 par (1) letter c) of Law 161/2003, the High Court of Cassation and Justice shows that there is no direct subordination between the local elected representatives and the county elected representatives and states that the text regulates two possible states of incompatibility, on two distinct systems of administrative decision-making – local system and county system.

The High Court of Cassation and Justice shows that, according to provisions of Law no. 215/2001, there is no administrative or decisional subordination between the county council and the local council, so that there may not be a state of incompatibility of the type local counselor – employee of a unit under the county council or

[39] In *Decision no. 7.205 of 12 November 2013*, the High Court appreciates that "an act bearing a certified date is required to attest resignation, withdrawal, renouncing the position; the mentions need not be registered with the Trade Registry so as to attest the value of the incompatible person's intention to renounce such position. An act, a mention bearing a certified date is required, i.e. such act is to be registered with the institution, the company, the registry vested to receive such request and later to proceed to having it registered with the Trade Registry". Therefore, the state of incompatibility has to be established in reality, whereas the evidence has to result from the person's intention to renounce the incompatible position by the date set forth by article 91, Law no. 161/2003.

[40] Cynthia Carmen CURT, "*Standards of Integrity regarding the Local Elected Representatives. Legal regime of Incompatibilities",* Transylvania Magazine for Administrative Sciences, 2 (37)/2015, p. 66.

[41] *Decision no. 5.728 of 13 June 2013*. In this present case, the court analyzed the supporting evidence and held that the actual renunciation to the "capacity of trader as natural person" took effect when the company was removed from the National Trade Registry. In the same ideational logic, by Decision no. 7.167 of 7 November 2013, the High Court of Cassation and Justice holds that, in order to note the state of incompatibility stipulated at article 87 par 1 letter g) Law no. 161/2003, it is not relevant the plaintiff's having earned no income as a result of his/her capacity of trader natural person, respectively the plaintiff's having performed no actual activity; the state of incompatibility resides in concomitant holding of these two capacities (vice-mayor and trader – natural person).

inversely.[42]. Furthermore, the High Court[43] holds that the position of local or county counselor is incompatible with the capacity of public servant within the prefecture of the respective county; "for this the legislator used the copulative conjunction or".

The High Court[44] rules that in the interpretation of the phrase "the respective local council's own apparatus", according to article 88 par (1) letter c) of Law 161/2003, one may not distinguish between "the mayor's apparatus of experts" and "the respective local council's own apparatus", because the interpretation of the legal text may not disregard the objective considered by the legislator and the conflict existing between the tasks involved by the activities carried out simultaneously.

6. In the enforcement of article 88 par (1) letter f) of Law no. 161/2003, the High Court of Cassation and Justice[45] rules that the analogy between the position of "state representative" and the position of "local council representative" is legally groundless, since the cases of incompatibility are strictly and limitatively set forth by the legislation in force.

7. In terms of enforcing the provisions of article 89 under Law no. 161/2003, the High Court of Cassation and Justice[46] shows that, in order to establish the state of incompatibility, the legislator took into account, by the phrase "trading company set up by the county council", not only the companies of which sole shareholder is the local council, but also all and any trading company to which establishment the local council decided to take part in capacity of shareholder, alongside other shareholders.

8. Mere holding of a local, respectively county public office, forces the local/county counselor to take all actions so as to avoid being in breach of the provisions under Law no. 161/2003. This is what the High Court of Cassation and Justice held by decision no. 598 of 7 February 2013 relating to enforcement of provisions of article 90 under Law no. 161/2003. In order to establish the state of incompatibility as set forth in article 90, it is not relevant who concluded the contract on behalf of the company, it is not relevant who signed such contract, how the contract was granted. What matters is the capacity of the county counselor to hold the position of associate, respectively censor within the trading company which concluded agreements with the County Council concerned. In addition, it is not legally relevant whether the effects of the agreements concluded have come to an end or are still effective, whether the elected person abstained from voting or the vote was formal within the council, or the fact the person was no longer a counselor on the date the evaluation report was drawn up; the number of agreements concluded or their "modest" value, the nature and the quantum of the benefits acquired are also irrelevant in establishing the state of incompatibility. Nevertheless, the High Court of Cassation and Justice[47] considers relevant the fact that the two capacities held simultaneously are of nature to distort or influence the free will of the contracting parties upon the conclusion of the contract.

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[42] *Decision no. 6.358 of 26 September 2013 of the High Court of Cassation and Justice.*
[43] *Decision no. 1.116 of 2 March 2012 of the High Court of Cassation and Justice.*
[44] *Decision no. 475 of 4 February 2014 of the High Court of Cassation and Justice.*
[45] *Decision no. 210 of 21 January 2014 of the High Court of Cassation and Justice.*
[46] *Decision no. 3.755 of 26 September 2012 of the High Court of Cassation and Justice.*
[47] *Decision no. 491 of 15 November* 2012 *of the High Court of Cassation and Justice*; *Decision no. 4.662 of 9 November 2012 of the High Court of Cassation and Justice*; *Decision no. 7.499 of 29 November 2013 of the High Court of Cassation and Justice; Decision no. 1.970 of 29 April 2014 of the High Court of Cassation and Justice.*

In the interpretation of the phase "may not conclude agreements for provision of services, execution of works, etc." (article 90 par 1), the High Court of Cassation and Justice holds that the conclusion of agreements covers and includes conclusion of addenda, as they have the same legal nature and represent an agreement concluded between the parties with a view to creating some liabilities, in compliance with the same requirements regarding the form and the content as the agreements themselves.[48] A determinant role in this case is played by the "positioning and the status of the signatory parties upon the conclusion of such legally binding acts", and less by the name of the act concluded. In the interpretation of the legal text of article 90, relevant is the Decision no. 3.568 of 1 October 2014, by which the High Court of Cassation and Justice clarifies the erroneous interpretation rendered by the court of first instance, in the sense of a forced holding of both the capacity of director and shareholder or associate within one of the trading companies stated in the law, in parallel with the position of local or county counselor, affecting the state of incompatibility (such circumstance would result from using the phrase " as well as the capacity of shareholder or associate"). The High Court of Cassation and Justice judiciously rules that the phrase "as well as" may only be alternative (and therefore replaceable with "or"), because holding any of the positions stated generates a state of incompatibility with the position of local, respectively county counselor[49]. By Decision no. 2868 of 18 June 2014, the High Court of Cassation and Justice rules with regard to enforcing the sanction provided by article 92 of Law no. 161/2003 and shows that enforcing the sanction of lawful cessation of office by prefect's order, does not remove the possibility for the National Integrity Agency to enforce provisions of Law no. 176/2010 regarding enforcement as a sanction to interdict holding a public office for a three-year timeframe, as the two normative acts set distinct, complementary sanctions.

2. Regulations on the Procedure regarding Evaluation and Establishment of the State of Incompatibility

2.1 Legal framework

The diversification of the legislative framework in the matter of regulations of restrictive nature which limit the possibility of a person to simultaneously hold several positions or to perform several activities remunerated has enabled creation of a more complex regulating framework and has also opened the way towards a dual regulation, under certain circumstances, a regulation which is contradictory to a great extent and creates major difficulties in the administrative practice. Legal provisions in procedural matter regarding incompatibilities may be found in: Law no. 161/2003, Law 176/2010, Law 215/2001 of local public administration and Law no. 393 of 28 September 2004 regarding Statute of the local elected representatives[50].

[48] *Decision no. 6.289 of 24 September 2013 of the High Court of Cassation and Justice.*
[49] In the same respect, *Decision no. 7 of 21 January 2008, Joint Departments within the High Court of Cassation and Justice.*
[50] Published in the Official Gazette no. 912 of 7 October 2004.

2.2.Act of intimation. Deadline.

The National Integrity Agency evaluates the incompatibilities ex officio or upon intimation of other natural or legal persons, in compliance with the provisions of the Government Ordinance no. 27/2002 regarding regulation of settling petitions, approved as amended and completed by Law no. 233/2002[51].

The incompatibilities are evaluated while in office and for a three-year timeframe after cessation of office. This activity is carried out exclusively for the period of holding an office or a public position.

According to article 12 par 3 of law no. 176/2010, the intimation submitted in bad faith entails legal liability in relation to the person who did so.

The subject would be incomplete if we failed to tackle in this chapter an issue which generated long debates on television nationwide, regarding the collaboration between the Romanian Intelligence Service and the National Integrity Agency, with a view to supporting the latter to fulfill their tasks. The general public has been informed on the conclusions of the Parliamentary Commission in charge of controlling the activity of the Romanian Intelligence Service, registered in the "Report regarding use of the Romanian Intelligence Service by Mister George Maior for personal gain."[52] Consequently, according to this document, the community has been informed that the National Integrity Agency acted between 2011 and 2015 as legal beneficiary of the Romanian Intelligence Service. "During this timeframe, the legislation was not amended; however, the manner in which the two institutions chose to collaborate is different and lacks legal bases expressly stipulated in a normative act". Yet, it is held that "the notes of the Romanian Intelligence Service were not mentioned in the internal procedures of the Agency or any other materials; the National Integrity Agency acted on their own initiative and these acts were assumed by the entire staff of the institution. It was thus impossible for the persons concerned to find who initiated the claim against them, as the legal framework of the National Integrity Agency provided the inspectors and the management of this institution with the possibility to "act ex officio".

Moreover, the Report includes the conclusion that these practices enabled the Romanian Intelligence Service to act "visibly toward influencing the political life in Romania". Such a case concerned the mayor of Sibiu Municipality. We chose to approach this case in our paper in the section dedicated to practical aspects regarding incompatibilities of the local elected representatives. In this part of our work, we will only emphasize that the Report notes how the Romanian Intelligence Service remitted the National Integrity Agency the information note regarding the state of incompatibility concerning the mayor of Sibiu Municipality only three years later, "right at the time when he was preparing to take over an important political position at national level."

[51]Published in the Official Gazette no. 296 of 30 April 2002.
[52]https://cmedia.romaniatv.net/other/201904/raport-comisia-sri_74783500.pdf

2.3.Competent bodies

Article 1 and 8- 9 specify that the law applies to different categories of public offices and positions, among which local elected representatives, and that the authority evaluating the incompatibilities is the National Integrity Agency. These articles continue by establishing the person within the Agency who is to evaluate the incompatibilities and state that this evaluation will be conducted by integrity inspectors in accordance with principles of legality, confidentiality, impartiality, operational independence, celerity, good administration, the right to defense as well as the right to presume that one's wealth was acquired licitly.

In accordance with article 9, with a view to conducting one's activity in a professional manner and in compliance with the principles abovementioned, the tasks are assigned randomly by the managers of the integrity inspectors who use an electronic system. The integrity inspectors carry out, among others, the following activities regarding incompatibilities:

– they evaluate conflicts of interests or incompatibilities of persons holding public offices or positions;

– they prepare evaluation reports when, following evaluation, they identify elements indicating breaches of legislation regarding the regime of incompatibilities;

– they prepare evaluation reports when, following evaluation, they identify no elements indicating breaches of legislation regarding the regime of incompatibilities.

Should the integrity inspector identify elements indicating an incompatibility, he/she will inform the person concerned thereon and shall invite the latter to express one's point of view[53]. The person is invited to provide the integrity inspector with data or information which they consider necessary, in person or by remitting a written point of view. The person will be informed and invited by post, with registered letter and acknowledgment of receipt. The person subjected to the evaluation is entitled to be assisted or represented by a lawyer and also to provide any data or information considered to be relevant. Throughout evaluation, the integrity inspector may request from all public institutions and authorities, other legal persons of public or private law, as well as natural persons, documents and information required in conducting the evaluation. The inspector shall keep confidential such data and information. Upon reasoned request of the integrity inspector, the natural and legal persons, the heads of public authorities, institutions or public or private companies, as well as the heads of the autonomous administrations, shall communicate within maximum 30 days, the data, information, acts and documents requested, irrespective of their medium, as well as data, information or documents which they already have and which may be useful in settling the case. Should, after expressing the point of view by the person invited to do so, verbally or in writing, or, in the absence of such point, after the expiry of the 15 days from the acknowledgment of receipt by the person under evaluation, the integrity

[53]Article 20 under Law 176/2010 states that "Should, following analysis of the declaration of interest and other data and information available, the integrity inspector identify elements indicating a conflict of interest or an incompatibility, he/she shall inform the person concerned thereon and shall invite such person to submit a point of view."

inspector consider that there are elements indicating an incompatibility, he/she will prepare an evaluation report. Failure to acknowledge receipt of the information by the person subject to evaluation will entitle the inspector to prepare the evaluation report after the new communication procedure has been observed.[54]

2.4.Legal nature of the evaluation report

In terms of the legal nature of the evaluation report, the High Court of Cassation and Justice decided[55] that the evaluation report prepared by the inspector of the National Integrity Agency, in accordance with provisions of article 17 of Law no. 176/2010 regarding integrity in exerting some public positions or holding some public offices, as part of the procedure regarding the evaluation of the person's wealth, may not be contested directly with the contentious administrative court, as such report does not meet the legal requirements so as to be considered an administrative act, given that this report may not take, by itself, the legal effects of the final act of the procedure. The High Court stated this is report is a mere act of information intended for the Commission in charge of investigating wealth within the Courts of Appeal, provided in Law no. 115/1996, and may be contested before the contentious administrative court only in conjunction with the act proving that the procedure carried out by this commission has been completed.

In addition, the High Court has shown that one must make the distinction between the evaluation report part of the wealth investigation procedure, set forth in article 17, and the evaluation report prepared in relation to an incompatibility found, set forth in article 21, for which there is an express provision in the law regarding the possibility to be contested before a contentious administrative court.

We may therefore conclude that, in terms of legal nature, there is no similitude between the two reports, i.e. the report drawn up as a result of investigating one's wealth and the report drawn up in case of an incompatibility. The first is not an administrative act, whereas the second is an administrative act subject to control of compliance and substance, in accordance with Law 554/2004 of contentious administrative.

2.5 Content of the evaluation report

Article 21 par 3 of the Law states that the evaluation report prepared as a result of finding a state of incompatibility shall include:

a. descriptive part of the actual situation;

b. point of view expressed by the person under evaluation, where such point was expressed;

c. evaluation of the incompatibility elements;

d. conclusions.

[54]Article 21, par 2 of Law no 176/2010.

[55]*Decision no. 5637 of 7 June 2013* sentenced in appeal by the Contentious Administrative and Fiscal Department within the High Court of Cassation and Justice, subject matter evaluation report drawn up by the National Integrity Agency.

The evaluation report shall be communicated within 5 days from completion, to the person subjected to evaluation and, where appropriate, to the criminal prosecution and disciplinary authorities[56].

2.6. Action before administrative court. Means of appeal

While the evaluation report prepared after conducting wealth investigations may only be challenged by the person dissatisfied after the Commission in charge of investigating wealth within the Courts of Appeal, set forth in Law no. 115/1996, has completed their check, as this report is a mere intimation act of this Commission, the evaluation report regarding the person subjected to such evaluation may be contested before the administrative court. The legal procedure is laid down in the same Law, i.e. Law no. 554/2004, and applies accordingly, inasmuch as there are no derogatory provisions in this respect.

- Time – the evaluation report may be contested within 15 days from receipt.
- Material and territorial jurisdiction – The actions filed with contentious administrative courts comply with the jurisdiction rules provided in Law of contentious administrative no. 554/2004, as amended and completed, applicable accordingly.[57] In terms of material jurisdiction, the Courts of Appeal judge the petitions on the main issue of the matter on trial whereas the High Court of Cassation and Justice settle the cases on appeal. With regard to territorial jurisdiction, the plaintiff shall file the petition with the court in his/her area of residence.
- Active and passive legal standing – Shall have active legal standing the person subjected to evaluation who feels aggrieved by the conclusions of the evaluation report. The National Integrity Agency shall have passive legal standing.

[56] Article 21, par 4, Law no. 176/2010.

[57] Article 10 under Law 554/2004 – Court of competent jurisdiction.

(1) Litigations regarding administrative acts issued or concluded by local or county public authorities, as well as acts regarding taxes, contributions, customs taxes and other amounts connected of up to 3,000,000 lei, shall be settled on the main issue of the matter on trial by administrative-fiscal courts, whereas the ones regarding administrative acts issued or concluded by central public authorities, and acts regarding taxes, contributions, customs taxes and other amounts connected exceeding 3,000,000 de lei, shall be settled on the main issue of the matter on trial by contentious administrative and fiscal departments within courts of appeal, unless provided otherwise by special organic law.

(1^1) The requests regarding administrative acts referring to EU non-reimbursable grants shall be settled in accordance with the value criterion, while the requests referring to non-assessable administrative acts shall be settled in accordance with authority ranking, in accordance with provisions of par (1).

(2) The appeal against the sentences awarded by administrative fiscal courts shall be settled by contentious administrative and fiscal departments within courts of appeal, while the appeal against sentences awarded by contentious administrative and fiscal departments within courts of appeal shall be settled by the contentious administrative and fiscal department within the High Court of Cassation and Justice, unless provided otherwise by special organic law.

(3) The plaintiff – natural or legal person of private law will seek exclusive settlement by the court in their area of residence or the area of the head office. The plaintiff public authority, public institution or any other entity connected will seek exclusive settlement by the court in the plaintiff's area of residence of the area of the plaintiff's head office.

(4) The territorial jurisdiction to settle the case shall apply when the action is filed on behalf of the plaintiff by any persons of public or private law, irrespective of their legal standing in the matter.

➢ Suspension of the evaluation report – According to provision of article 14 under Law 554/2004, in well grounded cases and in order to prevent an imminent damage, following intimation filed by virtue of article 7 of Law no. 554/2004, the plaintiff may request suspension of the administrative act. The court settles the request for suspension, as a matter of urgency and priority, without summoning the parties.

2.7 Status of the evaluation report not contested in court

If the evaluation report on incompatibility is not contested in the contentious administrative court within the legal deadline, the Agency informs the competent bodies thereon, within 15 days, so that the disciplinary procedure should be initiated; where appropriate, the Agency will inform the contentious administrative court, within 6 months, in order to request annulment of the acts issued, adopted or drawn up in violation of legal provisions on incompatibilities.

Should a mayor be subjected to such evaluation, the report on incompatibilities shall be conveyed to the prefect, by virtue of article 26 par 1 letter i) of the Law. Nevertheless, in case the report indicates that no state of incompatibility has been found, the integrity inspector prepares a report in this respect and remits it to the person subjected to evaluation.

2.8 Consequences of establishing the state of incompatibility

The consequences of establishing the state of incompatibility of local elected representatives, whether they are mayors, vice-mayors, local counselors, county counselors, president or vice-president of county council, the procedure and the sanction applicable are provided in Law no. 161/2003.

In case of mayors and vice-mayors (the president and vice-president of the county council), the consequences are governed by article 91 and Law 176/2010. As already mentioned, article 91 of Law no. 161/2003 sets forth that the state of incompatibility is established only after validation of office, respectively the appointment or employment of the mayor/vice-mayor (president/vice-president of county council), subsequent to validation of office, in a position incompatible with the position of mayor/vice-mayor. In case the person who is incompatible fails to renounce one of the two incompatible positions within 15 days, the prefect shall issue an order to acknowledge the lawful cessation of the legal elected representative's office upon the expiry of 15 days, upon the proposal of the secretary of the administrative territorial unit. This procedure is completed with provisions of Law on public administration and Law on the statute of the local elected representatives, regarding the lawful cessation of the office. Instead, Law no. 176/2010 article 1 par (1) and (3), corroborated with articles 8-12, and articles 20-25, with articles 26 par 1 letter i, and also with article 32, sets a different procedure which is much more complex than the one stated in Law no. 161/2003, procedure which was explained in the previous sub-chapters.

In terms of categories of local elected representatives, namely local and county counselors, in relation to the case provided at article 89[58] under Law 161/2003, the incompatibility with the capacity of local elected representative emerges upon the date the local elected representative, the spouse or the first-degree relative becomes shareholder.

The local elected representative may renounce the position held prior to being elected or appointed in the position generating the state of incompatibility or within maximum 15 days from being elected or appointed in this position. The local elected representative who becomes incompatible following enforcement of the provisions in the present section shall resign from one of the incompatible positions within maximum 60 days from the date the present law comes into force.

Should the local elected representative fail to renounce of the two incompatible positions by the time provided by par (3), the prefect shall issue an order to acknowledge the lawful cessation of the legal elected representative's office upon the expiry of 15, or, where appropriate, 60 days, upon the proposal of the secretary of the administrative territorial unit.

The order issued by the prefect by virtue of par (4) may be challenged in contentious administrative courts of competent jurisdiction.

One may also speak of criminal liability, so that, in addition to the conviction involving or not the deprivation of liberty, in case of incompatibility qualified as criminal act, there is also the sanction of cessation of office, in respect of which the prefect shall issue an order to acknowledge this fact.

3. Practical Aspects on Incompatibilities of Mayors

We will continue by presenting the status of the mayors whose incompatibility was analyzed in line with two different procedures. This presentation is intended to emphasize the previous findings, complete our analysis and add the conclusion thereto.

In anticipation of a potential question concerning the reason of choosing to present these practical aspects only for this category of local elected representatives – mayors – we took into consideration the legal consequences of establishing the state of incompatibility of mayors, especially for the community which they represent, fact which has been also confirmed by the notoriety of such cases.

In what follows we present the legal status of Mr. Dragoş Vlădulescu, mayor of Dragomireşti, Dâmbovița County, who was irrevocably sentenced to 6 months imprisonment with suspension. The High Court of Cassation and Justice maintained in part the decision of the Court of Appeal in Ploieşti and removed from this initial

[58] *Article 89 (1) The capacity of local elected representative is not compatible with the capacity of significant shareholder within a company* established by the local/county council.
(2) One may speak of incompatibility when the spouse or the first-degree relatives of the local elected representative are significant shareholders within of the economic entities stated at par (1).
(3) Significant shareholder means the person exercising rights attached to some shares which, cumulatively, represent minimum 10% of the share capital or confer the former minimum 10% of the total number of voting rights in the general assembly.

judgment the additional punishment regarding disqualification with regard to holding a public position, for a timeframe of maximum 3 years.

The National Integrity Agency found that Dragoş Vlădulescu was in a state of incompatibility between 22 June 2004 and 01 September 2009, as he simultaneously held the office of mayor in Dragomireşti Commune (Dâmbovița County) and the position of administrator of VLADOSTAR PROD Ltd.

It is also the case of the mayor of Drajna in Prahova County, whose office ceased upon issuance by the prefect of order no. 403/2012 by which the mayor's office ceased rightfully and lawfully on the ground that the mayor was in an incompatible state since he simultaneously held the office of mayor and the position of member of the Board of Administration of a school in the locality. The prefect of the county issued the order of lawful cessation of office according to the report drawn up by the secretary of Drajna and the minutes of the local council meeting, on occasion of which a group of counselors informed the secretary on the fact that the mayor is in an incompatible state as he simultaneously held the office of mayor and the position of member of the administration board of a school in the locality and therefore fell under the category of activities which are incompatible with the position of mayor as defined by article 87 par 1 letter k) under Law no. 161/2003. Following an action filed with the court of law, the judgment was ruled in favor of annulling the prefect's order and the mayor resumed his activity after one year and three months, time required by the court to judge on this case.

Another example is the former mayor of Poseşti, locality situated in the same Prahova County. The National Integrity Agency found this mayor incompatible, since he held for a certain period both the office of mayor and the capacity of administrator of a self-employed person. The National Integrity Agency was informed thereon, checked the facts and requested the mayor's point of view and documents from some state institutions. Following the analysis, they prepared an evaluation report indicating that the former mayor of Poseşti was in an incompatible state between 2008 and 2012. The mayor felt aggrieved with the solution included in the report of the National Integrity Agency and filed a petition with the contentious administrative court; however, this petition was rejected.

4. Conclusions

Starting from the reasoning according to which holding public offices and exerting public positions have to serve the public interest, and the citizens' trust and respect for public authorities and servants equally depend on compliance with standards of responsibility and public integrity, our first conclusion is that keeping in force the same norms incompatible with the current social realities leads to deficiencies at legislative level and affects the administrative practice and, the most seriously, human rights. Our opinion is also enhanced by the Constitutional Court of Romania[59], which held that the legislative intervention is required in order to adapt normative acts to the current

[59]Decision no. 1237 of 6 October 2010, published in the Official Gazette no. 785 of 24 November 2010, page 4

economic, social and political realities, on the one hand, and to ensure a unitary legislative framework, which should contribute to a better enforcement of the law and to removal of all equivocal situations or inequities in relation to such enforcement.

Another relevant conclusion is that having two different, contradictory and imprecise procedures to acknowledge the state of incompatibility violates the principles consecrated by the jurisprudence of the European Court of Human Rights, especially the principle of regulation unity. In fact, the European Court of Human Rights constantly held that "a norm is predictable only when written precisely enough, so that it allows any person to correct their conduct"[60], and the "citizen should possess enough information on the legal norms applicable in a given case and be therefore able to reasonably foresee the consequences occurred in a determined act". As a result, the law should be both accessible and predictable[61].

We consider that the procedure used in evaluating and establishing the state of incompatibility of the local elected representatives, governed by Law no. 161/2003, no longer corresponds to the realities nowadays and is in total disagreement with the modern principles specific to public administration. Therefore, we think that it is necessary that the Parliament of Romanian should repeal these norms under Law no. 161/2003 and keep in force only the procedure used to evaluate the local elected representatives' incompatibility as set forth in Law no. 176/2010.

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[60] *Rotaru vs. Romania*, 2000, when the plaintiff invoked violation of the right to respect for private life, due to the fact that the Romanian Intelligence Service possesses and uses a file with personal data. He also invoked a violation of the right to have access to court and the right to benefit from a remedy before a national court, with jurisdiction to rule on the request to modify or destroy the file; the Court decided that there was a violation of article 8 of convention, article 13 of convention, article 6 par 1 of convention.

[61] *Sunday Times vs. United Kingdom*, 1979, ECHM, the Plenary, sentence Sunday Times vs. Great Britain, 26 April 1979, 6538/74.

Interference with the freedom of speech should be set forth by a law which complies with certain requirements.

Article 10. Legality of interference. The concept of interference "stipulated by the law" encompasses both the written and the unwritten law, such as court judgments, especially in those systems in which they are sources pf law. On the other hand, this requirement imposes that the law should meet two additional conditions. Firstly, the law should be accessible enough, meaning that all and any person should possess information on legal norms applicable in a given situation. Secondly, the legal norms should be predictable, i.e. enunciated clearly enough in order to enable the persons to adjust their conduct. The law should determine, with a certain degree of precision, the situations when it applies as well as its legal consequences.

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THE INSTITUTION OF MAGISTRATES IN THE ROMAN REPUBLIC

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Abstract: *Magistrates were high rank public servants who, in the age of the republic, will undertake the duties of kings of the previous ages, as the magistrates form that political-judicial institution which would undergo important transformation as a result of the social tension of the Roman society, caused by the fight between the patricians, representatives of the traditions and the plebs who will play a significant role in the Roman state as a result of the important changes which occurred when Rome became a universal state on one hand; on the other hand, it occurred as a result of the territorial expansion determined by the great conquests and the change in Roman economy, from a closed autarchic one to a flourishing stock economy.*

Keywords: *state, magistrate, republic, administration, jurisdiction*

The historical evolution of ancient Rome across millennia sees its passage from the statute of citadel city, founded in 754 BC[1], as stated by a famous legend, to that of the most powerful state of the ancient world, which caused numerous Roman historians (Tacitus, Titus Livius, Suetonius – n.n.) to state that Rome was spread across three continents and the Mediterranean Sea would become a Marae Nostrum.

The banishing of the last Roman King, Tarquinus Superbus in the year 509 BC would see a new political regime set in Rome – the republic – a regime which would last for five centuries until the year 27 AD, when Octavianus Augustus, by handing down his mandate as „triumvir republicae constituende" has instituted the principality (the first phase of the empire) thus becoming the first lifelong monarch and naming himself „Princeps inter omnes"[2].

This historical time would correspond to the great territorial expansion of Rome, which would become, by the numerous wars it won, the king of the entire Italic peninsula and the neighboring territories, such as Sicily, Spain, some territories of Northern Africa. Subsequently, it would conquer Syria (190 î.e.n.), Macedonia (168 î.e.n.), Greece (146 î.e.n.) and, toward the end of the analyzed period, Gaul (during the reign of Caesar) or Egypt (during the reign of Augustus – n.n.)[3].

The Roman state would reach its maximum territorial expansion during the first and second centuries under the reign of the emperor Traian, who will conquer Dacia, as well as some parts of the Orient.

The new geopolitical reality created as a result of the great conquests of the Roman state would be an important factor which configured Roman law, thus transforming it by its interference with other law systems, resulting in „ius gentium"

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[1] Cf. Hanga, Vladimir, *Cetatea celor şapte coline* (*The citadel of the seven hills*), 1967.
[2] *Ibidem.*
[3] *Ibidem.*

becoming more influent as opposed to „ius civilae" which was a law system full of rigid forms and formulas which were specific to the ancient time which generated it.

The great wars of the Roman state which caused its territorial expansion resulted in a significant impact on political and judicial life, as well as the social and economical environment, as they will cause a phenomena of social equalization seen throughout the third century BC, when a state of equilibrium is reached between the patricians and the plebs, the latter affected by the toll of war and legitimately requesting the same public rights as the patricians.

As a result of century old fights, the Hortensia Law is passed in 289/286 BC, a law which regulated that „all decisions made by the plebs – plebiscita – in their gatherings would oblige the patrici ut plebiscita universum populum tenerent"[4], something which was likely to create a unified legal regime between these two social categories, categories which were in a permanent conflict frequently escalating (see civil wars) and threatening the very existence of the Roman state.

The fight between the patricians and the plebs would directly influence the structure and the functions of the main magistrates of the Roman state, magistrates meant to ensure the political leadership of the Roman state. Magistrates, along with popular gatherings and the Senate represent the main constitutional factor within the Roman state.

All of the above will essentially change the character and nature of the Roman republic, thus causing it to evolve from an aristocratic slavery republic to a democrat slavery republic under the impact of the reform performed by the Licinia Law or the laws passed by the Gracchus[5] brothers which allowed the direct participation of the plebs to public life along with the patricians.

In essence, magistrate represents „that certain institution which needed to be a replica to regality"[6] as it was sensibly influenced by the forces manifested in a social, economical and political environment between the patricians and the plebs, the main social actors of the Roman society.

The main magistrates within the Roman state were fulfilled by dignitaries who had competence in political, administrative or judicial life, as they were invested in these offices by the people, by special commissions. The magistrates would held the office for one year, in order to prevent the temptation of confiscating power or reach the much avoided monarchy, which was rejected by the new social and political frame, the republican one.

As the office of magistrate was performed in the name of the people as an effect of indirect representation, the office was unpaid and honorific and when the mandate ended, the magistrate would become a regular person like any other citizen.

When invested in office „the magistrate would publish an edict, an act by which they showed how they intent to perform their public function and the legal means they

[4] Cătuneanu, I.C., *Curs elementar de drept roman (An elementary course of Roman law)*, Cartea Romanească Publishing House, Cluj, 1922, p. 19.
[5] Sâmbrian, Teodor, *Instituții de drept roman* (*Roman law institution*), Sitech Publishing House, Craiova, 2009, p.19.
[6] Molcuț, Emil, & Oancea, Dan, *Drept roman* (*Roman law*), Şansa Publishing House, Bucharest, 1993, p. 30.

would use for this purpose (see ius edicenti)"[7]. It is also worth mentioning that Roman magistrates would function in a hierarchic system and their competence was collegial.

The area of expertise of a magistrate comprised two instances, namely imperium – which entailed the right to command an army and to request public gatherings and potestas – which entailed the right of administration.

Magistrates as consuls, dictators and praetorians enjoyed imperium, while censors, aediles, quaestors and tribunal plebes[8] would enjoy potestas.

The evolution of the institution of magistrates will be in an interdependent relation with the dynamic of the social-political life, and the competences which are specific to a certain magistrate will be passed on to another type of magistrate depending on the relation between the plebs and the patricians, which is likely to create a social and political equality, thus leading to a compromise starting with the third century.

The institution of Roman magistrate debuts by the naming of the two consuls which will undertake all the lay duties of the kings, thus they can call public gatherings, command the army, had the right to perform public and private justice and invest the senators. The person of the consul was sacred. The religious duties would belong to a „rex sacrorum" as in the Roman collective mentality the dominant opinion was the one according to which Roman religion was a given which was not to be impaired by political reform. Thus, the objective background was created in order to maintain the ancient religion of the citadel.

The consuls would exercise collegial power, as even the meaning of the word consul would entail the notion of „colleague"[9]. This very state would show the way in which that certain magistrate would be performed. Thus, the duties of the two consuls were identical and performed alternatively, daily by each consul. A synthetic analysis of the duties of the consuls might show that they were the successors in right of former kings; however, in reality their power was significantly reduced considering the fact that their duties were limited to one year, thus respecting the principle of all magistrates – the anuitas principle – and on the other hand given the fact that "each consul could annul the act of his colleague[10], as an effect of the intercessio right. All this would result in a tacit negotiation in regard to the decision act, as the veto right would provide censorship of the activity of the other consul, thus consensus became necessary as a remedy against arbitrary and unilateral decisions.

Unlike kings, when their magistrate was finished, the consuls could be held responsible by the people for the acts they performed when exercising their mandate.

As a result, they did not benefit from immunity, when their mandate ended, they would become regular citizens. If at first, they would be chosen among the patricians, as a result of the pressure of the plebs and their threats of secession, by the effect of the Licinia Sextiae Law 367 BC, plebs would be allowed to hold this office. In a similar manner, the power of consuls in regard to criminal jurisdiction was initially limited by

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[7] Guarino, Antonio, *Revista internationale di diritto romano e antico*, Napoli, 1969, p. 154.
[8] Molcuț, Emil, & Oancea, Dan, *op. cit.*, p. 30.
[9] Cf. Fredouille, J.C., *Dicționar de civilizație romană* (*Roman civilization dictionary*), Larouse, 1995, Romanian translation by Serban Velescu, Bucharest, Universul Enciclopedic Publishing House, 2000, p. 62.
[10] Molcuț, Emil, & Oancea, Dan, *op. cit.*, p. 31.

Valeria Horatio Law 509 î.e.n.[11], the person who was sentenced to death or corporal punishment ruled upon by the consul, would benefit from an appeal which could annul the initial decision, which was definitive and pronounced in public gatherings – commissions – (provocare ad populum).

The consuls had to delegate criminal instruction – questio – and the trials to certain specifically appointed people called qucastores, who, in time, will become independent magistrates.

The appearance of a new magistrate, that of the praetor, in the year 368 BC would limit even more the civil duties of the consul, as he was left with only the "gracious civil jurisdiction", adoption papers, emancipation or the freeing of slaves.

The very procedure according to which civil cases were solved in trials with ordo-judiciorum (see the law/sanction procedure of the formula procedure), the administration of justice was performed in front of the magistrate which corresponds to the in iure phase. Subsequently, in the second phase, namely the in judicio phase, simple citizens appointed by the parties would trial the matter and pronounce a sentence[12].

In time, given the social turmoil and the change in the geopolitical general background existent in the Roman society, resulting in the passing from the aristocratic republican slavery regime to the democratic one, as many of the prerogatives which belonged to the consuls will be transferred to the competence of other magistrates, who will subsequently appear in the political life of the Roman state.

The profound transformation which occurred in the structure of the economic system, some analysts even calling it a true revolution which occurred once the closed autarchic economy evolved in a trading economy, based on the production of merchandise, had effects both on a social level and on a political level in the Roman society of the third and fourth century BC. Thus, a new social category arises, that of the chevaliers, the newly enriched citizens as a result of the development of the production of merchandise and the commercial activity, naval activity and loan sharking, which are in an obvious contradiction with the nobles, the high clerks of the state, owners of large portions of land of the „ager publicus"; by different reform of judicial speculation they would attempt to seize these portions of land under the form of quiritary property, although they were part of the public domain of the Roman state.

In the new social and historical context, the plebes achieve certain reforms by which they will take over some duties in regard to public administration as well as the legal domain.

The fight between the nobles, the representatives of the traditional line in the political life of Rome and the new social category, that of the chevaliers who belonged to the new wave present in the economic and social life caused numerous social and political tension which ultimately resulted in civil wars whose outcome would be the founding of "the empire in the form of the principality,,[13].

As a result of the constant pressure exercised by the plebs in the year of 494 BC, they were acknowledged the right to appoint a number of "five tribes corresponding to

[11] Cf. Cătuneanu, I.C.*, op. cit.*, p. 25.
[12] *Ibidem*, p. 26.
[13] Bonfante, Pietro, *Storia del diritto romano*, vol. I, cap. XVI, Roma, 1934, p. 9.

the five social categories in which the population of Rome was organized; they were called on to protect the interest of the plebs from the abuse of the patricians,,[14].

Although they were not magistrates, as in the Roman conception, magistrates were of magical and religious origin, the plebs' tribune had a fearful authority in public life. The person of the tribune was sacred – sacrosaint – and benefited from the so called ,,jus auxilii et intercessionis,, – in the perimeter of the citadel or Rome, by which they would support the interests of the plebs by using the veto right by which they would annul the decision through which the consuls would impair on the interest of the plebs.

The authority of the tribune was so significant as, in time, the person who prevented him from addressing "the people in public was sentenced to death and his goods were to be confiscated,,[15].

The tribunes would lead the plebs and the political fight of the plebs, which, according to the model of the patricians, were first organized in curia; subsequently they would be organized in urban quarters called ,,tribus". Within the new gathering, called tribune commission, the tribune could demand "the conviction of any citizen based on the right to arrest all people who would impair the interest of the plebs"[16].

The plebs' tribunes constantly advocated the codifying and publishing of the legal regulations according to which the patrician magistrates would administer justice in the name of the gods, thus the legal regulations and the celebratory days in which trials would take place were kept hidden from the plebs.

On the request of the plebs' tribune Terentilius Arsa, in 462 BC, a commission was formed which was tasked with codifying habitual, unwritten law by publishing a law which was to be communicated to the people; this request was previously denied by the patricians for 8 years; due to the pressure exercised by the plebs, they were finally forced to form o commission of 10 men ,,decemviri legibus scribundi".

These men will codify the legal regulation on 10 tables and, a year later, in 449 BC another commission has added two more tables, thus the Law of the 12 Tables was formed, which according to Titus Livius formed the ,,fons omnis privatique juris"[17].

Although the text of the law was not formally transmitted across time, as Rome was burned by the Gauls in the year 390 BC at which time this monument of law was destroyed, it is still alive in the conscience of the Roman people, as, according to what Cicero stated centuries away by publishing the law in the Forum, the memorizing of the law is a true ,,carmen necessarium", namely a mandatory lesson to memorize for the students.

An important moment in the creation of a legal regime equal to that of the patricians was represented by the adaption of the „Canuleja" law as a result of the pressure exercised by the plebs' tribune in the year 445 BC, a law by which plebs acquire a legal status similar to that of the patricians in the matter of marriage by acknowledging a ,,justum matrimonium" which would give rise to a ,,patria potestas,

[14] Braviollo, U., *Atti del congresso internationale di diritto romano e di storia del diritto*, II, Milano, 1951, p. 149.
[15] E Molcuț, Emil, & Oancea, Dan, *op.cit.*, p. 31.
[16] *Ibidem.*
[17] I Cătuneanu, I.C., *op. cit.*, p. 27.

over the descendants of the plebs' thus achieving a legal situation symmetrical to that of the patricians in the area of civil rights.

The fight between the patricians and the plebs would represent a constant and a historic reality in the age of the republic as it led to a series of acute social conflicts but also political compromise in order to avoid the disintegration of the Roman state, also threatened by external pressures.

Thus the patricians will grant the plebs a series of concession which will grant them access to public office; however, they will seek to maintain their old privileges, especially those regarding the organizing of judicial life. Thus a series of duties of the consuls would be passed along to the newly created magistrate.

New magistrates such as censors will appear in 443 BC or, the most significant one is the one of the praetor, the most important judiciary magistrate who would interpret, correct or even modify Roman civil law with the purpose of making it useful and effective according to the new legal relation of the civil circuit. Sometimes, it went so far as to suspend the magistrate of the consul, as seen in 444 BC, when the "military tribunal" will be founded – tribuni militum consulari potestate[18] – a high function to which the plebs will also have access.

After the Gaul invasion (390 BC) when the Roman state was seriously threatened, the consulate will be reinstated, thus excluding the plebs again, which will lead to social tension, balanced by the access of the first representative of the plebs to the function of consul, in the year 367; however, as a precautionary measure, the patricians will separate judicial activity from consular power, thus placing judicial power in the hands of the praetor which will only be appointed from the patricians' social category.

The censors will also be appointed from the patricians; their duties were the drafting of electoral lists based on cens, the execution of public works as well as the supervision of morals cura merum[19].

By the effects of the Ovinia law 312 BC censors acquire increased powers, thus they can appoint members of the senate and even remove from office the senators who were guilty of violating tradition and the morals of Roman society.

The plebs' permanent fight to acquire the right to magistrate – Jus honorum – will eventually result in their access to censorship in the year 351 BC and praetor ship in 337 BC; by the Liciniae Sextiae Law it was stated that the two consuls could be appointed from the plebes. This made possible the access of plebs to priesthood. By the effect of the Ogulnia Law 330 î.e.n. plebs could also be appointed as pontifices or auguri. The first pontifex appointed from the plebes is Tiberius Coruncanius, famous for his public consultation and his interpretations of the civil law[20].

The praetor had a special place within the mentioned magistrates, as he played an important role in regard to the organizing of private trials as well as in the activity of creating law whether by indirect means, by mediate means or by the effective procedure of valorizing the subjective civil rights or by adapting ,,jus civilae" to the new demands of society or even by regulating new legal provisions meant to valorize

[18] *Ibidem*, p. 27.
[19] Molcuț, Emil, & Oancea, Dan, *op. cit.*, p. 32.
[20] Cf. Pomponius, The Digests 1.2.2.&35.

the interests of Roman citizens, thus creating a new system of law, the praetorian one. From a formal point of view, the praetor was unable to create law – praetor jus facere non potest – in reality, by the formula he would release to the interested party by procedural means, the praetor would often create new legal institutions, who were quite abstract in practice; however the legislative technique which was used was flawless.

Starting with the year 242BC along with the urban praetor, the peregrine praetor appears; his competence was the organizing of trials between quirits and peregrines, thus creating a new social and economical reality in the Roman society which resulted in major changes in Roman law as the influence of gentium law became more obvious, causing the law to become more flexible in relation to jus civilae who was extremely formal and rigid, thus less useful to a flourishing merchandise based economy.

The quaestors – quaestores – were those workers appointed by the consuls who appeared in 509; starting with the year 447 BC, they were chosen by comitia tributa[21].

If, in the beginning, there were two consuls, during the time of Sulla, their number reaches 20, while in the time of Caesar, as a result of the expansion of the Roman state, the number of consuls would reach 40[22] .

These magistrates would administer the public vault, the state records and had duties in organizing criminal trials[23].

Starting with the year 367 BC, comitia tributa would appoint 2 aediles curuli – aediles curules – chosen from the patricians as a result of the fact that one of the two consuls needed to be a plebs, this being a compensation measure for the patricians. They were tasked with supplying Rome with food; they would oversee the activity in markets and had some legal competence in regard to commercial trials which occurred in markets.

In exceptional situations, caused by internal crises or external threats to the Roman state, the consuls would appoint, on the orders of the Senate, a dictator[24], a magistrate which would suspend the other magistrates and could last no more than 6 months.

Towards the end of the republic, when Rome becomes the greatest power of the ancient world, although the institution of the dictator was abolished, it would still function under a new form. Thus, in the first century BC, by the so called „senatus consultum ultimatum" the Senate would „suspend all guarantees stated in laws, by providing dictator powers to one of the consuls for a limited amount of time„[25].

The magistrates' body of republican Rome was not organized according to hierarchy, as their power derived from the sovereign people who exercised power in comitia. The magistrates would form the so called cursus honorum[26].

By law „Cornelia de magistratus" 82 BC some conditions and age criteria were regulated in order to have access to a magistrate. Thus, for example, one was unable to become a consul if it wasn't previously named as questor or pretor. In regard to the age

[21] Sâmbrian, Teodor, *op .cit.*, p. 22.
[22] *Ibidem.*
[23] Pomponius, *lib.singulari enchiridi*, D.1.3.3.22.
[24] Molcuț, Emil, & Oancea, Dan, *op. cit.*, p. 32.
[25] *Ibidem* p. 23.
[26] Sâmbrian, Teodor, *op. cit.*, p. 22.

condition, the minimal age was set at „30 years for quaestors, 32 for aediles curuli, 38 for praetor, 40 for consul and 45 for censor„[27].

The magistrates would appear in public accompanied by a number of lectors who wore fascia, their number depending of the power. Thus, for example, dictators were accompanied by a number of 24 lectors. They would wear a red gown in order to be identified and would exercise their duties while sitting on a special chair.

By these magistrates, the Roman state would directly exercise tits leadership function, the institutional function, the legal function and that of guaranteeing the fundamental values of the Roman society in the age of the republic, all meant to protect the governing form in the time between the years 509 BC and 27 BC, a time when Rome would transform from an aristocrat slavery republic to a democrat slavery republic as a result of the reform which derived from the centuries old fight between the patricians and the plebs.

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[27] *Ibidem*, p. 23.

CURRENT TRENDS IN ORGANIZATIONAL DEVELOPMENT OF EDUCATIONAL INSTITUTIONS

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Abstract*: The educational act is a complex act which is influenced by various factors related to the human and managerial nature and by professional quality of the teaching staff, the stability and the legal coherence, and last but not least the level of involvement and understanding from parents and society in general. Without ignoring any of these factors, in our study we will focus on organizational management, focusing on the recruitment and selection process of teaching staff in the context of the new perspectives and tendencies of the educational organization.*

This will be done from the perspective of the existing educational policies and the level of involvement of the manager in knowing his own organization so that its decision-making act to be effective and to achieve its objectives established through the management plan.

Keywords: *manager, educational policy, leadership, recruitment, personal selection*

I. Reasons for rediscovering the school

Education is subject to a continuous process of change and, surprisingly, we are witnessing a rediscovery of the school and a repositioning of it into the center of society. Let us not forget that the progress of the world through school and education is relatively recent; it began with the rebirth, with the battle that science and the university had won over the church, and did not actually evolve until the eighteenth century when the first compulsory schools were organized on a national scale.

Since then, it was a strong link between civilization and school, the world progressing to the extent that education has progressed and stagnated as education stagnated. Not by accident, nowadays underdeveloped areas in the world are the areas where the educational system is the least developed. The desideratum of "towards a world of peace, prosperity and understanding among peoples" can only be achieved through school and education, because it has always been the school that preserved the scientific and humanistic spirit, the spirit that made man apt to discover self. The diminishing of this spirit can only be stopped by school and education.

We live today in a world of change, of interpersonal and intercultural communication, in a world of consumption and creation threatened by social and natural dangers and cataclysms on a planetary scale, yet confident in the possibilities of the human being to act, take an attitude, find solutions to these problems of the

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contemporary world. Effective solutions can be provided through education, because the school has a social vocation contributing to the welfare of the human community.

The degree and manner in which students use school resources and the availability of qualified teachers can have a strong impact. According to school managers, the morale and dedication of teachers as well as school autonomy are equally important. It can be seen that the world is progressing as education progresses. The more the school foundation is developed, the better the prosperity of a nation.

Effective education policies need to be developed and implemented. Policy in the field of education and training is primarily aimed to ensure a high level of education and training for all citizens. Thus, each school manager needs to understand the organization, how it works, from an integrative perspective. He needs to know his team and departaments, to acquire strategic skills, which will help him see the organization as a whole. This will facilitates the educational process and engages the group in achieving organizational goals. He is like a conductor, whose function is to create coordinated evolution and an appropriate pace by integrating the efforts of the members of the orchestra.

II. Perspectives and trends in the field of organizational development

The current context of decentralization through the redistribution of responsibilities, decision-making authority, public responsibility and resources from the central level to the local level, the creation of an organized, administrative and funded education system, according to the European regulations regarding the quality assurance of the instructive- educational process and free, equal and complete access of all children and young people to the educational system, the adequacy of the educational offer to the interests and needs of the direct and indirect beneficiaries, requires a new management approach in the educational institutions and organizations which offers educational services, so a new type of manager.

The dynamics of contemporary society require the development of leadership at the level of managers, because the leader is the one who can gather people around a goal, give them hope for what they are doing together, and then, with their support, turn it into reality. The managerial act becomes effective when management intermingles with leadership, building an organizational atmosphere which encourages exceptional efforts, high engagements, intellectual stimulation and risks acceptance.

Some specialists in the field believe that manager and leader are synonymous terms and use them alternately, but leadership and management are, in fact, distinct dimensions of persons from management. Leadership is the ability to make people act, but the manager, in turn, is the person who ensures the achievement of organizational goals through planning, organization and orientation of the work to the finality[1].

[1] Cristian Bențe*, Leadership in Public Organizations*, Public Administration and Social Policy Magazine, Year 1, no.4, 2010, pp. 49-50.

The process of change and the progress of the school organization can be attributed to two closely correlated plans: the development of the school institution – involving structural and managerial adaptations and changes – and the development of staff – involving teacher training and development processes.

Recruiting new staff has the advantage of bringing new ideas together, but it also presents disadvantages due to the integration difficulties and possible hostility that new members may face in an organization.

III. Public policies proposed for implementation in Romania, regarding educational management

By public policy, in general terms, we understand the idea of central or local public authority to solve a problem that society is facing. We do not find a field in which it not operates a public policy, otherwise we will utopically accept that there are sectors of activity in which all works perfectly, ideally and does not require innovation, improvement, change.

Evidently, the educational field has been marked throughout the time by public policies that have tried to solve educational problems.

After the adoption of the National Education Law no. 1/2011, new approaches to education were sought, in order to achieve the objectives proposed in the law, and was elaborated within a project of the central authority, the public policy entitled "Politics in the pre-university educational management"[2].

The construction of this policy had as a starting point the finding that "in our education there is still a crisis of managerial skills, even if, in the last period of time, we can identify a suite of positive developments regarding the application of modern management theories and strategies in the educational system and institutions ", which is due to the lack of willingness (lack of knowledge / skills in the strategic management and educational leadership) of the manager, but also cultural causes related to its formation (mentality, attitude and counterproductive behavior).

This public policy supports the concept of professionalisation of managerial careers, whereby the school manager becomes an educational leader, and it is necessary to redefine the management of the education system on all levels of decentralized structures (at school, local, county and national level).

Another public policy proposal that draws attention by the content of the proposal but also by the authors' expertise is referring to "Creating a National Network of Experimental, Pilot and Application Schools"[3], aiming to set up experimental centers, pilot and application centers at the national level, selected from the rural or urban area, with high or low results in evaluations, public or private, with an ethnically different school population, operating under the law of education, by applying art. 26.

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[2] Through OMECTS no. 3545/2012 on the adoption of the policy in the pre-university educational management elaborated within the project " Professionals in Educational Management".

[3] Public Policy Proposal developed within the framework of the "*Critical mass for quality education through public policies based on research*" through the Learn & Vision Association and the Center for the Study of Democracy Association, starting in 2015; see http://www.caliedu.ro/?p=612.

The purpose of setting up these pilot units is to undergo a process of change through a gradual expansion, the change being initiated in a narrow framework, followed by the generalization stage, in order to finally resort to the reform of the education system by accumulating good practice[4].

The idea of a pilot center is known to public policies theory as one of the recommended methods before any alternative/solution of public policy is implemented in a generalized manner at regional or national level. Given the effectiveness of these methods, we also support this approach, even if there will be opposition from professionals in the system, who are in practice subject to many repeated changes, sometimes radical and refuse any new ideas that may in fact be very good and progressive .

This is precisely why we appreciate the value of this mechanism. We are not leaving the premise that any proposal is ineffective, not beneficial. Undoubtedly, the changes can be very good, but rather than repeatedly applying national changes that can create instability into the educational system, it is recommended that they will be initially limited, followed by their gradually extension.

Moreover, we appreciate that great care must be taken in making a decision, because there are some questions to be raised: *Who will be selected for application* ?, *Why me* ?, *What are the risks* ?, *Will my school be affected* ?, and managers will be reluctant to join the pilot center.

Obviously, such an alternative needs to be assessed against a number of criteria such as: stability (ie public policy objectives will be sustainable regardless of the malfunctions that will occur during implementation), certainty (the possibility that the policy will operate under all conditions), flexibility (how the policy can be adjusted over time), communicability (how the solution is passed on to others), reversibility (the possibility of returning to the previous situation) that would eliminate the risks because a public policy is not an experiment but must be a solution to solve a problem.

Another public policy[5] initiative concerns university education by "Creating a national mechanism for assessing the quality of teaching at universities by students", which analyzes the way universities are funded, considering that a review of how to grant funding , which should gradually differentiate universities, and the allocation for excellence to be much higher. All this is proposed to consider an assessment of the quality of teaching through various methods[6], which have the purpose of monitoring by the Ministry of Education.

[4] See also Serban Iosifescu, *Elements of Strategic Management and Design*, Publishing House Corint , Bucureşti, 2000, pp. 85-101.

[5] Within the framework of the project – Critical Mass for Quality Education through Public Policy Based on Research (CALIEDU) Project funded by EEA Grants 2009-2014 within the NGO Fund in Romania; file:///C:/Users/Daniela/Downloads/Propunere_politica_publica.pdf.

[6] *Idem*; being highlighted: student assessment at the end of the courses; assessment of student learning, graduate assessment, employer assessment, peer review evaluation and self-evaluation.

IV. Plan of organizational change

Proposed change: ***Recruitment and selection of teaching staff through a selection interview***

Objectives	**Activities**	**Rules governing motivation and competence management**	**Rules for time and stress management**	**Possible results**	**Expected results**
Redefining the need for teaching staff, in terms of the requirements of organizational change	-setting the steps to follow – comparison of teaching staff needs with existing resources – identifying the staff shortage materialized in vacancies – presentation of the project within the Teachers' Council / Board of Directors – making the recruitment decision as a result of the analysis of the necessity and opportunity of filling vacant positions	-awareness of the need for change – clear exposure to the intended purpose – making a list of reasons	-clearly defining the purpose of the diagnosis – compilation of a working list specifying the deadlines	-initial diagnosis clarifies the problem and suggests the type of change – all the teachers are receptive to the new, open to innovation, change, development	-elaboration of a correct framing project – to individual tolerance to change – the formation of team spirit
Ensure fairness and transparency of the recruitment process	- establishing criteria for selecting staff to meet the level of proficiency required by the post and organizational changes – elaboration of the recruitment announcement – Popularize your ad by viewing or using a local newspaper	-teacher orientation in the desired direction – to understand the reasons improve the recruitment and selection process	-clarifying the priorities and objectives of the recruitment process – determining specific data	-human resources – the organization's most important investment – non-discriminatory and specific criteria	- the beginning of the modern administration of the teaching staff

Ensuring the legality of candidates' evaluation, equal chances for them, a successful selection	-constitution of the Examination Board – receiving and evaluating candidates' files – analyzing the compatibility of candidates with vacancies	-establishing responsibilities respecting the principle of competence – providing equal opportunities to each candidate	-establish responsibilities with clarity – allocate sufficient time to evaluate candidates' files	-teachers are the organization's active resources	- the beginning of the modern administratio n of the teaching staff
The foundation of the partnership decision by supporting an interview / special classroom inspection	-the establishment of the selection procedure for the teaching staff, by interview, by the board of directors, according to the principle of deci-sional autonomy; – elaboration of the interview guide – designing a person to interview, showing discretion and discernment – convocation of candidates for interview; – conduct the interview; – systematisation of the key points of each interview	-valuing people involved in the recruitment and selection of teaching staff – ability to implement the interview as a way of selecting the teaching staff	-avoiding overcrowding by correlating the time allocated to performing the tasks with the complexity of the selection process – schedule the weekly and daily interview – division of tasks	computerized / structured interview – tool used no matter of the hierarchical level of the position for which it is organized – providing a centralized picture of all interviewed candidates	-structure easily used to outline a clear idea about the candidate
Negotiating job conditions to increase the efficiency and effectiveness of the organization	-offering synthetic information that underpinned the appreciation of the chosen candidate – the signing of the individual labor contract, marking the agreement between the two parties and concretizing the selection	effective, open communicatio n	strictly following the deadlines	- the employment decision is justified but also the reservations are expressed (if any) by the persons participating in the recruitment and selection process – the employee and organization's interests are converging	-the signing of the individual labor contract – salarization according to occupied position – establishing additional responsibilities / tasks, depending on proven skills, how it will respond to professional and social challenges

V. Conclusions:

The managerial act has become a complex and specialized activity requiring a series of personal qualities that make the manager a leading specialist in his field. Each manager must develop and promote a policy based on a communication system that allows him to permanently adjust the structure and organizational process to changing conditions.

Also, through its role as a negotiator, promoter of organizational policy and its transmitter, the manager has to form and maintain a team of people who think, feel, act in harmony, instilling their desire to fulfill organizational goals, and to the newly recruited motivation to join the group and to act in accordance with the moral and professional obligation, which means to force people to adjust their thinking, priorities, the way they see reality and exploit opportunities.

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INSUFFICIENCY OF LEGAL REGULATIONS IN RESOLUTION OF SOME CRISIS SITUATIONS IN THE PUBLIC ADMINISTRATION

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Abstract*: The analysis of the administrative phenomenon highlighted the insufficient legal regulations in relation to the crisis situations, leading to unequal and ambiguous practices in the implementation of the law. Thus, the cessation of the mandate of a county council president, before the deadline, highlights precisely these legislative gaps, the incoherence and inadequacy of the legal regulations. The incoherence is the result of the lack of similarities between approaching crisis situations at local level and approaching crisis situations at county level. The insufficiency of certain regulations cannot offer the correct answer in order to solve certain crisis situations. On the other hand, the coexistence of obsolete regulations over new situations leads to major problems in law enforcement. We refer specifically to the discontinuity in the election of a president of a county council, both separated from the rest of the council, and within the council, so that the current regulations do not take into consideration the current situations, which need to be regulated. The study highlights such anomalies, grouped into four types of crisis situations, which do not find proper regulation under the existing and incidental laws, in different fields.*

Keywords: *Termination of the mandate of the president of the county council, papers issued during the vacancy of the position, convocation of the county council, presiding of the county council*

Administrative practice highlights, in some situations, a series of legislative shortcomings which are very difficult to solve in administrative practice when certain crisis situations occur.

This finding has recently started from the loss of political party membership even by the president of a county council. It is known that the president of the county council is elected from among its members, that is, from the county councilors, according to art. 101 (1) of the Law no. 215/2001, during the term of this deliberative forum.

Loss of party membership, according to art. 9 (2) let. h ^ 1 of the Law no. 393 / 2004 leads, as a matter of law, to the loss of the status of county councilor, and this loss leads to the end of mandate for the president of the county council according to art.18 (3) of the Law no. 393/2004.

This crisis situation is legally represented by a series of approaches so that by legal and logical measures the crisis can be overcome and reopened as soon as possible in a normal situation.

1) A first aspect is *the appreciation of the moment when the mandate of the president of the county council was terminated.*

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The law envisages two essential moments:

1.1. The quality of county councilor (respectively chairman of the county council according to art.18 (3) of the Law no.393 / 2004) shall terminate by law, before expiration of the mandate according to the situations expressly provided by art. 9 (2) let. a) – h ^ 1) of the Law no. 393/2004.

This moment T0 is precise, express, explicit, unequivocal, and in our opinion is the definite date at which the mandate of the president of the county council [in our case] ends before the deadline.

1.2. Taking into account the amendments to the Law no.393 / 2004 brought by Law no. 115/2015 at article 139, item 3: "In the case provided by art. 9 par. (2) lit. h ^ 1) within 30 days from the date of notification of the political party or of the organization of the citizens belonging to the national minorities on whose list the local councilor or the county councilor was elected, the prefect shall declare by order the termination of the local or county councilor's mandate on the expiry of its normal duration and declare vacant the place of local or county councilor", we deduce from this text that within 30 days the prefect by order finds termination of the mandate of county councilor, implicitly of the president of the county council.

Concluding, the legislator introduces a second T1 moment when this cessation is established. What is the moment of cessation in this context? T0 or T1? What happens to the representation of public authority and acts signed in this interval? In order to answer these questions, it is necessary to make another legal analysis, namely the delegation of tasks.

2) *The delegation of attributions involves the temporary assignment* by a person exercising a position of management of a task that is legally assigned to him, to another subordinate person with a lower-level or executing position, specifying competence and responsibility responsible.

2.1. The delegation of the coordination of some departments from the specialized apparatus can be made by the order of the president of the county council, vice-presidents or other persons according to art.103 (1) of the Law no.215 / 2001. It is the exception of leadership by the president of the county council, which is according to known management rules and represents, in our opinion, the rule in the field of delegation.

2.2. In case of suspension of the president, his duties will be exercised by one of the vice-presidents appointed by the county council by the secret vote of the majority of county councilors in office, according to art.107 (1) of the Law no.215 / 2001. It is a crisis situation that has a legal solution to solve but does not answer a question: who summoned the county council meeting? The president convenes the authority in the ordinary meeting according to art. 94 (1) of the Law no. 215/2001. In the stipulated situation of its suspension, it results that the public authority can be convened only in the extraordinary meeting by one third of the councilors in office (art.94 (2) of the Law no. 215/2001). Another legal solution is not seen in this hypothesis.

2.3. In the other cases of the President's absence (sick leave, leave, travelling abroad, etc.), his duties will be exercised, on his behalf, by one of the vice-presidents, appointed by the president by a provision (art.107 (2) of the Law no.215 / 2001. It is a common situation in practice that solves both the component of the delegation of tasks and the component of the convening of the ordinary council meeting.

2.4. What happens in case of lawful cessation, before the term of office of the president of the county council? In this case the law [art. 108 (2) of Law no. 215/2001] refers to art. 69-71 of the same law. These articles stipulate how to solve the legal termination of the mayoral mandate, and art. 72 also solves what happens during the vacancy of the position of mayor, more precisely his attributions are exercised by law as deputy mayor or, as the case may be, by one of the deputy mayors, appointed by the local council with the secret vote of the majority of councilors in office.

As it can be seen, if at the level of the local councils, the legislator provided for the solution of a crisis due to the vacancy of the mayor's office, at county councilor level this situation is not solved because art.72 of the Law no. 215/2001 does not apply in case of the vacancy of the position of president of the county council!

What are the consequences of the lack of such regulation?

a) Legal texts cannot be applied by logical assimilation because in the public administration the regulations regarding the organization and functioning of these authorities are of public order, imperative, express and limitative stipulated by law, not exemplifying!

b) The public authority is in a genuine crisis caused by this vacancy of the president. More specifically, a deputy chairman in the hypothesis previously discussed in point 2.2, that of delegation by order in the absence of the president, can't be extended to the vacancy of the post of chairman.

The consequence is that the delegation report always involves two parts, one part is the delegate, the other is the delegate, the disappearance of a part of the legal relationship is no longer right, it is as in mathematics, any number multiplied by zero is zero!

c) Who is the authority between the cessation of the President's term of office and the finding of termination by order of the prefect? What happens to the acts signed by the deputy chairman of the county council appointed to represent the president in case of his absence?

Does the absence of the chairman of the deliberative authority override his job? Our opinion is that such a hypothesis is not correct, there is a case of the absence of the president and another one in which he is nonexistent! In administrative practice, solving such a situation can work if we are forced to ignore the moment T0 and consider only the T1 moment!

If it is good or bad, only the court of law can give an answer until a correction of this legislative gap takes place! The only "argument" of resolving, in a way, this legal anomaly is administrative formalism, which involves action or inaction on the basis of predetermined acts or procedures. In this context, the county administration "does not know officially" that the mandate of the president of the county council has ceased, by law, ahead of schedule by losing the membership of the political party whose list was elected, but "learns" at the moment when he receives the order of the prefect to find this legal termination before the term of the mandate of county councilor, implicitly of the president of the county council.

This situation "saves", we consider, the acts issued and signed by the deputy chairman of the county council who is in possession of a provision given in the case of ... the "absence" of the president of the county council, but does not solve the dilemma of convening the county council in the ordinary meeting, can be done, as I have just pointed out by the chairman of the county council, or exceptionally by his deputy chairman, who has a provision from the delegation president during his absence from the county council, not in case of job vacancy.

On the other hand, the deputy chairman of the county council, as representative of the dismissed president, may convene a council meeting where the election of another chairman of the council instead of the one dismissed appears on the agenda? The situation is absurd and illogical, not only unlawful in our opinion. The legal variant is only the convocation of the county council in the extraordinary meeting of one third of the councilors in office to include on the agenda and the election of a new president of the county council.

3) *The termination of the mandate of the president of the county council as a result of the legal termination of the county councilor's mandate and the other cases* provided by art. 9 (2) of the Law no.393 / 2004 raise other legal issues which are not made clear by law!

Thus, let us assume that a president in the exercise of his mandate is dying, and in this case we apply art.9 (2) i). In this situation, the finding of the termination of the mandate of county councilor, respectively of the president, is made by the county council in the first ordinary meeting of the county council at which time the position of county councilor is vacant, according to art.12 (1) of the Law no. 393/2004.

As it is clear from the provisions of art.94 (1) of the Law no. 215/2001, the convocation of the county council in ordinary session is made only by the president of the county council, the person deceased in our case.

As the deputy chairman of the county council does not have this right and is not in possession of any provision of delegation of attributions, which in any case only helps him in the absence of the president, not his inexistence, we are in an administrative blockade without a legal solution!

If the note of the convening of the ordinary meeting is forced by one of the vice-presidents and he will also lead the meeting, the question arises: on what act does the vice-chairman convene the ordinary meeting of the county council? It is known that the deputy chairman does not have the legal instrument of the provision nor is the "deputy chairman of the president" as in the case of the deputy mayor, who is taking the position of the mayor as a result of his job vacancy [see art. 72 of Law no. does not apply to the vice-president].

Let us anticipate the possibility of convening an extraordinary meeting of the county council by one third of the councilors in office who do not include on the agenda the finding of the legal termination, before the term of the county councilor's mandate and as a legal consequence of the mandate of the president of the county council, and they should only find the vacancy of the county councilor and they should propose only the election of a new president.

By forcing the situation, we can anticipate this scenario but formally, there is no legal decision to vacate the position, on the one hand, and in many cases the election of the new president hinges on the so-called "golden vote", that is, a single vote makes the difference and this vote is missing because the County Councilor has not been terminated by law and the vacancy has not been vacated to allow the alternate on the party list to fill the vacancy!

All these aspects are real and possible in the day-to-day activity of the county public administration and the law texts are non-existent or elliptical and as such do not give any answer to the actual situations on the ground.

4) The situation in which *the president of the county council resigns from the position of president of the county council but remains a county counselor* is another anomaly of our legislative system for the following reasons:

Law No. 58/2009 also amends certain provisions of the Law no. 393/2004, among which art.15, in the sense that the regulations applicable to mayors are also relevant in the case of the county council presidents, ie they may resign from the position of president of the county councils according to art. 15 (2) a) of the Law no.393 / 2004.

If so far the texts are logical and coherent, Article 16 expressly speaks only of the termination of the mayor's term before the term, which is found by the prefect.

In a real situation, the prefect did not issue an order to declare the cessation of the mandate of president of the county council on the grounds that he did not have an express law text, and then the county council made use of an artifice stipulated by art.17 (1) of the Law no. 393/2004, in the sense that: "At the first meeting of the council, the chairperson of the meeting shall take note of this situation, which shall be recorded in the minutes", an article which is not fully implemented, meaning that the prefect has not issued an order stating the fact. If the prefect had issued a finding order, then the procedure had to go to the end as provided in Article 17 (2) et seq. Of Law no.393 / 2004, namely that the order and the minutes of the hearing be communicated to M.A.I. who then had to propose to the Government that the date of the election ... of the new president be set.

This article was valid under the old rules when the president of the county council was chosen distinctly from the rest of the county councilors, but in the current context these laws are not only obsolete but unclear about the concrete situation of which I was speaking before.

5) The situation in which *the president of the county council is elected by uninominal vote, distinct from the rest of the county councilors*.

Such a situation has been encountered during the second mandates, namely 2008-2012 and 2012-2016 and it seems that we will see it again in the future.

Questionable it is in our opinion the distinct choice of the president of the judiciary council from the rest of the county councilors in the context in which the Constitution recognizes only one county deliberative authority, that of the county council lacking in the Constitution "county executive authority" similar to that of the mayor.

Beyond the above-mentioned constitutional aspects to which may be added a few concerning the way of the birth of a public authority and its dissolution in the context in which that authority consists of the summation of two authorities and in case of dissolution a part of the authority disappears and one part remains, which violates any elemental logic of constitution or cessation of a public authority, it remains to analyze in this study what happens with ensuring the permanent leadership of the county council if the presidents resign, are sentenced or die.

Until the organization of the partial elections for this vacant place, who insures permanence? If in the situation of suspension or "absence" of the chairman of the permanent county council is ensured by one of its vice-presidents, the other is the situation in the case of vacancy by one of the above mentioned situations and until the organization of partial elections to have a new president will pass considerably [several months]. Is a vice president able to lead the destiny of this public authority? By what administrative acts?

If the provisions of art. 72 of the Law no. 215/2001 had an incidence also on the county council then, similarly a vice-president was the deputy chairman of the county council president, as in such situations the deputy mayor is the mayor's rightful deputy in the vacancy of the mayor's post. In the case of the vacancy of the post of mayor, the deputy may take this interim through the secret vote of the local council, so it will be based on the performance of these duties limited by time by the decision of the local council.

As Art. 72 is not incident in the county council, this similar variant can't be used, which blocks the activity of the county council. There is no one to hold the interim chief credit officer, there is no one who issues provisions, no one has convened in the ordinary meeting the county council. The fascination of the uninominal vote of the president of the county council has, as we see, multiple legal consequences that, unfortunately, do not raise any problem with the political decision makers who make the laws.

Even if this gives legitimacy and detachment to this public function, it collides directly with the fundamental law and the practical consequences of this situation are unimaginable in practice. If, to the above-mentioned practical and legal consequences, we also add the vacancy, for different reasons, the plenum of the council will never be able to notice that the dismissal of the county councilor's mandate and the vacancy of his post will be delayed, because this finding can be made only in the early session of the county council and the calling of this public authority in the ordinary meeting can only be done by to the president of the county council which, for various reasons, is no longer in office and his job is vacant.

Neither the preventive delegation of its attributions to a vice-president is possible because the delegation report is between two parts, namely a delegate and a delegate, and if one side no longer exists, the other party no longer has any reason to exist. legislating the election of the president of the county council to be unlikely to resist in time and the Constitutional Court to exercise its purpose for which it was created.

Such a situation is impossible to solve by the above-mentioned manner in a rule of law, but the reality is different and the authority must continue to operate so that the subsequent control of the legality which the prefect had to carry out in this case was inexistent because it concerned the involvement of the prefect himself in a case ... impossible to solve with the existing laws.

In conclusion, it is urgently necessary to amend the Law no. 215/2001 and Law no. 393/2004 and to adapt to the real situations on the ground in order to give correct, procedural and legal answers to such aspects, which we signaled in the practice of the county public authorities.

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ROLE OF JURISPRUDENCE ON THE APPLICATION OF THE CONSTITUTIONAL PRINCIPLE OF EQUALITY OF RIGHTS IN THE DEVELOPMENT OF THE NEW ROMANIAN LAW

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Abstract*: This study has the following title: Role of jurisprudence on the application of the constitutional principle of equality of rights in the development of the new Romanian law.*

Using a Key Scheme, the following parts of the study are analyzed successively: 1. Preamble. 2. Identification of constitutional regulations regarding the constitutional principle of equal rights in the Romanian constitutional system – selective aspects. 3. Romanian Doctrinal References on the Constitutional Principle of Equality of Rights. 4. Judicial references regarding the application of the constitutional principle of equality of rights in the decisions of the Constitutional Court of Romania. 5. Conclusions.

Keywords: *equality of rights, Romanian constitutions, doctrinal references, Constitutional Court decisions.*

1. Preamble

The object of study of the scientific approach will be circumscribed to the scientific analysis of its four great parts, i.e.: 1. Identification of the constitutional regulations related to the constitutional principle of the equality of rights in the Romanian constitutional system – selective aspects. 2. Romanian doctrinal highlights on the constitutional principle of the equality of rights. 3. Jurisprudential highlights on the application of the constitutional principle of the equality of rights, in the decisions of the Constitutional Court of Romania. 4. Conclusions.

What seems to us to be relevant for this study, is the addressing the regulations on the constitutional principle of the equality of rights in the constitutional system starting with the first document of constitutional value, i.e. *Developer Statute of the Paris Convention of 7/9 August 1858* until today, the *Constitution of Romania of 2003, the republished form of the Constitution of Romania of 1991,* respectively.

Considering the approach of this generous topic of study of over 145 years of constitutional evolution of the regulations on the *application of ther constitutional principle of the equality of rights* in Romania we should point out, since the very beginning, *the need for a diachronic approach to this subject* by the identification of all the Romanian Constitutions which regulated the constitutional system at that time.

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Moreover, we must say that during that period, Romania experienced several forms of government, i.e., monarchy, peopleţs republic, socialist republic and semi-presidential republic.

For a full but not exhaustive coverage of the area of study, we selected doctrinal and jurisprudential highlights on the *application of the constitutional principle of the equality of rights.*

On the other hand, it is worth mentioning that the jurisprudence of the Constitutional Court of Romania contributed to the the constitutionalization of the principle of the equality of rights, since its emergence.

As shown by the bibliographic research done, *equality of rights* is new in point of phrasing, but, it is not new in point of existence. Starting from this axiom, and paraphrasing K. Mbaye[1] we may say that: „The history of the *equality of rights* is confused with people's history".

The proposed study opens thanks to this approach a complex and complete view, but not exhaustive in the current area regarding equality of rights.

In our opinion, the studied field is important for the constitutional doctrine, for the doctrine of parliamentary law, for the doctrine of comparative law, for the general theory of law, for the legislative activity of drafting normative acts, for legislative technique, as well as for the research in the field covered by the themes of this study.

Even if the regulation and theorizing the equality of rights goes back in time to the first constitutions of Romania, the theoretical interest for resuming it is determined by the fact that the existing specialized literature has not always paid sufficient attention to the three aspects, normative, theoretical and jurisprudential regarding the *equality of rights,* analyzed in this study.

2. Identification of constitutional regulations regarding the constitutional principle of equal rights in the Romanian constitutional system – selective aspects

2.1. Developer Statute of the Paris Convention of 7/9 August 1858 [2]

A special discussion is required in relation with the *Developer Statute of the Paris Convention of 7/9 August 1858*. In our opinion, the *Statute* may be considered a Constitution, considering the provisions of art. XVII setting forth the following: "All civil servants, without exception, upon their entry into service, *are obliged to swear submission to the Constitution the laws of the country and faith in the Lord"*.

The systematic analysis of the normative content of the Statute shows that it does not include any regulation on the *equality of rights*.

[1] Baye K. M., *Les droits de l'homme en Afrique*, Manuel UNESCO, A. Pedone, Paris, 2002, p. 651.
[2] Muraru I., Iancu G., *Constituţiile române, Texte, Note. Prezentare comparativă*, Actami Publishing House, Bucharest, 2000, pp. 7-27.

2.2. The Romanian Constitution adopted at 29 June 1866[3]

We have to say that the Fundamental Law of Belgium of 1831 was a source of inspiration for the constitutions of other states among which the Romanian Constitution adopted at 29 June 1866. The systematic analysis of the normative content of the Constitution shows that art.10 of Title II, entitled *On the rights of the Romanians*, establishes the following fundamental principle related to the *equality before the law*, under the following phrasing: " There is no distinction in class in the State. All Romanians are equal before the law and they are obliged to contribute without distinction to public dues and tasks ".

2.3. The Constitution of Romania of 29 March 1923[4]

In the debut part, it is necessary to specify that the Fundamental Law of Romania of 1866, remained effective for 57 years, while important economic and political transformations occurred. The systematic analysis of the normative content of the Constitution shows that in art. 8 alin. (2) of Title II, entitled *On the rights of the Romanians*, establishes the following fundamental principle: „All Romanians, regardless of ethnic origin, language or religion, are equal before the law and are obliged to contribute without distinction to public dues and tasks".

2.4. The Constitution of Romania of 28 February 1938[5]

In the introductory part it is necessary to specify that the Fundamental Law of Romania of 1923 remained effective for 15 years.

Under the historical conditions of the year 1938, the new Constitution Draft was subjected to plebiscite at 24 February 1938. The Constitution is promulgated and was published by the Official Journal, Part I, no. 48 of 27 March 1938.

The systematic analysis of the normative content of the Constitution shows that in art. 5 par. (1) Chapter I of Title II, entitled *On the debts of the Romanians* establishes the following fundamental principle on the *equality before the law*, under the following phrasing: „*All Romanian citizens, regardless of their ethnic origin and religious faith, are equal before the law, owing respect and obedience".*

2.5. The Constitution of 13 April 1948[6]

The systematic analysis of the normative content of the Constitution shows that in art. 16 Title III, entitled *The fundamental rights and duties of citizens*, establishes the following fundamental principle regarding *equality before the law*, under the following

[3] *Ibidem,* pp. 29-60.
[4] *Ibidem,* pp. 61-92.
[5] *Ibidem*, op. cit. 93-119.
[6] *Ibidem*, op. cit. 123-139.

phrasing: „*All the citizens of the Peopleţs Republic of Romania, regardless of sex, religion or culture are equal before the law ".*

2.6. The Constitution of 24 September 1952[7]

The systematic analysis of the normative content of the Constitution shows that in art. 81 of Chapter VII entitled *The fundamental rights and duties of citizens,* establishes *the principle of full equality of rights*, under the following phrasing: „Workers, citizens of the Romanian People's Republic, *regardless of their nationality or race, are guaranteed full equality of rights* in all areas of economic, political and cultural life".

2.7. The Constitution of 21 August 1965, as republished[8]

The systematic analysis of the normative content of the Constitution shows that in art. 17 par. (1) of Title II entitled *The fundamental rights and duties of citizens,* establishes *the principle of equality of rights*, under the following phrasing: „The citizens of the People's Republic of Romania, regardless of nationality, race, sex or religon, *are equal in rights*, in all areas of economic, political and cultural life ".

2.8. The Constitution of Romania of 8 December 1991[9]

The systematic analysis of the normative content of the Constitution shows that in art. 16 entitled *Equality of rights,* establishes the following principles applicable to this concept:

1. The citizens are equal before the law and public authorities, without privileges or discriminations.
2. Nobody is above the law.
3. Public, civil and military offices and positions may be occupied by persons who have only Romanian citizenship and reside in the country.

2.9. The Constitution of Romania 2003, the republished form of the Constitution of Romania of 1991.[10]

The systematic analysis of the normative content of the Constitution shows that in art. 16 entitled *Equality of rights,* establishes the following principles applicable to this concept:

1. The citizens are equal before the law and public authorities, wuthout privileges or discriminations.
2. Nobody is above the law.

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[7] *Ibidem*, op. cit. 143-166.
[8] Republication under art. 11 of Law 19 of 23 October 1986, published in the Official Journal of the People's Republic of Romania, Part I, nr. 64 of 27 October 1986.
[9] The text of the Constitution of Romania was published in the Official Journal of Romania, Part I, no. 233 of 21 November 1991.
[10] The text of the Romanian Constitution was published in the Official Journal of Romania, Part I, no. 767 of 31 October 2003.

3. Public, civil and military offices and positions may be occupied by persons who have only Romanian citizenship and reside in the country. The Romanian state guarantees the equality of chances between women and men to occupy these offices and positions.

4. With the accession of Romania to the European Union, the citizens of the Union who comply with the requirements of the organic law are entitled to elect and be elected in the authorities of local public administration.

3. Romanian doctrinal references on the constitutional principle of equality of rights.

3.1. We will select from the Romanian docgrine the opinions of some reputed authors with recognized prestige, who studied the equality of rights.

3.1.1. A first opinion[11] mentioned by this study analyzes *Equality of rights as that constitutional category which guarantees the Romanian citizens the use and exercise in terms of equality of all the fundamental rights, liberties and duties set forth by the Constitution and by other laws, in the economic, social, cultural or any other field, without privileges or discriminations, being treated equally in front of the law, of the public authorities and gy the other citizens.*

3.1.2. A second opinion[12] mentioned by this study analyzes *Equality of rights, as a general principle of law encountered in all branches of law. It is also set forth by the Charter of Fundamental Rights of the European Union in art. 20. This principle is expressed both legally and doctrinatively and jurisprudentially. Over time, equality has defined as a principle of law, as a fundamental right and a legal category. It is thus that the evolutionary scale has moved from inequality to equality and then even to positive discrimination as a means of protecting certain disadvantaged categories. Equality is a complex constitutional principle which defines itself both by reference to difference and by reference to discrimination. Equality does not mean uniformity because people themselves are not equal in nature.*

4. Judicial references regarding the application of the constitutional principle of equality of rights in the decisions of the Constitutional Court of Romania.

4.1. Decision nr. 611 of 3 October 2017 on requests for settlement of legal conflicts of a constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry — The Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, requests made by the presidents of the Senate

[11] Nicolae Pavel, *Egalitatea în drepturi a cetățenilor şi nediscriminarea,* Universul Juridic Publishing House, Bucharest, 2010, pp. 65-66.

[12] Ştefan Deaconu, *Drept constituțional*, 3rd edition, C. H. Beck Publishing House, Bucharest, 2017, pp. 176-177.

and the Chamber of Deputies (published in the Official Journal nr. 877 of 07 November 2017).

1. It is pending the examination of the requests for settlement of legal conflicts of a constitutional nature between the Romanian Parliament, on the one hand, and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice on the other hand, requests formulated by the Senate and the Chamber of Deputies. The notifications are based on the provisions of art. 146 (e) of the Constitution and art. 11 par. (1) point A (e), of art. 34, 35 and 36 of Law no. 47/1992 on the organization and functioning of the Constitutional Court, were registered at the Constitutional Court under no. 9,686 and no. 9.687 of 13 September 2017 and makes the object of File no. 2.428E / 2017, and of File no. 2.429 / 2017.

2. By Application no. I 2.480 of 13 September 2017, the President of the Senate requested the Constitutional Court to rule on the existence of a legal constitutional conflict between the Romanian Parliament, on the one hand, and the Public Ministry, a component of the judicial authority, on the other hand.

3. The Court examining the requests for settlement of legal conflicts of a constitutional nature between the Romanian Parliament on the one hand and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice on the other hand, requests made by the Presidents of the Senate and the Chamber of Deputies, of the Chamber of Deputies, the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice – the National Anticorruption Directorate, the documents filed, the report drawn up by the Judge-Rapporteur, the claims of the representatives of the present parties, the provisions of the Constitution and of Law no. 47/1992 on the organization and functioning of the Constitutional Court, notes the following:

The Court

1. Finds that there is a constitutional legal conflict between the Romanian Parliament on the one hand and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice on the other hand, generated by the refusal of the chief prosecutor of the National Anticorruption Directorate to present to the Special Investigation Commission of the Senate and the Chamber of Deputies for the verification of issues related to the organization of the 2009 elections and the result of the presidential election.

Final and binding.

5. Conclusions

Considering the outlined in the above study we take note of the following ideas that we mention below:

1. The objective of the study on the *Role of jurisprudence on the application of the constitutional principle of equality of rights in the development of the new Romanian law* has been attained.

2. In our opinion, the studied field is important for the constitutional doctrine in the matter, for the doctrine of human rights and for the doctrine of the history of the state and the Romanian law.

3. There have been successively identified the constitutional regulations regarding the evolution of the regulations regarding the judicial power in the Romanian constitutions and in Romanian law 100 years after the great union.

4. We also note that the above study opens a complex and complete view, but not exhaustive, in the analyzed field.

5. The proposed key scheme, given the selective approach to the evolution of regulations on the constitutional principle of equal rights in the Romanian constitutions and in Romanian law 100 years after the great union, can be multiplied and extended to other studies in the field.

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CRITICAL REFLECTIONS ON THE APPLICATION OF SOME CONSTITUTIONAL AND EUROPEAN UNION'S RULES IN THE GOVERNMENT EMERGENCY ORDER NO. 52/2017 ON THE REFUND OF THE SPECIAL TAX FOR CARS AND MOTOR VEHICLES, THE POLLUTION TAX FOR MOTOR VEHICLES, THE TAX ON POLLUTING EMISSIONS FROM MOTOR VEHICLES AND THE ENVIRONMENTAL STAMP DUTY IN RESPECT OF MOTOR VEHICLES

Victor PENTELEEV[*]

Abstract: *Considering the case-law of the Romanian Constitutional Court and the Court of Justice of the European Union, in this study we analyze the Government Emergency Order no. 52/2017, regarding the mechanism of restitution of taxes to the creditors mentioned by Art. 3 para. (1) who applied for a refund before 1 September 2018*[1]*. The article is interesting to the society, given that the Romanian state is required to repay taxes levied in breach of European Union law and, according to the explanatory memorandum of Law no. 258/2018 for the approval of the Order, there are over 180000 national applications for refund and judgments, not paid or partially paid.*

Keywords: *restitution of taxes, unconstitutionality, EU law.*

I. General aspects

The Romanian Constitution, being a fundamental law, sets mandatory rules and principles for all subjects of law. As a result, any normative act must comply with constitutional provisions, according to the hierarchy of norms. In addition, it is necessary to carry out Romania's obligations resulting from binding EU legislative acts and the European Convention on Human Rights.

II. Regarding Article 21 para. (1), (3), Article 44 para. (1), Article 53 para. (1) of the Romanian Constitution

In the Decision no. 895 of 17.12.2015, the Constitutional Court underlined that execution of a judgment given by any court must be regarded as an integral part of the "trial" for the purposes of Article 6 of the European Convention on Human Rights.

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* Judge – Bucharest District 3 First Instance Court.

[1] The moment at which repayments established by court decisions should have been made, according to art. 3 par. (1^1) lit. b) of the Government Emergency Ordinance no. 52/2017, which is after the date provided by art. 3 par. (1^1) lit. a).

The Constitutional Court mentioned, in the Decision no. 458 of 31.03.2009, that respect of the fair trial guarantees is mandatory both in the judicial phase and in the execution of court judgments. Furthermore, the judgments of the European Court of Human Rights impose positive obligation on the State, in order to find the most appropriate means to ensure the execution of final and binding judgments which, in a state which respects the rule of the law, can not remain without effect. So, keeping in mind that execution of a judgment given by any court may not be prevented, invalidated or unduly delayed (*Immobiliare Saffi v. Italy*, 1999, *Burdov v. Russia*, 2002, *Sabin Popescu v. Romania*, 2004), the European Court of Human Rights considered that "each Contracting State must equip itself with an adequate and sufficient legal arsenal to ensure compliance with the positive obligations imposed on it" (*Ruianu v. Romania*, 2003).

We praise that in the preamble of the Emergency Order no. 52/2017 the Government acknowledged the obligation of the Romanian state to fully and immediately repay charges levied contrary to EU law. Unfortunately the legal mechanism for restitution was not and is not respected by the National Agency for Fiscal Administration and the Environmental Fund Administration.

Until the entry into force of the Emergency Order no. 68/2017, which introduced Art. 3 para. (1^1) of the Emergency Order no. 52/2017, there was no date from which payment of amounts under judicial decisions should start. Nevertheless, the Romanian authorities failed to fulfill their obligations, according to Art. 3 para. (1) of the Emergency Order no. 52/2017.

We also note that Order no. 1488/3198/2017 for the approval of the Methodological Norms for the application of the Emergency Order no. 52/2017 was issued on 12 December 2017, in violation of the Art. 8 term of the Emergency Order. Therefore the non-existence of the methodological norms prolonged the duration of non-implementation of court judgments.

After 9 October 2017[2], although Art. 3 para. (1^1) of the Emergency Order no. 52/2017 established a 120-day refund period from the date of filing the application (but not earlier than 1 September 2018 in the case of the environmental stamp duty and not earlier than 1 January 2018 in the case of the special tax for cars and motor vehicles, the pollution tax for motor vehicles and the tax on polluting emissions from motor vehicles), the Romanian authorities have not met the legal deadlines. Thus there are still many applications for refunds and judgments, not paid.

The European Court of Human Rights noted that it is not open to State authorities to cite lack of funds or other resources as an excuse for not honouring a judgment debt. Thus, while some delay in the execution of a judgment may be justified in particular circumstances, the delay may not be such as to impair the essence of the right protected under Article 6 § 1 (*Dumitru Daniel Dumitru and others v. Romania*, 2008).

In the preamble of the Emergency Order no. 52/2017 the Government did not mention complexity of the procedure or impossibility of restitution as a result of the creditors' behavior. In fact, the payments into bank accounts do not involve major difficulties.

[2] The moment of entry into force of the Emergency Order no. 68/2017.

We notice that the Romanian authorities have benefited from a rather long grace period, according to Art. 3 para. (1^1) of the Emergency Order no. 52/2017. Therefore they are currently to be blamed for the non-payments. No valid justification was given in favor of the non-performance of obligations.

It should also be taken into consideration that creditors can't force debtors to repay taxes levied in breach of European Union law because all enforcement proceedings (no matter when they started) are suspended, according to Art. 7 of the Emergency Order.

Moreover, although in the preamble of the same Government act it was mentioned that urgent measures would be regulated to unblock the situation at that time, Art. 63 of the Emergency Ordinance no. 114/2018 modified Art. 1 para. $(6)^3$ of the Emergency Ordinance no. 52/2017, extending the suspension of all enforcement proceedings until 30 June 2019. Thus, execution of judgments has been unduly delayed for almost 2 years (7 August 2017[4] – 30 June 2019[5]).

It is hard to understand why the execution suspension, regarding final judicial decisions, was not introduced until the payment deadline was met, according to Art. 3 para. (1^1) of the above-mentioned Order. Perhaps the Government took into consideration prolonged non-implementation of the judgments, without basis, wanting to prevent execution.

The suspension of all enforcement proceedings, according to Art. 7 of the Emergency Order no. 52/2017, together with the non-performance of obligations by the Romanian authorities in spite of the ending of the legal grace period, shows that judgments referred to in Art. 3 par. (1) of the Order reflect illusory rights. Thus, there is a lack of real and effective control of the courts over execution proceedings, which in effect is prolonging its duration. Such a situation is contrary to the purpose of enforcement proceedings, which involves the possibility for the debtor to comply with a judgment, even without his consent.

We also have in mind that the executions of judgments, suspended according to Art. 7, were initiated at the earliest in 2007-2008 (more than 11-12 years ago) because the special tax for cars and motor vehicles was levied from 1 January 2007[6]. Now, we can't say if the administrative authorities will comply with the judgments within a reasonable time. Thus, the creditors' right has become illusory because it depends exclusively on the will of the debtors. In fact, it is not possible to ensure the purpose of a court decision through enforcement proceedings.

So now we consider that final judicial decisions can't remain inoperative to the detriment of one party. The delay may be such as to impair the essence of the right protected under Article 6 § 1 of the Convention.

We therefore conclude that the provisions of Emergency Order no. 52/2017 are contrary to Art. 21 para. (3) of the Constitution due to the unreasonably long civil proceedings, regarding the creditors mentioned by Art. 3 para. (1) who applied for a refund before 1 September 2018.

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[3] Art. 7 is related to Art. 1 para. (6) of the Emergency Order no. 52/2017.
[4] The moment of entry into force of the above-mentioned Order.
[5] The end of execution suspension, according to Art. 1 para. (6), Art. 7 of the Order under examination.
[6] The date of entry into force of the Law no. 343/2006, regarding the introduction of Art. 214^1 – 214^3 of the Law no. 571/2003 on the Fiscal Code, as subsequently amended and supplemented.

The European Court of Human Rights considered that non-implementation of court judgments by a Contracting State may be a violation of Article 6 § 1 of the Convention regarding the right to a court. Also, non-execution of irrevocable court orders can constitute interference with the creditor's right to the peaceful enjoyment of his possessions, considering that a decision in his favour provides an enforceable claim that constitutes a "possession" within the meaning of Article 1 of Protocol No. 1 (*Burdov v. Russia*, 2002, *Ruianu v. Romania*, 2003).

Considering the ending of the legal grace period and the authorities' refusal to pay, we conclude that the suspension of all enforcement proceedings regarding the creditors mentioned by Art. 3 para. (1) of the Order under examination, who applied for a refund before 1 September 2018, breached their right of access to court in the matter of the right of access to enforcement proceedings of final and binding judgments. Therefore the provisions of the Government Emergency Order no. 52/2017 are contrary to the constitutional provisions of Art. 21 para. (1).

Not honouring a judgment debt represents an interference with the creditors' rights to the peaceful enjoyment of their possessions, that currently isn't conducted in accordance with the law, taking into consideration the ending of the legal grace period. Accordingly, there has been a violation of Art. 44 para. (1), Art. 53 para. (1) of the Constitution.

We emphasize that only the Romanian Constitutional Court may hold the unconstitutionality of the Emergency Order no. 52/2017. The Court could be referred to through the mechanism provided by Art. 29 para. (1) – (4) of Law no. 47/1992.

III. Regarding Article 110 of the Treaty on the Functioning of the European Union (TFEU), Article 47 of the EU Charter of Fundamental Rights

In the Decision no. 137 of 25.02.2010, the Romanian Constitutional Court un

derlined that it's not for it "to examine the conformity of national law with the text of the Treaty establishing the European Community (now Treaty on the Functioning of the European Union) from the point of view of Art. 148 of the Basic Law. Such jurisdiction, namely to determine whether there is a conflict between national law and the EC Treaty, lies with the courts which, in order to reach a correct and lawful conclusion, *ex officio* or at the request of the party, may initiate preliminary ruling proceedings".

The Court of Justice of the European Union noted that the detailed procedural rules governing actions for safeguarding the rights of taxpayers derived from EU law must not be any less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by the legal order of the European Union (principle of effectiveness) (see, to that effect, judgment in Târşia, C□69/14, EU:C:2015:662, paragraph 27). The Court also held that, in accordance with the principle of sincere cooperation, a Member State may not adopt provisions making repayment of a tax held to be contrary to EU law by a judgment of the Court, or whose incompatibility with EU law is apparent from such a

judgment, subject to conditions relating specifically to those taxes which are less favourable than those which would otherwise be applied to that repayment of the tax (see, to that effect, judgment in Câmpean, C□200/14, EU:C:2016:494, paragraph 40).

In regards to creditors mentioned by Art. 3 para. (1) of the Emergency Order no. 52/2017 who applied for a refund before 1 September 2018 and have not yet been paid, we believe that national courts could be requested to apply, and give priority to, EU law[7], according to Art. 11 and Art. 148 of the Constitution, either in the permission of enforcement proceedings, as stated in Art. 666 of the Code of Civil Procedure, or in the case of the complaint filed by the debtor, as stated by Art. 712 of the Code of Civil Procedure. We consider that after the ending of the legal time in which the authorities had the obligation to repay taxes levied in breach of EU law, the suspension of all enforcement proceedings shouldn't apply.

If having doubts about the interpretation of EU law, according to Art. 267 TFEU, national courts could refer the following questions to the Court of Justice for a preliminary ruling:

– Can the principle of effectiveness laid down in the case-law of the Court of Justice (see judgments in Târşia, C□69/14, EU:C:2015:662, Câmpean, C□200/14, EU:C:2016:494), Article 110 of the Treaty on the Functioning of the European Union and Art. 47 of the Charter of Fundamental Rights of the European Union be interpreted as precluding a national rule such as that found in Art. 7 of the Government Emergency Order no. 52/2017 which suspends enforcement proceedings regarding repayment of sums owed under EU law and the amount of which has been established by final and binding judicial decisions, although national authorities haven't fulfilled their obligation established in the judgement even after the ending of the legal grace period – 120 days from filling the request by the creditor, but no sooner than 1 January 2018 [according to Art. 3 para. (1^1) a) from the Order] or 1 September 2018 [according to Art. 3 para. (1^1) b) from the Order]?

– Can the principle of equivalence laid down in the case-law of the Court of Justice (see judgments in Târşia, C□69/14, EU:C:2015:662, Câmpean, C□200/14, EU:C:2016:494), Article 110 of the Treaty on the Functioning of the European Union and Art. 47 of the Charter of Fundamental Rights of the European Union be interpreted as precluding a national rule such as that found in Art. 3 para. (1^1) of the Government Emergency Order no. 52/2017 which establishes a grace period for the national authorities regarding execution of a final and binding judgment, in order to repay sums owed under EU law, comparable with similar actions based on an infringement of domestic law (according to Art. 1-3 of the Government Order no. 22/2002), adding (according to Art. 1 para. (6) and Art. 7 of the Emergency Order no. 52/2017) a suspension of all enforcement proceedings against the national authorities even after the ending of the legal grace period in which obligations established by judicial decisions

[7] See judgments in Tatu, C□402/09, EU:C:2011:219; Nisipeanu, C□263/10, EU:C:2011:466; Câmpean and Ciocoiu, C□97/13 and C□214/13, EU:C:2014:229; Manea, C□76/14, EU:C:2015:216; Irimie, C□565/11, EU:C:2013:250; Nicula, C□331/13, EU:C:2014:2285; Budişan, C□586/14, EU:C:2016:421; Ciup, C□288/14, EU:C:2016:495; Câmpean, C□200/14, EU:C:2016:494; Târşia, C□69/14, EU:C:2015:662.

should have been fulfilled willingly by the State (but they weren't), suspension that isn't applicable to similar actions based on an infringement of domestic law?

– Can the principle of sincere cooperation laid down in the case-law of the Court of Justice (see judgments in Târşia, C□69/14, EU:C:2015:662, Câmpean, C□200/14, EU:C:2016:494), Article 110 of the Treaty on the Functioning of the European Union and Art. 47 of the Charter of Fundamental Rights of the European Union be interpreted as precluding a national rule such as Art. 7 of the Emergency Order no. 52/2017 which suspends all enforcement proceedings against national authorities regarding repayment of sums owed under EU law and the amount of which has been established by final and binding judicial decisions, even after the ending of the legal grace period in which obligations established by judicial decisions should have been fulfilled willingly by the State (but they weren't), suspension that isn't established by the general law regarding fulfillement of payment obligations by national authorities, determined by enforceable titles (Government Order no. 22/2002)?

IV. Conclusions

For the above-mentioned reasons, we conclude that the Emergency Order no. 52/2017 does not meet the constitutional and EU law analyzed requirements. Therefore, our *de lege ferenda* suggestion is that this Order should be amended.

Bibliography:

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Charter of Fundamental Rights of the European Union;
Romanian Constitution;
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Judgment of the European Court of Human Rights in *Ruianu v. Romania*, 2003, *Burdov v. Russia*, 2002;
Decision of the European Court of Human Rights in *Dumitru Daniel Dumitru and others* v. Romania, 2008;
Decisions no. 895 of 17.12.2015, no. 137 of 25.02.2015, no. 458 of 31.03.2009 of the Constitutional Court.

THE FISCAL PRINCIPLES ENSHRINED IN THE EUROPEAN UNION AND THEIR IMPACT AT NATIONAL LEVEL

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Abstract: *The tax policy reflects the position of the state regarding taxes and duties, respectively regarding the tax-related tools and procedures that the state possess in order to make a fair collection and distribution of the budgetary incomes.*

The tax system gathers the majority of taxes, duties, contributions and the other classes of public incomes come from the taxpayers natural and legal persons.

The state has to create a taxation system able to assure the establishment of the public incomes to the state in the amounts necessary to cover estimated public expenses. In the process of establishing taxes and duties, the state has to comply with a series of principles established by law.

These principles are subordinated to the principles in the matter regulated at the European Union level.

Keywords: *tax, fiscal policy, principles, European Union, subsidiarity*

1. Introductory points

The tax policy is part of the economic policy of a state and contains "the totality of the ideas and strategies transposed into local regulations dedicated to insuring the most effective ways to establish and collect the budgetary incomes"[1].

The tax policy reflects the position of the state regarding taxes and duties, respectively regarding the tax-related tools and procedures that the state possess in order to make a fair collection and distribution of the budgetary incomes.

Thus we consider the notion of tax system designating the majority of taxes, duties, contributions and the other classes of public incomes come from the taxpayers natural and legal persons. In the recent literature, they identified four main important components of the tax system[2], respectively:

- A regulation component – represented by the legal rules regulating the social relations of constitution, modification, administration and redemption of tax receivables;

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[1] C. F. Costaş, *Drept fiscal*, Ed. Universul Juridic, Bucureşti, 2016, p.13.

[2] P. Beltrame, L.Mehl, *Tehniques, politiques et institutions fiscales comparees*, Ed.PUF, Paris, 1997, pp.375-480; C.F.Costaş, op.cit., p.16.

- An organisational component – in order to enforce the state tax policy, the existence of a political-administrative body is necessary whose task is represented by the establishment and collection of taxes and duties;
- An economic component, resulting from the collection of the amounts due as taxes and duties from the assets of natural and legal persons;
- A psychosocial component – to establish and collect taxes and duties taking into account also some prevailing social conceptions, attitudes or behaviours at that time.

The regulation component is the object of study of tax law, a branch of law regulating the rights and obligations of the parties from legal tax relationships concerning administration of taxes and duties due to public budget[3].

In the process of establishing taxes and duties, the State[4] is bound to observe a set of principles enshrined in law, consistent with the principles governing matters at European Union level, as set out below: the principle of subsidiarity, the principle of non-discrimination, the principle of the protection of legitimate expectations and the principle of legal certainty , the principle of equivalence and the principle of effectiveness, the principle of proportionality, the principle of loyal cooperation and the principle of fiscal neutrality.

2. The principles of the European Union's law in the fiscal matter

2.1. The principle of subsidiarity

The Treaty on the functioning of the European Union contains this principle of subsidiarity in art. 5, according to which: "The Member States coordinate their economic policies within the European Union. In this regard, the Council shall adopt measures and, in particular, the general trends of such policies".

According to this principle[5], in the domains which are not its exclusive competence, the European Union intervenes only if the objectives of the estimated action cannot be achieved satisfactorily by the Member States at central, regional and local level, but, due to the sizes and effects of the estimated action, they can be achieved better at the European Union level.

Thus, by the legislative Resolution of 15 March 2018 on the proposal of directive of the Council regarding a common consolidated corporate tax base[6], taking into account that the objectives of the directive, i.e. the improvement of the operation of the domestic market by fighting tax evasion practices at international level and easing the extension of the companies, especially the SMEs, at cross border level within the European Union, the European Parliament appreciated that they "cannot be achieved satisfactorily by the Member States acting individually and disparately, because a

[3] M. Tudor, D. Iancu, A. Pirvu, *Drept financiar şi fiscal*, Ed.Universității din Piteşti, Piteşti, 2017, p.6.
[4] A. D. Dumitrescu, *Dreptul comerțului internațional*, Editura C.H.Beck, Bucureşti, 2014, pp.42-45.
[5] A. D. Dumitrescu, "The subsidiarity principle in the context of harmoniying national legislation with the European law of securities", Volum de conferință, Conferința Internațională "*Uniformizarea dreptului – efecte juridice şi implicații sociale, politice şi administrative*", Iaşi, 23- 25 octombrie 2014, pp. 594-600.
[6] http://www.europarl.europa.eu/doceo/document/A-8-2018-0050_RO.html, accessed on 02.04.2019.

coordinated action to achieve such objectives is necessary, but, as the directive aims at the inefficiencies of the domestic market originating in the interaction among the disparate national tax rules which have an impact on the domestic market and discourage the cross border activity, these objectives can be better achieved at the European Union level, and the European Union can adopt measures, in accordance with the principle of subsidiarity, as provided in article 5 to the Treaty on the European Union"[7].

2.2. The principle of non-discrimination.

In the tax matter, one of the most important principles pointed out by the Court is **the principle of non-discrimination**.

The obvious, hidden and indirect, differentiations, based on nationality or origin, are forbidden as direct discrimination. The differentiations based on other criteria that the nationality of persons or origin of goods, thus seeming neutral, such as residence or conformity to limited or unlimited tax liability, but which jeopardize mainly the non-nationals, the imported goods or the foreign investment, are as harming for the free movement as the direct discrimination[8].

Tax non-discrimination supposes that any Member State commits itself not to enforce to the nationals of another Member States, for tax purposes, any rules more burdening than those applicable to its own taxpayers which are in the same situation[9].

The tax regimes established by the Member States should be neutral compared to the European guarantees in order to assure an equal tax treatment to both residents and non-residents, European[10]. Therefore, starting from art. 110 TFEU (former art. 90 of TCE), according to which: "No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products", the Court decided on 7 April 2011 in the case Tate v. Romanian State that: "Art. 110 TFEU should be interpreted as opposing that a Member State should establish a pollution tax applied to vehicles on their first registration in such Member State if the regime of this tax measure is set out in a way to discourage the putting into circulation, in such Member State, of some second hand vehicles purchased in other Member States, but without discouraging the purchase of some second hand vehicles having the same age and wear from the national market"[11].

If the Member States were allowed to set out new taxes whose object or effect would be to discourage the sale of imported products in favour of the sale of similar products available on the national market and introduced on such market before the

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[7] *Idem*.

[8] Radu Bufan, *Introducere în sistemul European de TVA*, http://conferinte.hamangiu.ro/wp-content/uploads/2018/06/Bufan-Radu-SLIDE-URI-Seminar-Malherbe.pdf, accessed on 05.04.2019.

[9] I. M. Costea, *op.cit.*, p.114.

[10] *Idem*, p.89.

[11] http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=9ea7d2dc30db791c52e0bb204ce09930900589619b93.e34KaxiLc3qMb40Rch0SaxuLc390?doclang=RO&text=&pageIndex=1&part=1&mode=DOC&docid=124709&occ=first&dir=&cid=632352, accessed on 03.04.2019.

entry in force of the above-mentioned taxes, then art. 110 of TFEU would lack its meaning and object[12].

2.3. The principle of protection of legitimate trust and the principle of judicial security

The literature and the European Union Court of Justice analyse and use together the **principle of protection of legitimate trust and the principle of judicial security**.

These two principles are considered as part of the European public order and should be observed both by the European institutions and by the Member States, when they exert the prerogatives offered by the European directives. At the bottom of these principles there is the wish to protect the addressees of the law even from their insecurity. The principle of security, in tax matter, mainly aims at the retroactivity of the law and at the obscurity of the legal texts. The protection of the legitimate trust and the maintenance of the judicial security cover aspects such as: access of taxpayers to enforceable legislation, predictability of tax legislation, obligation of tax authorities to define their requirements and to observe their commitments taken, and also the right of citizens to a unitary interpretation of tax legislation[13].

Nevertheless, in case-specific circumstances, the national courts have the competence to decide, in some situations, whether a breaching of such principles was committed. Thus, in the case Belgocodex SA v. Belgium[14], the Court stated that the national court is the one that should specify if, by a retroactive repeal of a law whose decree of enforcement was never adopted, a violation of the principles of legitimate trust and of judicial security took place or not.

In a case involving the Romanian state, respectively in the case Salomie and Oltean v. The General Department of Public Finance Cluj, the Court stated, related to the two principles, that ”the legislation of the European Union should be certain, and its enforcement should be predictable for litigants, this requirement of the judicial security imposing with a special strictness when it is about a regulation that can have financial consequences, in order to allow to interested persons to get to know exactly the extension of the obligations that such rule impose on them. Also, in the domains falling under the incidence of the European Union, the rules from the law of the Member States shall be formulated unequivocally that should allow the targeted persons to know their rights and obligations clearly and accurately, and allow the national courts to assure their observance”[15]. In the case, the Court appreciated that the action of the tax-administrative bodies, following a tax control, to subject certain operations to the value added tax and that the imposition of tax increases does not contradict the two principles, as long as the decision is based on clear and accurate rules, and the practice of the tax bodies did not create, for a cautious and competent

[12] C. F. Costaş, *op.cit.*, p.34.
[13] A. M. Găină, *Principiile dreptului fiscal – fundament al impunerii fiscale*, Revista de Ştiințe Juridice nr. 3/2009, p. 95.
[14] CJUE, hotărârea din 3 decembrie 1998, cauza C-381/97, *Belgocodex*, ECLI:EU:C:1998:589.
[15] http://curia.europa.eu/juris/document/document.jsf?docid=165649&doclang=RO, accessed on 03.04.2019.

economic operator, the reasonable trust in the non-enforcement of such sanctions for the targeted operations[16].

Also, the principle of the judicial security was invoked in the case H.Ferwerda BV v. Productschap voor Vee en Vlees, where the authorities erroneously enforced some provisions of a European regulation concerning the recovery by the public authority of the export reimbursement in the sector of the products that are the object of a price single regime. In this regard, the Court stated that the community law does not oppose to the enforcement of the "principle of the judicial security derived from the national law, based on which the financial advantageous granted by mistake by the public authority cannot be recovered if the mistake committed is not due to some inaccurate information supplied by the beneficiary, or if such mistake could be easily avoided, despite the fact that the information supplied were inaccurate, but it was supplied in good faith"[17].

2.4. The principle of equivalence and the principle of the efficiency

The principle of equivalence and the principle of the efficiency have the role to correlate the procedural rules from the national legislation with the rules from the Union law.

The principle of the equivalence offers to litigants the guarantee that the rights grounded on European rules are favourable to the same extent as the rights grounded on the rules from the national law.

The principle of efficiency offers the guarantee of the possibility of exercising easily the rights granted by the European judicial order, through the national procedure. In other words, this principle entails that each Member State should assure the real and effective exercise of the rights guaranteed by the European treaties, being forbidden to enforce measures that would hinder the exercise of the rights or to undermine the direct effect of the European law[18].

The European Union Court of Justice decided, in terms of the principles of equivalence and of efficiency, that the procedural means or ways applicable to those actions, aiming at assuring the defence of the litigants' rights recognised or offered by the Union law, should not be less favourable than those applicable to the similar actions from the domestic law and should not create the impossibility or the exercise of the rights granted by the Union judicial order in excessively difficult conditions[19].

For example[20], the observance of the principle of equivalence imposes to the Member States the establishment of some procedures at least as favourable as those

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[16] CJUE, Camera a 7-a, hotărârea din 9 iulie 2015, cauza C-183/14, în A. M. Truichici, L. Neagu, *Drept fiscal. Jurisprudența Curții de Justiție a Uniunii Europene*, Ed. Universul Juridic, Bucureşti, 2017, p. 57.

[17] https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A61978CJ0265, accessed on 03.04.2019.

[18] [18] T. Vidrean-Căpuşan, A. M. Zah, S. I. Puț, *Drept fiscal*, Ed. Solomon, Bucureşti, 2016, p.33.

[19] Cauza *Unibet (London) Ltd şi Unibet (International) Ltd c Justitiekanslern*, http://curia.europa.eu/juris/ show Pdf. jsf;jsessionid=9ea7d2dc30dcef7815ce85b6434096df85335f9cd2a3.e34KaxiLc3qMb40Rch0SaxuMchr0?docid =62060&pageIndex=0&doclang=RO&mode=&dir=&occ=first&part=1&cid=768159 accessed on 06.04.2019.

[20] Cauza *Littlewoods Retail şi alții c. Her Majesty□s Commissioners for Revenue and Customs*, http://curia.europa.eu/juris/document/document.jsf;jsessionid=9D4AEB0DF8518D48C0F44EA9FF3BF 5D8?text=&docid=125224&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=271174 7, accessed on 03.04.2019.

provided at European level for the reimbursement requests of a tax based on a violation of the Union law, for similar actions, from the point of view of the object, case and main elements, based on a violation of the domestic law. The task to verify if the domestic law rules comply with the principle of equivalence, comes to the national court, because it knows directly the procedural ways assigned to assure, in the domestic law, the protection of the rights granted to the litigants from the Union law.

The verification of the observance of the principle of efficiency imposes the examination of the degree of access to domestic procedures, i.e. they have to analyse if the national system of reimbursement of the tax perceived with the violation of the European Union law "makes it difficult or impossible, in practice, to exercise the rights based on the judicial order of the European Union, taking into account the place such rules have within the procedures, the way in which the procedure is carried out and the particularities of such rules in front of the national courts"[21].

The Court appreciated in the case Silvia Georgiana Câmpean v. the Administration of Public Finance of the Municipality of Mediaş, currently the Municipality Tax Service Mediaş, and the Administration of Environment Fund[22], that the principle of efficiency is not in concordance with an interest reimbursement system of the taxes perceived with the violation of the European Union law, system supposing a five-year spaced out reimbursement of such taxes, and determines the tax reimbursements conditional to the existence of some funds collected based on another tax, without stipulating the possibility of the litigant to force the public authorities to comply with their obligations, in case they do not comply willingly.

2.5. The principle of proportionality

The principle of proportionality is considered one of the safety measures against the excessive use of the legislative and administrative power of the state.

This principle imposes that the measures or decisions taken by the competent bodies should be based on a fair and righteous assessment of the facts and on the maintenance of a reasonable balance between the particular interest involved and the higher public interest[23]. Thus, when it acts to reach a predefined purpose, the state has to proceed to a careful selection of the means and mechanisms it is going to use, in order to assure the proportionality with the implications that such interference can have and in order not to jeopardize the rights and guarantees offered by the international regulations to individuals.

This principle had a first formulation in the case Handelsgesellschaft v. Einfuhr und Vorratsstelle Getreide, on behalf of the Advocate General who stated that "one

[21] Cauza *Agrokonsulting-04 Velko Stoyanov c. Izpalnitelen direktor na Darzhaven fond „Zemedelie" – Razplashtatelna agentsia,* http://curia.europa.eu/juris/document/document.jsf?text=&docid=138861&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=2713433, accessed on 03.04.2019.

[22] http://curia.europa.eu/juris/document/document.jsf?text=&docid=181104&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=864142, accessed on03.04.2019.

[23] A se vedea A. Chiper, *Principiul proporționalității în context european şi național*, Revista Themis, nr. 2/2018, p. 142.

person should not have its freedom to act limited beyond the extent necessary to defend the public interest"[24].

Subsequently, the principle was developed by the Court in the case R v. Minister of Agriculture, Fisheries and Food ex parte Fedesa, where they established that the principle of proportionality is one of the general principles of the community law and, based on that, " the lawfulness of instituting a prohibition over the performance of some economic activity is subjected to the condition that the prohibition measures should be compliant and necessary to the public objective protected by the legislation in the field; where there is the possibility to choose between several appropriate measures, they should choose the less onerous one, and the disadvantages should not be disproportionate to the purpose aimed"[25].

The principle of proportionality is currently found in art. 5 para.4 of the Treaty on the European Union, according to which: "Based on the principle of proportionality, the action of the Union, in content and form, does not exceed what is necessary to achieve the objectives of the treaties. The European Union institutions enforce the principle of proportionality in accordance with the Protocol concerning the enforcement of the principles of subsidiarity and of proportionality". This provision refers to Protocol 2 to the Treaty[26], regarding the enforcement of the principles of subsidiarity and of proportionality, stating in art. 5: "The legislation projects are motivated in connection to the principles of subsidiarity and of proportionality. Any legislation project should include a detailed sheet allowing the assessment of the compliance with the principles of subsidiarity and of proportionality. The sheet previously mentioned should include elements that would allow the assessment of the financial impact of such project and, in case of a directive, the assessment of its implications on the regulations to be enforced by the Member States, including on the regional legislation, if any. The reasons leading to the conclusion that an objective of the Union can be better achieved at the Union level, are based on the quality indicators and, as often as possible, on quantity ones. The legislation projects consider the need to proceed in such a way that any financial or administrative obligation, that comes to the Union, to the national governments, to the regional or local authorities, to the economic operators and to citizens, be as reduced as possible and proportionate to the objective pursued".

A measure is considered appropriate to make sure that the objective pursued is reached, if it really answers to the concern to reach it in a coherent and systematic way. A measure is necessary if it is the least burdening for the interest or judicial value in question of several measures which are appropriate to reach the objective pursued. There is an unreasonable restriction of the interests or of the judicial values in question in case the measure, despite the contribution to reach the legitimate objectives pursued, has as result an excessive interference into these interests or judicial values)[27].

[24] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61970CJ0011, accessed on 04.04.2019.
[25] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CJ0331, accessed on 04.04.2019.
[26] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A12012E%2FPRO%2F02, accessed on 03.04.2019.
[27] R. Bufan, *op.cit.*

Obviously, the principle of proportionality should find its application in the tax domain, too. In this regard, the European Union Court of Justice stated[28] that to the extent in which, through legislative provisions, financial expenses are imposed to economic operators, they should be appropriate and necessary to achieve the objectives pursued in a legitimate way by such regulation. In case they can turn to other measures appropriate to achieve the objectives pursued, they should choose the one supposing the least constraint, and in relation to objectives, the expenses imposed should be proportionate.

2.6. The principle of loyal cooperation

In accordance with the principle of loyal cooperation, the European Union Member States cooperate among them to accomplish the missions assumed.

The principle of loyal cooperation is formulated in art. 4 of TFEU, as follows:

(1) The Union shall share competence with the member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

(2) Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

(b) social policy, for the aspects defined in this Treaty;

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy;

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

(3) In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

(4) In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

The principle of loyal cooperation laid the bases for:

[28] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:61987CJ0265, accessed on 02.04.2019.

- The intervention of the Court of Justice on the actions of the Member States that could prevent the useful effect of the EU measures or even of the measures proposed;
- A case law of the Court requesting the Court to interpret the national law so that it is in accordance with the EU relevant law;
- A case law according to which the national procedural law cannot be more burdening with regard to the exercise of the EU rights than it is regarding the similar actions of internal case law committing, under certain conditions, the liability of the Member States for the damages suffered by natural persons or enterprises as a result of failure to implement or inaccurate implementation of the EC directives;
- A case law pointing out that the national procedural law cannot be more burdening with regard to the exercise of the EU rights than it is with regard to domestic similar actions[29].

The principle of loyal cooperation should therefore be interpreted as opposing that a Member State should adopt decisions subjecting a tax reimbursement – that was declared contrary to the Union law by a Court decision or whose incompatibility with this right results from such a decision – to some conditions regarding specifically such tax and which are less favourable than those that would have been applied to such reimbursement, the task of verification of this aspect coming to the sending court in this domain[30].

2.7. The principle of tax neutrality

The principle of tax neutrality opposes especially that the economic operators performing the same operations, should be treated differently.

For the Court of Justice, the principle of equal treatment does not only impose that identical situations be treated identically, but also the similar situations; in case a situation is not identical, an activity can be regarded as similar only if the quality is equivalent from the point of view of the addressees.

In other words, the principle of tax neutrality is a particular expression of the principle of equal treatment at the level of EU secondary law and in the particular domain of taxation, and it is not a primary law rule.

3. Conclusions

Although the States maintain the competence to introduce, remove or adjust the taxes, the tax law appears as having a more and more significant European component. So the Member States may choose the taxation system they consider the most appropriate, as long as it complies with the EU rules.

[29] R. Bufan, *op.cit.*

[30] Cauza *Silviu Cup*, C-88/14, http://curia.europa.eu/juris/document/document.jsf?text=&docid=181112&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=864142, accessed on 05.04.2019.

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MANIFESTATION OF THE RULE OF LAW. A HISTORICAL APPROACH

Gabriela POPESCU*

Abstract*: The history of human civilization inherently includes a history of the birth and evolution of the rule of law.*

The organization of the population on a territory, bound by a community of language, life habits, economy (agriculture, crafts, commerce), culture, depended on the establishment of an authority endowed with a right of command. Initially, necessary to its own defense, the power of authority gradually turns into autocracy.

Keywords: *state, freedom, democracy, rule of law.*

In extenso:

The Sumerians, the Babylonians, the Assyrians have gone through the "dawn of history from caverns to villages and towns, from hunting to shepherding and agriculture" from social, political, cultural, military, religious early stages to evolved forms[1].

Before Christ, from the beginning of the second millennium, in Mesopotamia, the state-towns fought for supremacy. This is how we know the cities of Ur, Babylon, Ugarit, Nineveh, Mari, and others, in the cities are organized centralized administrations, rules are applied to the observance of public order, rules of trade are established, rules for the collection of taxes, military personnel are recruited for security, and so on. Moreover, through wars, these cities have expanded, increasing their power and state and lawful influence over large populated areas. To have a subordinate administration, to be able to collect their taxes and strengthen their military power, the leaders of those times needed a justification. This is how they invented the rule of law, originally motivated as of divine origin[2], to enforce the respect and fear of an entity.

The oldest code of laws, discovered to date, seems to be that of King Ur-Nammu, who reigned in Ur, around 2100 before Christ[3]. Or, there is another Sumerian code enacted by King Isun Lipit-Ishtar around the 1950 before Christ [4]. Hammurabi's code, written in 282 articles, has been inherited on a black basalt stone, today in the custody of the Louvre Museum. "May any persecuted who has a complaint, wants to come in

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[1] See Sabatino Moscati, *Vechi imperii ale Orientului* (*Old empires of the Orient*), „Meridiane" Publishing House, Bucharest, 1982, p. 48.

[2] Hammurabi's code, as well as other Sumerian codes, have a prologue and an epilogue. In the prologue he says: "Then Anu (the kind of Anunnaki) and Enlil (the master of the sky and the earth) called me Hammurabi, Prince-praised, faithful to the gods, to make the justice shine in the country, to destroy the villain and the wicked – see Sabatino Mossati, *quoted work,* p. 92.

[3] See Sabatino Moscati, *quoted work,* p. 92.

[4] *Idem,* p. 73.

front of my statue as king of justice, to read my stone and its inscription, listening to my precious words; May my stone understand his complaint, and show his justice, easing his heart[5]" It was of a state which, by legal rules carrying the divine power, imposed the omnipotence of the royal ambitions.

Hammurabi's state does not last more than four years after his death, but the rules of law become contagious and impose on the state organization. Mesopotamia is divided into power centers, Babylon and Assyria. The law in the age of the ancient East gives power and stability to the Egypt of Tutankhamon and especially of Ramses II, remarkable in organizing the country and the army. And in Egypt, the rule of law was of supernatural inspiration, a fact explained as pharaohs in general, promoted their image in direct connection, "carnal," with the god.

It is perhaps paradoxical, but Moses, Israel's liberator, leader and legislator, had to flee in his youth because he killed an Egyptian guard who maltreated a Jewish slave. If the fear of the law made him run away, it is a paradigm of history that Moses, in time, through his wisdom and the power of doing miracles, takes over not only the leadership of the Jews on their way to the Promised Land of Canann, but also gives them what he has received from Yahve on Mount Sinan, the Decalogue, the 10 commandments that constitute not only the urge to morality, but also the incipient form of Hebrew law (among the ten commandments is also the law of the talion).

The state created by David, who followed Saul, the unification of the 12 Israeli tribes, most suggestively, has a new capital, the Jerusalem, which sheltered the ark containing the Table of the Law that Moses had received from Yahve. So, the Hebrew state was created by laws and perhaps not by chance, in the idea of mythicizing the triumph and power of the legal regulation, his successor to the throne, Solomon, was identified with the right judgment.

The Iliad and the Odyssey of Homer in their time, the 8th century before Christ (about 800 before Christ) creates a world where wars, parricide, fratricide, murder are possible only in a world lacking the virtues of law. On the contrary, it can be said that the Homeric epics make the apology of respect for morality and justice. On this basis, Licurg's institution in Sparta (about 675 before Christ) or Dracon's Code of Laws in Athens (about 621 before Christ) appeared. Fleeing from the truth, not in vain more blind than Homer, the tyrant of Sicyon, Clistene banned – obviously through a legal norm – the malignant role of subjugating the law to the political interest – the spread of Homeric epics. But, in vain.

Almost at the same time, in 753 before Christ, Rome, the "eternal fortress", appears, marked in its turn by a fratricide, and perpetuated in time by another immoral fact – the kidnapping of Sabine Women. The Roman organization by law was the one that "pushed" outward the borders of a state, which unprecedentedly marked the human civilization. And, "because all these had to bear a name", it was called the Roman law.

It appears remarkable in the historical evolution of the state, this passage from village to town and then to state.

Undoubtedly, Assyria in northern Mesopotamia or Babylonia in its southern part, Persia, Alexander's Macedonian conquests, formed vast empires overpowered only by

[5] Quote from the epilogue – see Sabatino Mossati, *quoted work*, pp. 53, 72.

the almost-world empire created by the Romans[6]. But it was obvious that the extent of a state was not directly proportional to its real strength[7].

On the other hand, for reasons of strategy, the Greeks organized, in relation to their real strength, states of such nature that in case of attack, they could respond as quickly as possible to eliminate the danger. Here's the explanation why, in contrast to the giant empires, the ancient Greece was "populated" with numerous state-states, with a not so large territorial area. In the 8th century before Chirst, Lacedemona, later Sparta, gathered several villages, affirmed as a powerful state in the west of the Peloponnese, reached its peak during the Persian War (500-449), it was conquered by Philip II of Macedonia, and ended in decline in the third century[8].

The need for order and measure made Platon see the state as an administrator of justice, but without appreciating the existence of the "best state", being in search of the "ideal state"[9]. On the basis of the rule of law, in Plato's view, the category of "Guardians" made up of "Philosophers – Leaders" helped by "Auxiliaries" and their education meant teaching "Auxiliaries" to listen to "Leaders", and "Leaders" to act for the wellness of the state[10].

If the cities of ancient Greece have found their strength in the power of ethnic and national unity, empires have disappeared precisely in the absence of this unity or closer to reality, in the absence of a national political unity[11]. This explains how the Israeli nation, divided into 12 tribes, lived the drama of division and isolation, accentuated by deportation to Babylon during Nebuchadnezzar.

Good organizer, pragmatic or visionary, Justinian, driven by the wish of restoring the Roman Empire unity, considering that Byzantium was the successor of Rome, saw strengthening the state only on the basis of political, religious and legislative unity[12].

To issue a judgment of value on the state itself as an organized authority means to appreciate the level of development of economic and social relations that varied from one region to another, from one state entity to another, from a historical period to other. The chronological, initial and moving limits of the notion of state have temporarily surprised the Middle Ages with a measure unit called the feud and then the country, after which the revolution backed by a bourgeoisie almost hysterical in its expansive rush in the search for new markets for goods.

The omnipotent leader, because he was not only the administrator or legislator, but also the judge found his full expression in the absolute monarchy. *Principis voluntas habet legis vigorem* (the will of the principles sets the laws in force). Dimitrie Cantemir

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[6] See Iorgu Radu, *Dreptul international public în antichitate* (*Public international law in antiquity*), Carol Göbl Institute of Graphic Arts, Bucharest, 1914, p. 17 and the following; Vojtech Zamarovsky, *La început a fost Sumerul* (*At first it was Sumer*) , "Albatros" Publishing House, Bucharest, 1981, p. 34 and the following.

[7] See Iorgu Radu, *quoted work,* p. 18.

[8] *Ibidem, p. 425.*

[9] See Ernst Cassirer, *Mitul statului* (*The myth of the state*), "Institutul European" Publishing House, Iasi, 2001, pp. 98 -99.

[10] See Oxford, *Dictionary of politics*, "Univers enciclopedic" Publishing House, Bucharest, 2001, p. 335.

[11] See Iorgu Radu, *quoted work*, p. 18.

[12] See Vladimir Hanga, *Mari legiuitori ai lumii* (*Great legislators of the world*), Editura Ştiintifică şi enciclopedică (Scientific and Encyclopaedic Publishing House), Bucharest, 1977, p. 127.

in his "*Descriptio Moldaviae*" demonstrated that the power of the Lord was unlimited. The freedom of the individual and the private property were at the discretion of the absolute monarch, who could order, as he pleased, to abduct this freedom by the so-called "*lettres de cachet*" or to confiscate his possessions. At the time, these were the rules of law.

Elements of emergence of a rule of law were manifested in the 17th century in England, more precisely in 1628, by the so-called "*Petitions of Rights*", which included guarantees against tax collection without the approval of Parliament, arrests and seizures of goods without complying with normal court proceedings.

England makes a step forward through the famous ordinance "*Habeas corpus*" (1679) in which it offered protection to the citizen from the state abuse, so that detention, arrest and release could only be made by courts of law. In these successive regulations, which lay the foundations of the rule of law, the "*Bill of Rights*" of 1688 intervenes, which introduced the rule that only the Parliament could vote for the taxes and salaries of the military, and therefore the king had no longer control and blackmail means on them, which was taking away from him the possibility of prejudicing the fundamental acts of the state.

While many of the recommendations made by Machiavelli to his "Prince" or the much-admired Cesare Borgia are questionable, we cannot fail to accept that he is the first to understand in the new, political, social and philosophical context, the real place of the structure of the state. For this reason, he is considered the creator of the beginnings of the modern secular state theory, to which the "*Prince*" gave *de iure* a theoretical and legal justification[13].

The French Revolution has permanently removed the absolute monarchy and instead it has been installed the "individualist democracy", which is based on the principles of national sovereignty and individual rights and freedoms[14].

In order to defend individual rights and freedoms, the principle of legality by which the police state (without legal limits) has been transformed into a state of law. The principle of legality establishes the fact that the state can make provisions only in a general and not personal manner, and that all individual acts must comply with regulations developed in a general and impersonal way. In other words, the rule of law was proclaimed in the state activity, and it was compelled to respect the Constitution and its own laws.

The exception from this rule were the totalitarian regimes, regardless of their names, Stalinist-Leninist, national-socialist or fascist, that have made the state supremacy as the rule and, on the other hand, have emptied the individual's freedom from the content.

It is precisely in order to remove the possibility of exercising power in the state by such forces, that in many Constitutions and international documents the idea of the need to develop and defend the fundamental freedoms and human rights has been promoted, starting from the theory that there are certain rights inherent in human

[13] See Ernst Cassirer, *Mitul statului* (*The myth of the state*), "Institutul European" Publishing House, Iasi, 2001, p. 180.

[14] See Erast Diti Tarangul, *Tratat de drept administrativ român* (*Romanian administrative law treaty*), "Glasul Bucovinei" Publishing house, Cernăuti, 1944, p. 4.

nature. This was the necessary premise, besides other conditions, that in some countries, even if only partially, a political organization based on elements of the rule of law could be created.

Yet, just trying to legitimize education, training, and obedience measures, maybe extremely profound, did not make the order in Plato's state of law possible.

One of the most important representatives of legal positivism, Hans Kelsen, saw in the rule of law*: a relatively centralized law, after which jurisdiction and administration are bound by laws, that is, by general rules decided by a Parliament elected by the people, with or without the collaboration of a government or head of state at the top of the government; the government members are responsible for their acts, the law courts are independent and certain freedoms of citizens are guaranteed, especially the freedom of belief and conscience and freedom of speech*[15].

In other terms, *the rule of law* is nothing more than the "*state of the rule of law*", reflected in its own activity, either in relations with other organizations on its territory or in relations with citizens[16]. The phrase, acting like a definition for the existence of some states, is mentioned as such in the Constitutions of different countries (Germany, Spain, Romania) – curiously, with a dictatorial past – that wanted to emphasize the status of the state subject to the law.

Moreover, to exemplify: the preamble to the Constitution of the Republic of Bulgaria adopted on July 12, 1991 states: "We proclaim the will to create a democratic and social democratic state"[17]; the Constitutional Law of the Czech National Council comprising the Constitution of the Czech Republic of December 16, 1992 in Chapter I, Article 1 shows: "The Czech Republic is a state of law"[18]. The Constitution of the Russian Federation of December 12, 1993 expressly mentions in Article 1 paragraph 1, the phrase "rule of law"[19]. Similarly, in the Constitution of the Republic of Hungary of August 20, 1949, modified for peaceful political transition, it is mentioned that it is a "rule of law, independent and democratic"[20].

It should be noted that such a phrase is not found in the Constitution of France of 1958 or the Constitution of Italy of 1947. It is natural that such an emphasis be placed on the Constitutions adopted or modified after 1990, as the former communist states have tried to be as convincing as possible about their attachment of the values of democracy that are guaranteed by the deep observance of the law.

The theoretical issues of the rule of law have been studied by several authors: Hugo Grotius (1583-1645), Thomas Hobbes (1588-1679), Baruch Spinoza (1632-1677), John Locke (1632-1704), J.J. Rousseau (1712-1778) etc.[21].

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[15] See Hans Kelsen, *Doctrina pură a dreptului* (*The pure doctrine of the law*), Humanitas Publishing house, Bucharest, 2000, p. 368.

[16] See Tudor Drăganu, *Dreptul constitutional şi institutii politice* (*Constitutional law and political institutions*), volume I, 1993, U.E.D.C., Târgu Mureş, Faculty of Law, 1993, p. 228.

[17] See Ovidiu Tinca, *Constitutia şi alte texte de drept public* (*Constitution and other public law texts*), "Imprimeria de Vest" Publishing house, Oradea, 1997, p. 373.

[18] *Idem, p. 403.*

[19] *Idem, p. 577.*

[20] *Idem, p. 705.*

[21] Enciu, Nicolae, q*uoted work,* p. 174.

The rule of law concept was elaborated in Continental Europe at the end of the 19th century on the basis of the German legal doctrine – "*Retschstaat*" – "*state of law*", which contained the ideas of E. Kant, according to which the individual has his natural rights guaranteed in the society.

Then, it appeared in the French doctrine – "*Etat et droit*", becoming gradually generalized under the influence of different terminology for each language: "*Estado dé déreché*" in Spanish, "*Stato di dirito*" in Italian, "*Rule of Law*" in English etc.

For John Lock, the rule of law was that state where laws do not restrict, but maintain or increase the freedom of the individual.

Montésquieu, in the work "*The Spirit of the Laws*" formulates the request to the rule of law: "No one should be compelled to do things, which law does not oblige him to do, and not to do the ones law allows him to do." [22].

J.J. Rousseau figures the state of law as the state which strictly adheres to its own laws and which substantiates them on the natural rights of individuals.

French political scientist Raimond Aron states that for the constitution of a rule of law there is a need to elect a parliament, to elect the constitutional bodies, to be invested with legitime authority the civil servants, and the law to govern the social relations as a whole. [23].

Jaqués Chévallièr defines the "*rule of law*" as "the type of political regime in which state power is framed and limited by law."

A renowned French lawyer, L. Duguit, said that law without force is helpless, but force without law is barbaric. The rule of law involves harmonizing, balancing the relations of the two components in the sense of the rule of law, that is, of its absolute supremacy in the purpose of preservation of individual rights and freedoms[24].

The idea of limiting the state by law constitutes the "heart of the rule of law". The problem of relations between the state and the law gave rise, over time, to several theories that have tried to answer the questions: law – as a factor limiting the state – finds its source inside or outside of it? And if the state is the author of law, how is it possible for this "child" to "rebellize", bringing to order exactly the one that produced it?

a) The theory of natural law could give a first answer. Starting from Sofocle and Aristotle, which was later continued by Grotius (Hugo de Groot) – considered to be the founder of natural law – and by other important representatives, the theory of natural law has as central idea the existence of an eternal, natural, immutable law. According to this conception, the law is based on the nature of man and the principles of reason. Starting with Grotius, the concept of natural law gains an individualist orientation, after that not speaking of a "natural right", but of "natural individual rights".

The existence of some natural subjective rights inherent to human beings is criticized for at least the following reasons: human rights derive not only from his nature, but most from the individual's position in society; if there is a "predefined" set of natural rights, how and who sets the "catalog" of these rights and the content of each right?; in front of such rights, what is the sovereignty of the law and how to ensure the

[22] Vâlsan, Călin, *Politology*. Economic Publishing House, 1997, p. 58.
[23] *Ibidem.*
[24] Lazar, Carmen. *Teoria generală a dreptului (General Theory of Law).*

stability of the rule of law ?; how and who to sanction the "written law" for his contrariety with the "unwritten law"? if "natural law", in order to be effective, is now in "legal institutions", how and why does the separation between "positive law" and "natural law" still be achieved and justified?

b) The theory of hetero-limitation of the state is a second theory that tries to clarify the relations between the state and the law. Also known as the "objective conception of law", this theory has as a central idea the finding that behind the legal norm lies a previous legal reality that the legal texts crystallize. Sovereignty does not exist, but there is only belief in sovereignty, and this belief is unfortunate because, in principle, forbids the subordination of the state to the law. At the same time, the theory of hetero-limitation of the state implies a double legal fiction: the state is an abstract entity; the subjective law is a metaphorical notion, an a priori concept.

c) The state self-limitation theory is an exclusively legal concept. According to this theory, the state precedes law and obeys the law that it created. The success of this theory in Germany is due to its hegelian filiation; starting with Jellinek, theory becomes a coherent construction. The law is neither prior nor superior to the state, the state being at its origin, being "the sole source of law". The law can not constitute an external constraint for the state, an objective limitation of it; the state itself by its will, sets the rules applicable to its activities. He is self-limiting; so, by law, the state self-determines itself, and at the same time self-limitates, if it does not want to deny itself. [25]

And this theory holds some criticism: the limitation of the state is just formal, because the legitimate content of its obligation to respect the law is not determined; if the state is the one that is self-limiting, then, in reality, its power (authority) strengthens instead of diminishing; the state's self-limitation theory sacrifices the individual towards the state; this theory is a fragile guarantee in the face of state arbitrariness; the state is not limited to the power to create a new legal order; the will to create a rule of law „is a utopia," an "element of false illusion," as reality does not correspond to the ideal model; another criticism is that the theory relies only on the subjective will of the state.

In the French version, the law created by the state is objective, it is detached from the will that created it, thus acquiring an own existence that attaches itself to the state and obeys it. The law, in its objective form, is constituted as a factor limiting the power of the state, not as an external instrument of state constraint, but as an intrinsic force characterized by stability, coherence and hierarchy. We can conclude that the law once created is imposed on the state – itself a subject of law – like all other subjects.

The Romanian author, Paul Negulescu, who embraces the idea of the rule of law, speaks of the "*triumph of legality*" through the rule of law. He highlights those aspects that confirm the existence of the rule of law in Romania: the provisions of the Constitution of 1923 which "apply this principle", as well as those relating to the control of the constitutionality of laws by the Court of Cassation (Article 103) and the ones regarding the right of the law courts to cancel unlawful administrative documents (Article 107) and those which constitute deviations from the rule of law; therefore he

[25] Jellinek, G., *L'État moderne et son droit*, Ière partie, éd. Fr., Paris, Giard et Brière, 1991, p. 268, quoted by Deleanu, Ion, *Instituții şi proceduri constituționale în dreptul român şi comparat (Constitutional institutions and procedures in Romanian and compared law)*, C. H. Beck Publishing House, Bucharest, 2006, p. 78

criticized, giving arguments, the way of establishing powers, the way they function, the way of reflection of the will of nation for the purpose pursued by the state at a certain moment[26]. Constantin Dissescu shows that the state is obliged, on the one hand, to do nothing against the principles of law and justice and, on the other hand, to obey its laws; "It is one of the most significant acquisitions in the evolution of legality"[27]. His theory recalls that in Strasbourg, represented mainly by Carré de Malberg, who developed the doctrine of the rule of law in the form of "*the principle of legality"*.

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[27] Dissescu, Constantin, *Dreptul constituţional*, Editura Librăriei Socec&Co. Societate anonimă, 1915, p. 23, quoted by Vrabie, Genoveva, *Organizarea politico-etatică a României (Organization related to politics and etatism of Romania)*, 2nd volume, Cugetarea Publishing House, Iaşi, 1999, p. 45

FREE MOVEMENT OF LAWYERS WITHIN THE EUROPEAN UNION

Viorica POPESCU*

Abstract*: According to the Law No 51/1995 or the organization and practice of the lawyer's profession, the lawyer has a fundamental role, namely that of promoting and defending the rights, fundamental freedoms and legitimate interests of individuals*[1]*. The importance of this liberal profession has determined the European Union to adopt a series of regulations allowing the lawyers to perform their profession in all Member States as effect of the complete recognition of the professional title received in the origin state. The free movement of lawyers within the European Union is the result of the application of the communitarian objective of maintaining and developing a space of freedom, security and justice, within which the free movement of persons is guaranteed. This right to free movement is not recognized for all liberal professions activating within the legal area, but only for lawyers, who also enjoy a series of sectoral Directives, with the condition to possess a professional title. Despite the professional routes of qualification differently stated by each Member State, the Union through its sectoral Directives and mainly through the Directive of Stability and the Directive of services aimed to unitary regulate this right for lawyers performing cross-border services.*

The current article aims a brief analysis of the communitarian legal regulations in this area, as well as of the legal practice of the Court of Justice of the European Union.

Keywords: *lawyers, cross-border services, directives, European Union*

After the adoption of the Lisbon Treaty[2], the European Parliament and the Council have enhanced the attention on the uniformization and dynamicity of the national legislations of the Member States, to ease the specialized assistance and counseling or representation during the civil or commercial procedures.

Liberal legal professions, including lawyers, are one of the means of creating jobs for entities, subsidiaries, branches or groups of economic societies willing to invest in areas of economic interest beyond the borders of the states in which have been legally established. The globalization of different markets of products or services, the free movement of capitals and labor force have imposed a flexibilization of the legal procedures in civil or commercial matters, the adjustment of the informational circuit, processing data quickly and eliminating administrative blockages.

The lawyer was and remains an important actor in solving the matters of administrative or legal nature, being an authorized representative of the assisted party, a connoisseur of the law and judicial or extra-judicial procedures. The nature of the

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[1] Art 2 Para 2 of the Law No 51/1995 on the for the organization and practice of the lawyer's profession, republished in the Official Gazette of Romania, Part 1, No 440/24 May 2018.

[2] The Lisbon Treaty was published in the Official Journal of the European Union C 306/01.

services provided to the clients or consumers by the lawyer is more and more diversified, in line with social developments.

The European Union has among its fundamental values the principle of free movement of persons and services[3], reason for which was permanently preoccupied with the unitary recognition of the professional titles acquired in any of the Member States, the exercise of the profession in states different than the one attesting the training, for the nationals of the Member States. The recognition of the diplomas and professional titles for the persons who have passed the stages of licensing and post-university, the recognition of the qualifications was materialized by a Council Directive of 1988[4]. The communitarian normative act stated general provisions for the recognition of the license degrees issued by any authorized institution, if the duration of the studies is of least 3 years.

A lawyer who is fully qualified in a Member State may exercise his profession under the professional title received in that state[5]. The arguments underlying the recognition of a professional title in any of the EU Member States have been the rapid integration of the lawyer into the profession pursued in the host state, the pursuit of the same objectives as those acquired in the State of origin, and the change of professional rules and the evasion of their execution and enforcement.

The recognition of the right to practice advocacy in a different state than the one of residence was a difficult process, each state trying to protect its own structure of lawyers. Nevertheless, the intervention of the EU at the level of legal regulation has represented the premise of development and inter-institutional collaboration, that currently all EU Member States recognize the right to practice a lawyer, a form of exercise of the profession or a form of professional association for lawyers residing in a State other than the one in which they obtained the professional title under which they continue to exercise their prerogatives the host State.

Initially, a small number of Member States allowed from the outset to practice as lawyers without a period of professional training, but the adoption of a number of European regulations subsequently allowed the swift integration of professions as well as the lawyer's profession in order to exercise freely, an independent title or an employee.

The opening at European level of the space of free movement for the professional owners of the title as lawyers in other states than the one of residence was marked by the adoption of two European directives, namely: Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services[6] also known as the Directive of Services and the Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the

[3] Treaty establishing the European Union (Lisbon Treaty 2007/C306/01) Art 3 Let c) and Art 7 Let a).
[4] Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, published in the Official Journal of the European Union L 19, p.16; special edition 05/vol. 2.
[5] Directive 89/48/EEC.
[6] Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, published in the Official Journal of the European Union L 078/17.

profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained[7] also known as the Directive of Stability.

Other communitarian acts regarding the performance of cross-border counseling services are:

1. Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes[8];
2. Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications[9];
3. Directive 2006/123/EC of 12 December 2006 on services in the internal market[10];
4. Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters[11].

Among the enlisted communitarian normative acts, the most important one is the Directive 95/5/EC. Its adoption aimed the uniformization of the basic regulations within the EU Member States and to create an efficient and simplified means by which a lawyer has his qualification recognized, according to the internal procedures of the origin Member State and who, for certain reasons, aims to practice law in other state. The provisions came to meet the objective needs of the natural or legal persons who wanted to address law professionals to meet the needs of counseling, representation, or giving specialist advice in civil or commercial legal relationships. Increasing trade flows on a free common market, diversifying social relations in the sphere of production or commodity exchanges, as well as freedom of association or family-related issues have led to many judicial or administrative blockages, requiring uniformity in procedures and the recognition of professional titles[12].

The Directive does not lay down rules of a strictly internal nature and does not affect the international rules. Its purpose is that of recognizing certain rights given by the quality as lawyer, who is compelled to obey the national regulations, conditionalities and effects that the internal norms of each state impose to its own professionals. The obligation to practice in the host state under the title with which they

[7] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, published in the Official Journal of the European Union L 77/36.

[8] Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, published in the Official Journal of the European Union L 026/41. The provisions of the Directive shall apply for all EU Member States, except Denmark. Between Denmark and other Member States the European Agreement on the Transmission of Applications for Legal Aid of 1977 shall be applied.

[9] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, published in the Official Journal of the European Union L 255/22.

[10] Directive 2006/123/EC of 12 December 2006 on services in the internal market, published in the Official Journal of the European Union L 376/36.

[11] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, published in the Official Journal of the European Union L 136/3.

[12] Directive 2008/52/EC – Pct. 5.

are registered in their state of origin, represents an objective differentiation between its national lawyers and those representing the interests of justice seekers or consumers interested in cross-border services.

The definition of the profession as lawyer[13], stated by the Directive refers to "any person who is a national of a Member State and who is authorized to pursue his professional activities under the titles of the origin State"[14].

The areas of jurisdiction refer to legal advice and counseling in the law of the State of origin, international law, the right of the host state and the uniform right of the European Union, the provision of services recognized by the provisions of the Directive 77/249/EEC. Were excepted from the provisions of this European act, the United Kingdom of Great Britain (currently under the procedure of Brexit) and Ireland[15], who have expressed their reservations about the recognition of other successional procedural forms or rules applicable to real estate area, beside the national ones.

The Directive on Stability allows the collaboration of a lawyer from a Member State with one who practices under the title received in the origin State, for the purpose of an efficient representation of the consumers. The jurisprudence of the Court of Justice of the European Union shall be mandatory for all Member States after the adoption of the Decision No 427/85 in the case file *European Commission v Germany*[16]. In order to ensure the good functioning of justice and to guarantee the fundamental rights and freedoms of persons, goods and security of the civil circuit, access to high-quality professional services, it has been necessary to integrate lawyers of the Member States effectively if they meet the requirements of the directives and national laws.

According to Art 4 of the Directive 77/249/EEC – the Directive on Services, the activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence.

The practice of the profession, regardless of the state of origin, may be achieved either through an independent activity, or through a remunerated one (with a salary). A lawyer practicing advocational services, regardless of the means of performance, shall have the obligation to maintain the quality received in the origin state in order to enjoy the Directive, an efficient collaboration between the competent organs and authorities being necessary especially in the area of disciplinary procedures[17].

[13] Directive 98/5/EC – Art 1 Para 2 Let a).

[14] Idem Art 1 Para 2 Let a) which states the professional titles in different states of the EU, namely: Belgium – Avocat/Advocaat/Rechtsanwalt; Denmark – Advokat; Germany – Rechtsanwalt; Spain – Abogado/Advocat/Avogado/Abokatu; Sweeden – Advokat; France – avocat; Ireland – barrister/solicitor; Luxembourg – Avocat; Holland – Advocaat; Austria – Rechtsanwalt; Portugal – Advogado; Finland – Asianajaja/Advokat; Sweeden – advocate; United Kingdom- Advocate/Barrister/Solicitor.

[15] In UK and Ireland are exempted the successional procedures or some internal provisions referring the real estate area.

[16] CJEU – European Commission v Germany has stated by the decision ruled in case 427/85, drafted on 27 February 1988, the right of the persons found under a judicial procedure in front of a national court to be represented by a lawyer from that state together with one or more lawyers from his own state of origin.

[17] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 on reasoning the initiative, pct. 12.

The ending of the normative approach is represented by the means laid at the disposal of this category of professionals in the performance of specific activities holding a title issued by the origin state, but for the recognition of experience, qualification and attestation from the host state. To the same extent, according to Art 48 and 52 of the Treaty, as interpreted by the CJEU, the host Member State has the obligation to take into consideration the experience acquired within its territory, so that after a period of 3 years in the exercise of his profession in any of the States of the Union, he is granted the right to full integration into the organizational structures of that State, being able to obtain the necessary attestation in his own structures, after examination of the level of knowledge of the specific law institutions, and the appropriation of the language of that state[18].

The possibility of practicing in common with other forms of exercising the profession in the host state, including association in a form prescribed by law, should not be used to prevent or discourage definitive establishment in the host state, States being required to provide the necessary safeguards to ensure professional independence, the exercise corresponds to professional standards, the level of representativeness without prejudice to the profession.

Also, it must be mentioned the fact that cross-border services practiced by lawyers may have a permanent or a temporary feature. In relation to this aspect, the CJEU stated in the case file C-55/94 – Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano[19] that "the temporary feature of the services provided, stated by Art 60 Para 3 of the EC Treaty shall be evaluated depending on the duration, frequency, periodicity and continuity".

The activities that lawyers may fulfil in the practice of their permanent activity in any of the Member States, under the professional title received in a different state are:

1. They perform the same professional activities as any other lawyer practicing under the title received from the competent authority from the origin state;
2. Provide assistance regarding the law of the state of origin, the communitarian law, the international law or the law of the state in which the lawyer effectively practices;
3. In the performance of the activities of legal representation of a client, to the extent to which the domestic law does not state this right for its lawyers, may impose the recognition of this qualities only in association with lawyers or forms of practices in the host state or to collaborate with a lawyer pleading in front of the judicial authority and who may be held responsible before it either personal or with an *avoue* who practices in that court[20].

Art. 5 Para 2 of the Directive 98/5/EC states an exception in the meaning that the Member States which authorize in their territory a prescribed category of lawyers to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land which, in other Member States, are reserved for professions other than that of lawyer may exclude from such activities lawyers

[18] Art 10 of the Directive 98/5/EC.
[19] CJEU – Case C-55/94 – Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0055&from=EN, accessed on 6 May 2019.
[20] Directive 98/5/EC – art 5.

practicing under a home-country professional title conferred in one of the latter Member States".

For a good functioning and administration of justice the Member States may draft specific norms for access to supreme courts and for the performance of the attributions specific to specialized lawyers.

One of the conditions mentioned for a lawyer to practice his activity in another Member State is that of registering, based on Art 3 of the Directive of Stability with the competent authority of the host State. According to Para 2 of the same article, "The competent authority in the host Member State shall register the lawyer upon presentation of a certificate attesting to his registration with the competent authority in the home Member State. It may require that, when presented by the competent authority of the home Member State, the certificate be not more than three months old. It shall inform the competent authority in the home Member State of the registration". Regarding this aspect, the CJEU has stated in Case C-506 – Graham J. Wilson v Ordre des avocats au barreau de Luxembourg the "right of a lawyer of [another] Member State to practice on a permanent basis the profession of lawyer under his home-country professional cannot be subjected to a requirement of proficiency in the languages of [the first] Member State"[21].

Regarding the application of the deontological norms, those applicable to lawyers practicing cross-border services are those from the host state, but only for the activities performed within its territory. Really, a lawyer is subjected to a double deontology, namely that of the state of origin and that of the host state, for cross-border services.

Conclusions

The activity of lawyers is based on the freedom of practicing (Art 56 of the TFEU) and is protected by the fundamental values of the legal profession, which "guarantees the proper fulfilment, by the lawyer, if his mission, which is being recognized as essential for the correct functioning of each society".

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[21] CJEU – Case C-506/04 – *Graham J. Wilson v Ordre des avocats au barreau de Luxembourg*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62004CJ0506&from=GA, accessed on 6 May 2019.

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ABOUT IUS SCRIPTUM AND THE DEVELOPMENT OF LEGAL SCIENCE

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Abstract*: More bound forms of political-juridical thinking with laic character started to appear, both in Moldova and in the Romanian Country, towards the middle of XV century, when, promoting a policy of consolidation of feudal state and of a more focused centralisation, under the conditions of constituting a religious organisational unity, the lords leading the state, with the support and through Church, introduced written legislation, the same on the entire Romanian territory.*

Keywords*: ius scriptum, feudal law, legal science, unwritten law, Romanian territory.*

1. Introduction

Evolution of thought and Romanian juridical science are closely related to the development of society. In this study, referring to the period prior to constituting law as science, we shall deal with the ideas and conception of some significant personalities of the time. We shall focus on their juridical, as well as political thinking, both expressed in documents and legislations, that had an important role in the development of Romanian juridical science.

The period of IX-XIV centuries is characterised by the assertion of Romanian people, as distinct personality from an ethnical perspective, with own political organisation and juridical norms. The ancient Romanian law, as Dimitrie Cantemir stated as well, was *ius non scriptum*, that is an unwritten law.

The existence of Romanian unwritten law, with a strong identity, was acknowledge as well by our neighbours, calling it in the official documents, drafted in Latin, *ius valachicum*.

In the Romanian chancelleries, the law is known as *The Custom of Ground* or *The Law of the Country*[1], with the same disposals for all Romanian countries.[2]

Therefore, the name of *Law of the Country* means at the same time its territorial, unitary nature, since it is the law of a country, of a territory inhabited by the same Romanian population.

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[1] The expression of *Law of the Country* presents the best the contents of Romanian juridical custom.

[2] Romanians have called these norms, *law*, having the signification of *unwritten norm*, signification explained by Nicolae Noica (in *Romanian philosophical saying*, Scientific and Encyclopaedic Publishing House, Bucharest, 1970, p. 174), coming from the Latin *re-ligio*, that is *inner law with faith and consciousness*, since *law* at Romanians means as well *religious faith*. Christian law influenced the moral contents of the consciosness of Romanians since their ethnogenesis. Therefore, when *nomocanons* (church laws) appeared, in the XV century, Romanians called them *God's laws* or the *Laws of God*.

The Law of the Country is a Romanian creation, generated by the lifestyle of ancestors, developed by Romanians under the conditions of organisation in collectivities and feudal political formations.[3]

In order to define the sphere of enforcement of the *Law of the country*, one shall rely on the assertions of Nicolae Bălcescu:

The Law of the Country substituted as well the political constitution and of civil register and of criminal register. The Law of the Country is an inclusive law system, of a society politically organised in countries, including all norms of unwritten law that rule the organisation of states on local and central level, the juridical regime of property, the juridical status of individuals, the organisation of family, the successions, contracts, collective liability in criminal and tax field, repression of criminal acts and judging trials.

These norms of law must be construed and enforced in conformity to the principles of equity, since in the Romanian conception[4], justice is equity.

It must be considered that during all this period the Romanian feudal law had a strong religious nature, and also that unwritten law predominates comparatively to written law.

2. Ius Scriptum

More bound forms of political-juridical thinking with laic character started to appear, both in Moldova and in the Romanian Country, towards the middle of XV century, when, promoting a policy of consolidation of feudal state and of a more focused centralisation, under the conditions of constituting a religious organisational unity, the lords leading the state, with the support and through Church, introduced written legislation, the same on the entire Romanian territory.

During the following period, that lasted until the end of the XVI century, when feudal immunities started to be limited, and lord force to consolidate, the feudal law includes juridical principles more and more systematised and crystallised.[5] Naturally, the juridical thought registers evolutions, as well the base of which cannot dispense with the legislative, unwritten or written background, certain in terms of contents and accurate as formulations.

In this respect, *the Precepts of Neagoe Basarab to his son Teodosie* (1519-1520) may be considered the first attempt of theorizing the policy of centralised feudal state. With a double character, laic and religious, the work contains elements of public law (receiving messengers, military organisation, rules concerning the organisation of war

[3] The juridical norms related to the organisation of principality and voivodeship represent the beginning of *public law* in the Romanian Countries.

[4] Based on the Romanian principle, according to which, the law system is conceived by Celsus as, *ars boni et aequi,* where *bonus* is the social wellbeing which refers to the protection of social values, and *aequi* is equity.

[5] From a doctrine perspective, Traian Ionaşcu, Mircea Duțu, *History of juridical sciences in Romania*, Academia Româna Publishing House, Bucharest, 2014, p. 17.

etc.), for the explanation of which the author declares himself partisan of the idea of authority of lord power for the substantiation of which he used the religious argument.

In the same XVI century, it is noticed a beginning of differentiation between canonic law and laic law, between church law and royal law, being focused distinctions, both practical and theoretical, between public and private law. On their turn, the by-laws of Saxon borough included own regulations.

These include *Statuta iurium municipalium saxorum* (1583), juridical masterpiece which, inspired from Roman and German law, was to satisfy the new desires of urban economy in full development from Saxon towns. The drafting of *bylaws* was preceded by a juridical activity rather intense, carried out by the humanists of the era, one of them being Johannes Honterus from Braşov. In this two juridical works, he supports the substitution of feudal law with a new Roman ruling, based on humanism, which may correspond to the needs of municipal bourgeoisie in formation.

Also, in the same period, some principles of natural law are also established. Thus, in Transylvania, in the *Tripartitum of* Ştefan Werböczi -1517[6], code of laws appearing immediately after the peasant war headed by Gheorghe Doja[7], it is defined the notion of „people", including only the aristocrats, and the notion of „populace", assigned to non-aristocrats, to the peasants constituting the majority of Romanians. By this act, the Romanians are completely excluded from the political life of Transylvania. Distinction was made between law and customs, between church and laic law, between law, justice and jurisprudence, between public law and private law and even between natural law and positive law. By its contents, the *Tripartitum* occupies an intermediary place between written and customary law, being a codification of both forms of law in force in such era. *The code* has an introductory part, *prologus,* which includes a range of juridical principles and three parts widely corresponding to tripartite division of law in the law of individuals, goods and actions, division used by Romanian jurisconsults in the presentation of their juridical system. The third part deals with the law and local customs of Transylvania.

In the XVII century in the writings of great scribe aristocrats and mainly in the works of historians, elements of laic thought appeared theoretically substantiating the restriction of lord prerogatives and the increase of the role of great aristocrats, by consolidating the political power of manorial council, by control of state apparatus by the great aristocracy, through the organisation of military forces under the heading of great aristocrats, by their consolidation of feudal exploitation etc. It was simultaneously acknowledge, in a more restricted form, however, the role of Ottoman suzerainty, in the life of Romanian Countries. For instance, Grigore Ureche (1590-1647), partisan of aristocrat regime, supported the need of written laws with a view to restrict central power and secure the political power of great aristocracy, declaring himself however an adversary of Ottoman power.[8] A similar conception we encounter at Miron Costin

[6] The original title is *Tripartitum opus iuris consuetudinarii inlycti Regni Hungariae partiumque adnexarium.*

[7] He was a small Szekler nobleman from Transylvania, who led the peasant revolt against great Hungarian owners (magnates) of ground from 1514, which bears his name.

[8] *Annals of the Country of Moldavia*, 2nd edition, managed by P.P. Panaitescu, Academia Publishing House, Bucharest, 1959.

1633-1691 and Ion Neculce 1672-1745 in Moldova, as well as at Constantin Cantacuzino 1650-1716 in the Romanian Country.

The feudal law of these times is characterised by beginnings of codifications, founding their expression in the juridical monuments of XVII century, firstly, in the codes of laws of Vasile Lupu, *Romanian book of learning* (1646) and Matei Basarab, *Rectification of law* (1652), both being an original arrangement of Roman – Byzantine law to the realities of Romanian life. Acknowledging as sources of law, the law and customs, the *Book* …. makes a difference between world law, *ius humanum* and God law, *ius divinum* and the law of human nature, *ius naturale*. The first concept corresponds to positive law, the second to the canonic law, whereas the third, to the idea of natural law. It makes an important step on the line of development of Romanian juridical thought, approaching, although only implicitly, issues of a classical juridical importance: principles of enforcement of laws, rights and obligations of individuals, patrimony, field of obligations, successions, institutions of criminal law etc.

The second law, *Rectification of law,* has the same contents as the *code of laws* of Vasile Lupu, to which it is added a part of canonic law from Byzantine law.

Feudal laws by excellence, these codes provided for the inequality of individuals in front of law in a pyramidal medieval society, focused on multiple vassalage relations, consolidating, simultaneously, a state heading when the lord aspired more and more obviously to the position of Byzantine autocratic.

The crisis of aristocratic regime determines the occurrence of new forms of government, of absolute monarchy, supported by lords such as Şerban Cantacuzino (1640-1688)[9] and Dimitrie Cantemir (1673-1723)[10].

An important contribution to the development of juridical science in this period was that of the patriotic lord and great scribe Dimitrie Cantemir, representative cultural personality of his era who, by his wide and multilateral activity, as well as by these advanced, laic and humanistic ideas, was one of the most important European science people. Referring to his works that include as well researches in the field of juridical sciences[11], we should outline the signification of his contribution by knowing the history of Romanian law, the scientific value of his theories and the manner of presenting it[12]. Partisan of the ideas of the school of equity, supporter of the state of law, where the lord himself is subject to laws and justice, for the sake of the people, protector of law and justice towards the people and predecessor of illuminism, Dimitrie Cantemir considered necessary the evolution of people by culture, with a view to provide the social evolution and preparation of the conditions for the achievement of reforms with a view to improve the situation of peasants. Dimitrie Cantemir supported from a historical perspective the traditions of hereditary monarchy in the Romanian Countries, the subordination of aristocrats to central power and the independence of the country towards the Ottoman Power, proving that the tribute which the lords of

[9] He was the lord of Romanian Country between 1678 and 1688.
[10] He was lord of Moldavia (March-April 1693; 1710-1711) and great scribe of Romanian humanism.
[11] Such as, *Description of Moldavia* (*Descriptio Moldaviae*), Academy Publishing House, Bucharest, 1973.
[12] Roman origin of ancient law; receiving the Romano-Byzantine law; hereditary nature of lordship and of succession to lord seat, supporting an enlightened monarchy relied on equity; origin of high dignities; suzerainty and position of Romanian Countries in international relations.

Moldavia agreed to pay to Turks was only a sign of rendering, not a tribute of submission.[13] The absolute monarchy, *the lordship that dominates alone*, regarded by Dimitrie Cantemir in the form of European enlightened absolutism, was not however a monarchy of divine law, since, in his conception, the lord had to observe law and consider the *voice of vulgus* and the *whispers of herds*. Consequently, he conceived political history as a succession of monarchies, led by the laws of nature, with periods of ascension and regress.

These ideas were reflected in Romanian written law at the end of XVII century and the beginning of XIX century.[14]

Absolute monarchy, in the form of enlightened absolutism, was supported by the annalists of the time[15], in their works.

During the period of division of feudalism (end of XVIII century – first half of XIX century) primary were the norms of the *customs of ground*, the norms of feudal law, as well as the written norms. In parallel, it was developed the action of codification of law, being removed the regional and municipal particularities. There were however enforced as well the norms included in the *charters* and *lord establishments*, with respect to financial organisation, the organisation of courts, procedure of judgement[16], adoption[17], alienations of premises, gypsy servants[18] etc.

The rulings of Fanariot lords included juridical norms concerning the state organisation and social structure.[19] They included advanced measures, with respect to the organisation of administration, by introducing the waging of state officers and mainly with respect to tributes, with a view to remove the abuses concerning the determination and collection of it.[20]

Register of laws (1780) of Alexandru Ipsilanti, elaborated in Greek and Romanian, reflects some authoritarian ideas concerning the state heading, equally taken over from Byzantine law (*Basilicans*) and from the *customs of ground* and included in the scope of defence of the privileges of feudals and their power (consolidation of ownership) a range of improvements concerning the concerning the court organisation and judgement procedure.

The civil code of Moldavia (1817) of Scarlat Calimach, having as source of inspiration *the Austrian Civil Code* (1808) and maintaining some feudal traits, reflects the beginnings of division of feudalism and constitution of capitalist relations. It

[13] Traian Ionaşcu, Mircea Duțu, *History of juridical science in Romania*, Romanian Academy Publishing House, Bucharest, 2014, p. 20.
[14] *Register of laws* (1780) and *Code of Calimach* (1817).
[15] Ion Neculce and Mihail Cantacuzino.
[16] *Charter of Alexandru Ipsilanti* in the Romanian Country from 1775.
[17] *Charter of Alexandru Moruzi* in Moldovia from 1800.
[18] *Catholic charter* in Moldavia from 1785.
[19] *Establishments of* Constantin Mavrocordat from 1740 in the Romanian Country and 1743 in Moldavia.
[20] *Manual of laws* of Mihail Fotino (Photinopoulos), written in neo-Greek, in three different draftings (1765, 1766, 1777), it may be characterised as code of laws, treaty and legislative codification meant to be adopted as legislation in the Romanian Country. It included excerpts from *Basilicans* and from other Byzantine collections adapted to Romanian social realities. Meant to become an official *Code*, *the Manual from* 1766 was used in Romanian Country and Moldavia only as simple private collection of Byzantine law. In its drafting from the year 1777, where it is paid a special attention to the *customs of ground*, it served to the drafting of the *Register of laws*.

provides a wide juridical frame, which materialises the newest requirements of juridical and political thought.

The Law of Caragea (1818), having as source of inspiration the *custom of ground*, *Basilicans and Register of Law*, although it provided for the feudal relations and even the rests of servitude, it included as well few new disposals, due to some sporadic influences of the *Code of Napoleon* (1804).

A characteristic of bourgeoisie ideology was the modern concept of *illuminism* which, following the instauration of a *national state* and the creation of a *national society*, included all fields of social life. Therefore, *illuminism* represented a political-cultural formula corresponding to the needs of renewal of feudal state and of adjustment of it to the new economic development. *The new formula* intended to prevent the revolutionary subversions, that had taken place in England and France and to shape the medieval institutions in the spirit of the new social-economic requirements and bourgeois claims.

The only solution was the *enlightened absolutism,* meant to modernise, by reforms, *a state crushed by social contradictions*.[21] The enlightened absolutism claims new concepts and positions opposite to state and justice. The monarch exercises the prerogatives in virtue of equity (and not divine), based on a *contract* concluded with its people, to whom it has to provide *happiness*.

In its first form, illuminism developed in our country as a wide progressive movement, the beginning of which was noticed in the *Transylvanian School*, by its representatives: Samuil Micu (1745-1806), Gheorghe Şincai (1753-1816), Petru Maior (1761-1821) and Ion Budai-Deleanu (1760-1820). They criticised the feudal structure and the exploitation of peasants by aristocrats and bourgeois, supporting the need of acknowledgement of equal political rights for the Romanians from Transylvania. Their program claims, besides the elimination of bondage[22], equal rights for all inhabitants, political emancipation of Romanians, by acquiring the status of *constitutional nation*[23] and not *tolerated.* Such claims relied, both on equity, and the right of Romanians resulting from their number and proportion of duties incumbent upon them opposite to the state.

On the same line, by *Supplex Libellus Valachorum* from 1791, Romanian bourgeois from Transylvania asked for being instated in full citizenship rights, equal rights with *constitutional nations*, proportional representation in the political life of the country. This report was grounded, both on historical arguments, proving the authority of Romanians opposite to all the other nations of the country and juridical (constitutional)[24] based on which one asked for proper rights in public life. We notice that these aren't *new rights* but a *reinstate in the prior status* (*restitutio in integrum*).

In this context, it must be outlined the contribution of the first Romanian author of juridical treaties, Vasile Vaida (1780-1835), who, in the three volumes approaching Transylvanian civil law and his history (1824-1826)[25], proved to be the partisan of the ideas of Latin school, by the historical-juridical arguments brought in favour of Roman

[21] Traian Ionaşcu, Mircea Duțu, *quoted work*, p. 23.
[22] This was as well one of the objectives of reformist policy of Iosif II.
[23] State component.
[24] Romanians were the most numerous nation and with the highest number of duties.
[25] It was considered the *first treaty of civil law* drafted by a Romanian.

origin and continuity of Romanians from Transylvania, as well as their claims and social and national rights.

In juridical plan, a first manifestation of illuminism takes place in the form of spreading the theory of equity, on which it shall rely the elaboration of codes in the centuries XVIII-XIX. It will influence as well the activity of the jurists of the time, such as: Petre Depasta, Greek annalist of Constantin Mavrocordat; Toma Cara, translator of the books of Armenopol from 1804 and author of the tree parts of *Pandects* (including the law of individuals); Andronache Donici, representative of the new rationalist-metaphysical thinking, of the centuries XVII-XVIII and author of the famous juridical manual, used as an authentic code of laws, until the adoption of the *Code* of Scarlat Calimach; Damaschin Bojinca, personality with a wide juridical culture; Christian Flechtenmacher[26], one of the main authors of the *Code* of Calimach.

An important thinker of such times, in the Romanian Country, was also Naum Râmniceanu (1764-1839) who, under the influence of the French Revolution and Illuminism, supported the annulment of privileges, equality of all citizens and their representation in the Public Assembly, by deputies, equal rights to learning, as well as the other *illuminated nations of Europe*.

The illuminist conception entailed other important juridical demarches as well. Therefore, the report of the Moldavian middle bourgeoisie, from 1822, entitled *Carbonaro Constitution*[27] reflected the influence of the ideology of lights and of the ideas of Montesquieu, preoccupation to enforce equal rights for all categories of aristocrats, as well as the maintenance of feudal relations in agrarian economy. *The report* included almost accurate translations of the *French declaration of rights*[28]. As for state organisation, the conception of authors relied on the restriction of the lordship powers and acknowledgement of the law of Public Assembly, as representative body of aristocracy of all categories, of effective heading of the country.

Based on the same illuminist ideas and with a view to develop juridical education, the bourgeois conceptions about the state were amplified; it was gradually created a scientific terminology; the juridical notions were advanced and works with high scientific level were published. Therefore, the main characteristics of juridical sciences in the century XVIII – the beginning of the century XIX-lea consisted in the preoccupation of spreading juridical knowledge and creating a Romanian legislation according to the requirements of Romanian people. Consequently, during the lordship of Constantin Mavrocordat (1711-1769)[29] more consolidated forms of studying law

[26] He considers that the development of national culture is a decisive factor for social and political emancipation.

[27] Whose main author was Ionică Tăutu (1798-1830), social-political thinker from the beginning of XIX century in Moldavia, partisan of the ideas of French Revolution and active participant to the political fights, being speaker of middle and small aristocrats and thus a predecessor of forty-eighters.

[28] Law of property, freedom of consciousness, individual freedom, equality in front of law etc.

[29] In the Romanian Country, he reigned six times: September 1730 – October 1730; 24 October 1731 – 16 April 1733; 27 November 1735 – September 1741; July 1744 – April 1748; c. 20 February 1756 – 7 September 1758 and 11 June 1761 – March 1763 and in Moldavia four times: 16 April 1733 – 26 November 1735; September 1741 – 29 June 1743; April 1748 – 31 August 1749 and 29 June 1769 – 23 November 1769.

appeared, and during the times of Ioan Gheorghe Caragea (1812-1818)[30] it was constituted a position of Latin and jurist professor occupied by Nestor Craiovescu[31], author of a law course, highly appreciated by contemporaries.

The Charter from February 1816, of constitution of the position of *professor of laws teaching this science to those who want to learn it*, included significant recitals, *since the science of law, both for judges, and for those summoned and eventually for all people is useful, as one which, based on a natural principle, stands as the most healthy support for humanity*.

The Fanariot lords, like bourgeois, to whom juridical attributions were assigned, knew the Byzantin and occidental legislations in original.

During the same period, it was manifested as well the wish of juridical specialisation on superior schools.[32]

The development of capitalist relations influenced the development of the process of systematising the law on subjects. Thus, at the *College from Saint Sava*, Constantin Moroiu[33] (1837-1918) was teaching Roman law[34], criminal law and commercial law, and at Mihăileană Academy from Iaşi it was made the proposal to present during the classes the public legislation and private legislation of peoples. Between 1839-1840, Petru Câmpeanu[35] (1809-1893) sustained for the first time a course of public law and theory of law, and Gheorghe Costaforu (1821-1876), the first rector of the University of Bucharest, professor of civil law, published, in the form of a magazine, *Historical Magazine*, including studies of civil law.

At the beginning of the century XIX the political-juridical conceptions of the era encountered their expression in the *Organic Rules*, introduced by tsarist occupation, in 1831 in the Romanian Country and in 1832 in Moldavia. They were considered by specialists our first constitution, since the state organisation relied on the principle of separation of powers in the state. Thus, the legislative power is entrusted to the Public Assembly, the executive power – to the lord, elected for life, and the court power – to county courts, independent bodies. Also, one stipulated measures concerning the organisation of the profession of lawyer. By the document entitled *Science of collectivity* dated 30 September 1831, published in the *Official Gazette*, it was issued the registration certificate of Ilfov Bar[36], further turned into the Bar of Bucharest.

During the revolutionary year 1848, the juridical science expressed the basic ideas of the political acts of revolution concerning the state and law.

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[30] Former Fanariot lord of Romanian Country he became famous for the first *Code of laws* from Walachia bearing his name, *Caradja Legislation*.

[31] Erudite aristocrat from Romanian Country, knowing the laws of the country and Roman-Byzantine law.

[32] In this respect, in 1817 Gheorghe Bibescu and Barbu Ştirbei went to Paris, followed in 1820 by the brothers Filipescu, Bălăceanu, Racoviță, and the sons of Dinicu Golescu left to Switzerland.

[33] Pioneer of national education, he was officer of Royal Army, with degree of captain. He participated to the Russian-Turkish war against Ottoman Empire. He was one of the most important masons from Romania and also a very active philatelist.

[34] Deemed right of the country.

[35] Of Transylvanian origin, professor of philosophy, successor of Eftimie Murgu.

[36] An *authentic Board of lawyers,* subscribed by the Great Logothete of Justice Iordache Golescu, where are mentioned 22 lawyers *ranged at the Divans from Bucharest*, see Mircea Duțu, *History of Bar of Bucharest*, Herald Publishing House, Bucharest, 2006, pp. 50 and the following.

Thus, Nicolae Bălcescu (1819-1852) criticised acerbically the existent social-juridical structures, supporting the need of a new and modern constitution, state suzerainty, equal rights of states. In this respect, he supported with legal arguments, the right of Romanian principalities to independence towards the Ottoman Empire, proving that the so-called *Capitulations* were in fact, treaties of alliance, based on which suzerain power was to provide to Romanian Countries military protection and support.[37]

By its form and contents, *the Proclamation from Islaz* (9/12 June 1848) was above all political acts of the times, being considered an authentic constitution. Among the *social-economic claims*, recorded in the program of Romanian revolution we state: observance of the principles concerning freedom and equality; putting peasants in possession of lands, with or without compensation; removal of feudal privileges; overall tax contribution.

As for the *rights of people and citizens,* one drafted a range of petitions concerning: removal of feudal ranks; abolishment of bondage; political equality of all citizens of any nationality; securing the rights and freedoms of citizens; elaboration of democratic reforms in administration, justice and army; enforcement of the principle of justice and equality in exercising public functions.

As for the *modernisation of political life*, the program of Romanian revolution, includes a range of principles characteristic to bourgeois constitution: constitutional monarchy; separation of powers in the state; ministerial responsibility; inamovibility of judges; equality of all citizens opposite to laws; institution of national guards.

An important representative of this period of national renaissance, who expressed his convictions, both in his scientific, historical and legal works, and in the reforms' program targeting a modern state organisation, was Mihail Kogălniceanu (1817-1891). In this respect, he stated that social evolution may be achieved by reforms, as well as by the spread of culture. In the revolutionary program entitled *Desires of national party of Moldavia* (Iaşi, 1848), drafted by him, measures and reforms were included finding continuation, in the juridical form, in the *Constitution Project for Moldavia*, document to which he had as well a significant contribution: removal of any ranks and personal or birth privileges; equality in civil and political rights; *Public Assembly* to include all states of society; lord elected by all states of society; ministerial responsibility and of public officers; individual freedom, of domicile and press; equal and free school education; incorporation of jury for political, criminal and press cases; introduction of civil, commercial and criminal bourgeois registers; removal of beat to death and beat; reform of county courts, inamovibility of judges, removal of county courts and special commissions; freedom of cults; political rights for all inhabitants of Christian religion; gradual emancipation of Jewish; secularization of monasteries' fortunes; new norms concerning policy and prisons; measures for removal of corruption.

Innovative political and juridical conceptions were presented as well by the lord Alexandru Ioan Cuza (1859-1866), jurist. With Mihail Kogălniceanu will incorporate the modern Romanian state, creating a range of reforms such as: agrarian reform (putting peasants in possession of lands), electoral reform based on qualification (but with a lower qualification), reform in education; modern state organisation, development of national

[37] Traian Ionaşcu, Mircea Duțu, *quoted work*, p. 28.

institutions, unification and modernisation of legislation by adoption of civil code, criminal code, code of civil proceedings, code of criminal proceedings.

In parallel, the social-economic and national claims of Romanians from Transylvania in the revolutionary year 1848, were sustained with strong juridical arguments by Avram Iancu[38], *Rake of mountains (1824-1872)*, being himself a good knower of law. In this respect, on 20 December 1850 he bequeath all his movable or immovable fortune, *as support for the incorporation of an Academy of Laws, strongly believing that the fighters with the weapon of law may impose the rights of the nation*.[39]

A remarkable Romanian politician, historian, philosopher and jurist, university professor, Simion Bărnuțiu (1808-1864) was one of the main organisers of the revolution of 1848 in Transylvania. He participated to the *National Meeting from Blaj* on 18/30 April 1848 and in May 1848. He conceived and shared his famous manifest *Proclamation from March* 1848, presenting his principles, previously formulated, starting with 1842, about Romanian nation and the fate of Romanians from Transylvania. His social claims were indissolubly related to acquiring independence and suzerainty of Romanian nation, acknowledgement of the nationality of Romanians, observing the principles of equal rights of all nations living in Transylvania. He was a partisan of national-idealist theory of equity putting it in accordance with the requirement of the era, using it in the scope of satisfying the desires of social and national release of Romanians from Transylvania, as well as democratic organisation of Romanian national state. In his works, *Dereptulu naturale privatu* (1868) and *Dereptulu naturale publicu* (1870), defining equity as *primitive fontana and conditioning validity of all positive law*, he elaborated the practical precept according to which, *any honourable and noble man cannot observe but that positive law corresponding to a national law*.

As professor at the Mihăileană Academy (1855-1860) and then at the University of Iaşi (1860-1864), Bărnuțiu educated people with new thinking, people who further on asked for democratic reforms, universal vote, expropriation of aristocrat and monasteries' properties.

3. Conclusions

The Romanian modern state, before becoming an institutional reality, was imagined as a political project, of entire generations of tourists, thinkers, political people. This project was outlined in the XVIII century. He continued in the XIX century, when the juridical and political thinking created a program of reforms and national emancipation, which outlines the project of modern Romanian state. In this respect, the programs of the revolutions from 1821 and 1848, as well as of secret political societies, between the two revolutions contributed to the clarification of the political project.

[38] He was head in fact of the Motilor Country in the year 1849, leading the army of Transylvanian Romanians, in alliance with Austrian Army, against Hungarian revolutionary troupes under the heading of Lajos Kossuth.

[39] Dr. Ioan Fruma, *About Transylvanian juridical spirit*, *Transylvania Magazine, Organ of Astra*, Sibiu, February 1944, no. 2, p. 101.

In conclusion, we may assert that, in the first half of XIX century, the Romanian society developed progressively, looking for new models and forms of organisation. Between the reforming theoretical activity (reform projects, reports) and social-political action (revolutions, secret societies), the official reform programs only accelerated the achievement of this political project.

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PROTECTION OF VICTIMS OF VIOLENCE AGAINST WOMEN IN SPAIN

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Abstract: *Violence against women, especially of gender and domestic, is a universal phenomenon based on the historical inequalities between women and men, which have led to their domination and discrimination.*

The countries of the European Union suffer from this same problem, and although there are differences in its incidence, there is the conviction and consensus to act without delay in its prevention and eradication throughout its territory.

This commitment is reflected in the 2011 Council of Europe Convention about prevention and combat of violence against women and domestic violence, called the Istanbul Convention. This document marks the lines of action of the different ratifying countries.

This paper presents a vision on the measures of awareness, prevention and protection of women, which are carried out in Spain to combat this social scourge. The offences referred to in the criminal law, the rights and aids which correspond to victim women, the police and judicial procedures that apply to the persecution of these facts and to the protection of women, making a special mention to "Comprehensive monitoring System in cases of Gender Violence (Viogen),to police assessments of risk and to police protection measures that are applied.

***Keywords**: Violence against women, Rights, Crimes, Risk Assessment, police Protection.*

1. Introduction

In order to ease the tracing of this exposition, the Convention of the Council of Europe in 2011 on the prevention and control of violence against women and domestic violence and the Istanbul Convention (henceforth referred to as the IC) will be used.

The IC was ratified by Spain the 10/04/2014 and by Romania the 23/05/2016[1], although in this case with any reservation that will be said.

We will focus on the most important procedural aspects from the point of view of the health care and police protection of those victims. In each development the comparison with the regulations or procedure that corresponds in Spain will be exposed.

The Preamble to the IC recognizes that the realization of fact and the right of equality between women and men is a key element in the prevention of violence against women and that this violence is a manifestation of historical imbalance between women and men that has led to the domination and the discrimination of women by men.

It is also recognized that domestic violence affects women disproportionately and children are victims of this violence, even as witnesses.

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[1] https://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/210/signatures.

According to a study by the EU Fundamental Rights Agency FRA, published in 2014[2], 22% of women over fifteen years old, with a current or previous partner, have experienced physical and/or sexual violence by that couple.

It is Therefore considered that the phenomenon of violence on women in the EU constitutes a violation of their human rights, and that the protection of these is still an obligation, so that the efforts needed to achieve a Europe free of violence against women and domestic violence must continue.

In Spain, according to a macro survey about the violence against women made by the Government of 2015[3], 13% of women aged 16 or older have suffered physical and/or sexual violence of any partner throughout their lives. It must be considered that the comparison of these statistical data between different countries cannot be exact, since there are differences in the collection systems and in factors such as cultural and the perception of equality.

2. Conceptualization

Article 3 of the IC defines:

"Violence against women" as a violation of human rights and a form of discrimination against women should be understood, and shall designate all acts of gender-based violence which imply or may involve for women harm or suffering of physical, sexual, psychological or economic nature, including threats to perform such acts, coercion or arbitrary deprivation of liberty, in public or private life.

"Domestic violence" means all acts of physical, sexual, psychological or economic violence occurring in the family or in the home or between spouses or ex-existing or current partners, irrespective of whether the perpetrator shares or has shared the same address as the victim.

In Spain, in the Penal Code[4] (SPC onwards) the criminal differentiation is established as follows:

– In article 173.2 SPC, that which is called **gender violence**, refers to the exercised on who is or has been his spouse or about person who is or has been linked to him by a similar relationship of affection even without coexistence.

– And that which is called **domestic violence**, refers to the exercised on the descendants, ascendants or siblings by nature, adoption or affinity, own or of the spouse or cohabitant, or on the minors or persons with disabilities in need of special Protection that with it coexist or that they are subject to the power, guardianship, conservatorship, foster or custody of fact of the spouse or cohabitant, or of person protected in any other relation that is integrated in the nucleus of his family coexistence.

In other words, the aggravation of penalties in gender violence will always be given on the author who has to be a man when he abuses the woman he or she has or has had a relationship with; And the aggravation in domestic violence will be given on

[2] https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_es.pdf.
[3] http://www.violenciagenero.igualdad.mpr.gob.es/violenciaEnCifras/estudios/colecciones/.
[4] Organic Law 10/1995 of the Penal Code.

any person who exerts the abuse on some other of the people with whom it lives at that moment in the domicile and family nucleus, can be the woman on the man.

– Article 22.4 of the SPC contemplates a circumstance which also aggravates the perpetrator's criminal responsibility, and is, when the offence is committed... for **gender reasons**. This aggravating factor finds its basis in the situations objectively y sexist and discriminatory, without that it is necessary an intentional (intention) specific of the author to subordinate or to dominate the woman. According to the Spanish Supreme Court, it should be applied in all cases where it acts against the woman for the mere fact of being, although between the perpetrator of the crime and the victim there is no relationship whatsoever, and even it is compatible with the aggravated kinship. In this way, the criminal specificity would be extended to any type of violence on women, according to the IC.

– Article 23 of the SPC contemplates the mixed circumstance of **kinship**, which can mitigate or aggravate criminal liability, and which consists in being or has been the aggrieved spouse or person who is or has been linked in a stable manner by analogous relationship of affection, or being ascendant, descendant or sibling by nature or adoption of the offender or his or her spouse or cohabitant. This circumstance aggravates, in general, those crimes which have an eminently personal content (such as crimes against life, physical integrity or sexual freedom of persons), and it has its reason that precisely the aggressions within this circle of people deserves a greater reproach as they threaten the moral duties that must prevail in family relations. This would broaden the criminal specificity to violence among the most direct relatives, although there is no current coexistence, according to the IC.

3. Normative review

Article 7 of the IC establishes that States Parties shall adopt the necessary legislative or other measures to prevent and combat these forms of violence against women and must involve from national, regional and local authorities up to Civil society organizations.

In Spain, the most relevant legislation for the prevention and fight against violence on women is as follows:

– The Penal Code (SPC), approved by Organic Law 10/1995, with numerous modifications to date, and where all offences and penalties are contemplated.

– The Criminal Prosecution Act (LECRIM in front), which comes from a standard of the year 1882 with a multitudes of reforms, and where criminal judicial procedures are established, highlighting for these facts, the usual procedure for Rapid Trial of Title III, article 416 which regulates the waiver of the obligation to declare certain witnesses, and article 544ter which regulates the order of criminal protection for victims of domestic violence.

– Organic Law 3/2007, for the effective equality of women and men, where as a development of article 14 of the Spanish Constitution proclaiming the right to equality and non-discrimination on the basis of sex, establishes the principle of equality, the consequences Legal acts of discriminatory conduct, and administrative actions for equality in the fields of education, intellectual creation, health, sport, the media, labour, and Administrations.

– The Organic Law 1/2004 of comprehensive protection measures against gender-based violence (LIVG in front), which was the turning point when addressing the phenomenon of gender-based violence in a decisive and comprehensive manner. It includes measures to sensitize, prevent and detect these violences, the rights of women victims, judicial guardianship with the creation of the Courts of Violence on women and the special Prosecutor's Office against this violence, and the review of the measures Protection and security of the victims. It develops at the next point.

4. Comprehensive Protection

Following the IC, chapter IV (articles 18 and below) establishes the general obligations concerning the protection and support of the victims of any act of violence.

In Spain, in the LIVG, this protection is addressed in an integral way, as expressly indicated by the title of the law, involving all the Public Administrations and Institutions dependent of the Government of the State, of the Autonomous Communities, and of the Local Administrations.

The support services are configured in a network that covers the whole national territory by means of its approximation to the citizenry, in the presence care provided by the City Councils through the Social Services in general and through the Centers of Information to the Woman in particular, and in more deferred attention by means of telephone services also specialized, free and 24 hours, such as the information phone 016 which also leaves no trace in the mobile terminal of the caller, or the telephones of the Woman who have active the Autonomous Communities.

Specialized support services usually provide the following services:

a) Information to the victims.

b) Psychological care.

c) Social support.

d) Monitoring of women's rights claims.

e) Educational support to the family unit.

f) Preventive training in the values of equality aimed at their personal development and the acquisition of skills in non-violent conflict resolution.

g) Support for training and job placement.

In cases of urgency, outside the usual working hours, various Autonomous Communities have psychology services enabled, which after activation by the Bodies and Security Forces (police), can move to the point of demand for care Immediate to a victim who needs it.

There are also shelters (foster homes) to provide urgent and safe accommodation for victims who need it and their children, being able to be activated from the Bodies and Security Forces, and even facilitating the means of transport to the place, as it is required in a city other than that of the woman's origin.

In Chapter V of the IC, referring to material rights, article 30 States that the State should grant adequate compensation to those who have suffered serious damage against their physical or health integrity, to the extent that the injury is not covered by other sources.

In Spain, the LIVG recognizes economic rights and aid, which will be modulated in relation to the age and family responsibilities of the victim have as a fundamental objective to provide minimum subsistence resources that allow it to become independent of the aggressor. There are several modalities and compatibilities between them, from the budgets of the different territorial Administrations.

There are other types of aid, not direct economic content, such as facilitating access to certain homes or public residences for older people.

5. Criminal types

Even in the articulated Chapter V of the IC, we contemplate the behaviours that should be categorized as crimes of violence against women, and are quoted below the correlatives in Spain that are considered as crimes in the SPC.

a. In accordance with art. 33 IC – Psychological Violence is defines as intentionally committed to seriously threaten of the psychological integrity of a person through coercion or threats.

The SPC penalised several criminal behaviours that punish these facts, in the next articles:

– Art. 171.4 SPC[5]; Art. 171.5 and 7 SPC[6]; Art. 169 and 171 SPC[7]; Art. 172.2 SPC[8]; Art. 172.3, 2º SPC[9]; Art. 172.1 SPC[10]; Art. 153.1 SPC[11]; Art. 153.2 SPC[12]; Art. 173.2 SPC[13]; Art. 173.4 SPC[14].

[5] The minor threat in gender violence will be punished with imprisonment of 6 months to 1 year or works for the benefit of the community (WBC in front) and in any case deprivation of the right to the possession and carrying of arms-weapons (DPA in front).

[6] The minor threat in domestic violence, if carried out with weapons or dangerous instrument, will be punished with imprisonment of 3 months to 1 year or WBC and in any case DPA, and if it is carried out without those means it is punished with permanent location penalty of 5 to 30 days or WBC.

[7] Serious threats have different penalties depending on the conditions, and will be punished with fines or imprisonment from 3 months to 5 years depending on the severity. There is No specificity for gender or domestic violence, with the possibility of aggravating gender or kinship reasons, if any.

[8] Mild coercion in gender-based violence will be punished with imprisonment from 6 months to 1 year or WBC, and in any case DPA.

[9] The minor coercion in domestic violence will be punished with permanent location penalty of 5 to 30 days or WBC.

[10] The serious coercion of preventing another with violence to do what the law does not prohibit, or compel to carry out what it does not want, is fair or unfair, will be punished with imprisonment from 6 months to 3 years or fine. There is no specificity for gender or domestic violence, with the possibility of aggravating gender or kinship reasons, if any.

[11] Causing less serious psychic impairment, in gender violence, will be punished with imprisonment of 6 months to 1 year or WBC and in any case DPA, and possibility in the interest of the minor, of disqualification for the exercise of the parental authority, guardianship or guardian up to 5 years.

[12] Causing less serious psychic impairment, in domestic violence, will be punished with prison sentence of 3 months to 1 year or WBC and in any case DPA, and possibility in the interest of the minor, of disqualification for the exercise of the parental authority, guardianship or custody from 6 months to 3 years.

[13] The habitual exercise of physical or psychic violence in violence of gender or domestic will be punished with prison sentence of 6 months to 3 years, DPA, and possibility in the interest of the minor, of disqualification for the exercise of the parental custody, guardianship or guard from 1 to 5 years.

[14] The slight unfair injury or vexation in gender or domestic violence will be punished with permanent location penalty or WBC. This slight offense (the insult) is the only one that requires denunciation to be persecuted.

b. Article 34 IC: – Harassment, intentionally committed on several occasions, a threatening behaviour against another person who leads to fear for his safety.

The SPC includes in the art. 172Ter, the *insistently and repeatedly, monitor, persecute, seek physical closeness, try to establish contact, or stick to the freedom or heritage of a person, so that seriously alter the development of your daily life, both in violence of Gender as domestic, will be punished with imprisonment from 1 to 2 years or WBC.*

c. Article 35 IC: – Physical violence, when intentionally committed on another person.

The SPC can give several criminal behaviours that punish these facts. So we mentioned the next articles: Art. 153.1 SPC[15]; Art. 153.2 SPC[16]; Art. 147.1 SPC[17]; Art. 149.1 SPC[18]; Art. 138 and 139 SPC[19].

d. Article 36 of the IC: – Sexual violence, including rape, shall be criminalized when intentionally committed; Consent must be voluntarily provided by the person considering the surrounding conditions.

The SPC can give several criminal behaviours that punish these facts through the next articles: Art. 178 SPC[20]; Art. 179 SPC[21]; Art. 181 SPC[22]; Art. 191 SPC[23].

[15] Causing a minor injury, or beating or mistreating without causing injury, in gender violence, will be punished with imprisonment of 6 months to 1 year or WBC and in any case DPA, and possibility in the interest of the minor, of disqualification for the exercise of the PAT Custody or guardianship for up to 5 years.

[16] Causing a minor injury, or beating or mistreating without causing injury, in domestic violence, will be punished with imprisonment of 3 months to 1 year or WBC and in any case DPA, and possibility in the interest of the minor, of disqualification for the exercise of the PAT Authority, guardianship or custody of 6 months to 3 years.

[17] By any means or procedure cause to another an injury that undermine his bodily integrity or his physical or mental health, provided that the injury requires for his health medical or surgical treatment beyond the simple follow-up of the same one, it will be punished with imprisonment from 3 months to 3 years or fine.

[18] Cause to another the loss or uselessness of an organ or principal member, or a serious psychic illness, will be punished with imprisonment of 6 to 12 years. There is No specificity for gender or domestic violence, with the possibility of aggravating gender or kinship reasons, if any.

[19] Killing another person or concurring certain circumstances will be punished as a prison sentence of 10 to 15 years, or as a prison murder of 15 to 25 years. There is no specificity for gender or domestic violence, with the possibility of aggravating gender or kinship reasons, if any.

[20] The person who will violate the sexual freedom of another person, using violence or intimidation, will be punished as responsible for sexual assault with a prison term of 1 to 5 years.

[21] When it comes of sexual aggression when it consists of carnal access by vaginal, oral or buccal, or introduction of bodily members or object by any of the first two ways, the person responsible will be punished as a prisoner of rape with imprisonment of 6 to 12 years. There is an increase in penalties up to 10 and 15 years in prison for previous behaviors if certain circumstances are given.

[22] Without violence or intimidation and without consent, perform acts that threaten the sexual freedom or indemnity of another person, will be punished as responsible for sexual abuse to the prison sentence of 1 to 3 years or fine; of the abuse consists of carnal access or penetration, the penalty will be prison for 4 to 10 years. The consent must be valid, not considered as such if the victim has his will (chemical submission...) or alibi his freedom.

[23] In order to prosecute these crimes, it will be necessary to denounce the aggrieved person, although after formulating it, his forgiveness would not extinguish the criminal action or the responsibility, so the procedure will continue. There is No specificity for gender or domestic violence, with the possibility of aggravating gender or kinship reasons, if any.

e. Article 37 IC: – Forced Marriages that means an intentionally forcing an adult or minor to marry. The same when you deceive another to take it to a different State for the same purpose.

The SPC contemplates this offense in art. 172 bis SPC, who establish that represents a crime – *when serious intimidation or violence force another person to marry, he or she will be punished with imprisonment from 6 months to 3 years or with a fine, depending on the severity of the coercion or half-employee. The same penalty will be put when forced to another, even with deceit, to leave the Spanish territory or not to return to it. It is considered aggravated if the victim were underage. There is no specificity for gender or domestic violence, with the possibility of aggravating gender or kinship reasons, if any.*

f. Article 38 IC. – Female genital mutilation, when the excision or other mutilation of the labia major or minor or clitoris of a woman is intentionally committed or forced to undergo it.

The SPC contemplates this offense in the article 149.2 SPC, who establish the represents a crime the *causing to another person a genital mutilation in any of its manifestations, facts that will be punished with imprisonment of 6 to 12 years, and possibility in the interest of the minor, of disqualification for the exercise of the parental authority, guardianship or custody of 4 to 10 years. There is No specificity for gender or domestic violence, with the possibility of aggravating gender or kinship reasons, if any*.

g. Article 39 IC: – Forced abortion and sterilization, when a woman is intentionally given an abortion, or a surgical intervention is carried out which aims to terminate her reproductive capacity, both behaviours without her consent.

In the SPC these offences are contemplated in the two articles of SPC, as art. 144 SPC[24] and art. 149.1 SPC[25].

h. Article 40 IC: – Sexual harassment, any unwanted, verbal or non-physical behaviour, of a sexual nature that violates the dignity of a person, creating an intimidating, degrading, humiliating environment, will be punished with penal sanctions or other penalties.

This offense is punishable on the SPC in the article 184 SPC, who establish that, when a person solicits favours of a sexual nature, for oneself or for a third party, in the field of a working, teaching or service-providing relationship, continued or habitual, and with such behaviour will provoke in the victim a serious intimidating situation or

[24] To produce the abortion of a woman, without her consent or with this obtained by means of violence or deceit, will be punished with prison sentence of 4 to 8 years and professional disqualification. There is no specificity for gender or domestic violence, with the possibility of aggravating gender or kinship reasons, if any.

[25] Cause to another sterility or a serious deformity, will be punished with imprisonment of 6 to 12 years. There is no specificity for gender or domestic violence, with the possibility of aggravating gender or kinship reasons, if any. Valid consent may lessen the penalty or exempt from liability when performed by an optional (art. 156 SPC).

Humiliating, it will be punished as the perpetrator of sexual harassment with a prison term of 3 to 5 months or fine. If the author prevails in a situation of hierarchical superiority, the prison sentence reaches 7 months. If the gender or domestic relationship is given, the behaviour would fit in one of the penal types already seen.

Also, in the Organic Law 4/2015 of protection of the citizen security, it is punished with a non penal penalty by the art. 37.5 LOPSC, who establish that: *the realization or incitement to carry out acts that threaten the freedom and sexual indemnity of a person, will be punished as minor infringement with fine from 100 to 600 Euros. This administrative offense applies to any person, even if there is no relationship between them.*

i. Accessory penalties on the SPC. In all crimes punishable in Spain in the field of gender and domestic violence, penalties may also be imposed on those established in each case, and are those collected in article 57 and 48 SPC, including the deprivation of the right to reside or go to Determined Places and the prohibition of approaching or communicating with the victim.

And the penalties of WBC that correspond to each offence, may consist in the participation of the penalized in training programs or of sexual re-education or other similar (art. 49 SPC) Like those of equal treatment and non-discrimination. These courses may also be imposed in cases of suspension of the prison term (art. 83 SPC).

j. Aggravated crimes of arts. 153.1,2, 171.4,5 , 172.2 , and 173.2. In these articles, the penalties for these offences shall be imposed in the upper half when the fact is perpetrated in the presence of minors, or using weapons, or taking place at the common home or in the victim's home, or performing a penalty or a security or safety measure.

6. Police Protection

In Chapter VI of the IC, the investigation measures, procedural procedures and protective measures applicable to these criminal offences are collected.

A general principle is found in Article 50 IC, which states that the security forces and bodies (police) must respond quickly and effectively to all these forms of violence by providing adequate and immediate protection for the victims. An assessment of the risk of lethality and recurrence of this violence is envisaged by the relevant authorities (art. 51 IC), and in a situation of immediate danger, the author leaves the residence of the victim for a certain period of time, prohibiting you from entering or contacting your home (art. 52 IC). For all victims of the violence referred to, it is envisaged the possibility of benefiting from appropriate protection orders and with legal sanctions (art. 53 IC).

Also considered are measures of protection in this IC (art. 56 and 57) a series of measures to protect the rights and interests of victims, such as those referred to their right to be informed of the course of the procedure, to be heard, to the protection of

their image, to avoid contact with the authors, and free legal assistance. Special Protection If the victim is less.

With regard to the ex part and ex officio allegations (art. 55 IC), for the offences covered by this Convention relating to physical, sexual, forced marriage, genital mutilation, abortion and compulsory sterilization, the processing of Procedures will not be entirely dependent on the victim's submission of complaints and may continue the complaint even when it retracts or withdraws its complaint. In the case of Romania, this State has made a reservation in the instrument of ratification of the IC with regard to this article as regards the minor physical violence, so this circumstance will not be effective until 01/09/2021.

In Spain, for a better understanding, the path of a victim of gender violence will be described from his first contact with the support services or the police, until the end of the protection.

Attention to the victim in Social Services (non-Police). If the woman addresses these services in support of any Administration and considers that she is the victim of any of the gender or domestic violence, she may prove it to exercise all the rights and Be a recipient of all the aid that corresponds to the LIVG (according to RDL 9/2018). The woman will not be able to accede to the police and judicial protection, because for this it is necessary the complaint that initiates the procedure in this way.

Arraignments before the Police. If the victim appears before the police, "in no case will you leave the police units without having been valued or have been assigned the police protection measures that correspond to the level of risk resulting", this According to the police Protocol for the protection of victims of gender Violence of the Year 2019, which expressly establishes it, even if it does not want to denounce the fact.

Police report. The victim can directly formulate it, or a third person who has knowledge of the fact; the police have a special obligation to prosecute these offences (ex officio) for their own knowledge or investigation, in any case to the Judicial Authority.

Of the total of complaints made in the year 2018, 66% were put by the victim and 15% directly by the police (Report on gender violence of the General Council of the Judiciary, Spain).

In Spain, the offences referred to in the IC must be pursued by trade, even without denunciation of the victim, that is to say, in addition to those already mentioned for those purposes in article 55 CE, also those of harassment and psychological violence, all with a single exception, the aforementioned art. 173.4 SPC of insult or slight unfair vexation. A different procedural position is that of the crimes of sexual violence, where the complaint is required to initiate the procedure (that manifests the violence or intimidation or the non-consent), but after that, the procedure continues although the victim Forgive the aggressor or want to withdraw the complaint.

In the act of denunciation, the victim may be accompanied by the person she appoints. She have the right to a lawyer, a specialized shift in gender-based violence,

and totally free, which will help her in the act of the complaint and represent you throughout that procedure and those that derive from it, including the family. The victim will be informed of her right not to testify against her partner or other spouse, if she did not want, both in police headquarters and later in the Judicial Office (art. 416 LECRIM). 11% of victims of gender-based violence accepted this right not to declare (Report on gender violence of the General Council of the Judiciary, Spain 2018).

Also, she will be informed of all the rights that have access to, which are basically those established in the LIVG (social, psychological, legal, economic, labour, housing, etc.). If the emotional situation requires it, the victim may be assisted in that Police Unit by an emergency psychologist required from that location to the service on duty. Another help that may receive appear in the situation that the victim urgently need a housing solution for her and your children; in that case, the home service will be required from that Dependency, and even the means of transportation for your transfer, to the guard service.

The victim will provide the statement in the police, before a specialist trained officer (art. 31 LIVG) for the attention of these cases, if possible, ensuring that she is always interacting with the same agent, female if possible.

The victim's contact with the aggressor will always be avoided, being in separate Dependencies and adapted as far as possible for the first one.

In the European Union Handbook of good police practices to combat violence against women, it is established in point 3, that it is desirable that police bodies create specialized police services in preventing, investigating and protecting women victims of this violence, formed in this regard, as well as the opportunity to dispose in the Police Units of rooms and spaces adapted to the needs of these victims and witnesses, to avoid their secundarial victimization.

The protection order. In this police appearance, the victim will be informed of the possibility of requesting the Order of Protection, with an explanation of its effects.

It is regulated in the article 544 ter LECRIM and in Law 27/2003, where it is intended that through a quick and simple judicial procedure, before the Court of criminal Investigation, the victims of violence of gender and domestic can obtain a comprehensive statute of protection, which includes civil measures (on the couple and children on the use of housing, visitation, compensatory economic benefits for children and/or victims...), criminal (prohibition of approach to the victim, prohibition of communication with the victim, intervention of the aggressor's weapons...), and welfare and social protection.

It is usually handled with the police, and is resolved within the maximum period of 72 hours in Court of Guard or Violence on Women. It is therefore a judicial resolution of the criminal order, which is granted when there is evidence of the commission of such an offence and there is an objective situation of risk to the victim.

The measures of protection that have been granted in greater proportion the year 2018, according to the Report on gender violence of the General Council of the Judiciary in Spain, have been, the prohibition of rapprochement 67.3%, the prohibition of communication 66.8%, the provision For food 20.4%, the attribution of housing

17.2%, the suspension of the visitation with children 2.9%, and the suspension of the guard and custody of the children 4.4%.

Another possibility of activating the Order of Protection is when a European Order of Protection is processed before the Judicial Authority according to the Directive 2011/99/UE, derived from the mutual recognition of penal resolutions in the EU of Law 23/2014, displaying then the same effects.

The arrest of the author of the fact. Conforming to articles 492 and 520 of the LECRIM, the cases in which the perpetrator of a criminal act may be detained shall be established.

In the protocol of action of the forces and bodies of security and of coordination with the judicial organs for the protection of the victims of domestic violence and of gender, it is established that will proceed to the arrest of the author when the entity of the facts and/or the IF Sight of risk advise. That is, in addition to the severity of the facts themselves, it has special relevance to determine the arrest of the author, the circumstances of risk that occur in the case, the antecedents of the author, existence of other aggressions to the victim, addictions, Collaboration with agents, etc.

All these circumstances will be reflected in the Police Valuation of the Risk that will be made to the effect.

Police assessment of risk. In Spain is implemented at a national level a computer application called "Comprehensive monitoring System in cases of Gender Violence" (Viogen in front), which brings together the different public institutions that They have competence in this area, where all the relevant information of each case is integrated, where the risk assessments are made, and where the protection of the victims is monitored at the national level.

All police bodies that protect victims of gender-based violence have access to the System. But also officials of Penitentiary Institutions, Social Services and Courts, including in these forensic teams that can also carry out risk assessments in cases of "special relevance" that the system itself qualifies or That the Judicial Authority requires.

With all available data of the case, the police with specialized training in the subject, will complete the indicators of the valuation of risk VPR, and the system will yield a predictive result of the level of risk, classified at risk Not Appreciated, Low, Medium, High or Extreme. Depending on the level of risk, a number of compulsory police measures are established to be carried out by the police to protect the victim, and they are initiated at the same time. This procedure is established in a police Protocol that evolves in time, the current one derives from the Instruction 4/2019.

During the year 2018, the number of cases with active police protection was 23 at extreme risk, 262 at high risk, 5.901 at medium risk, 26.877 at low risk and 25.435 at risk not appreciated. At the end of that year, 1.183 telematics tracking devices (aggressor locator bracelets) were active, and 13.376 Atenpro phones (urgent warning for victims). And of the 47 women killed in the year, 14 had filed a complaint (almost 30%), and of these, 5 still had the protection in force. Bad data these last.

The judicial procedure. After the instruction of the police officer with the pertinent proceedings, this will be referred to the Judicial Authority of the criminal order.

When the offences are of simple instruction and the penalty of imprisonment which they carry does not exceed 5 years, the procedure which is habitually applied is that of rapid prosecution of the articles 795 LECRIM and following.

From the Police Office of Complaints, and through access to the programmed Agenda of subpoenas, it is determined date and time for rapid trial, as soon as possible, citing all parties to appear in the Court of Guard or violence on women determined.

In this first court appearance, a view is held which determines whether or not the requested Protection Order is granted, and its scope. If there is conformity with the facts by the perpetrator, it can be dictated at that time sentence that carries a tax on the corresponding penalty. If there is no conformity, the procedure continues with the instruction of the judicial proceedings to be considered and its subsequent prosecution in the Criminal Court competent in the field of gender-based violence.

If the alleged offence cannot be processed by the rapid trial procedure, an immediate hearing shall also be carried out in the Court of Guard to determine exclusively the granting or not of the Order of Protection of the victim, continuing the processing by the procedure that corresponds to their prosecution.

The Courts of violence on women, have been created as specialized bodies in this field and therefore in art. 87ter of the Organic Law 6/1985 of the Judiciary has been assigned extensive competencies, ranging from the instruction of the processes to demand Criminal liability for crimes of gender-based violence, the adoption of protective orders, the sentencing of conformity where appropriate, to the breaches of sentences in this field; But also, when one of the above is given, they attract for their competence the derivative civil procedures, like those of filiations of the children, dissolution of the marriage, schemes of visits of the children, custody and custodial, benefits by food, etc. Everything is concentrated in a single judicial body to have a broad vision of the circumstances concurrent in each case facilitating their prosecution.

7. Monitoring of Protection

The most common protective measures that apply to a victim of gender or domestic violence are the prohibition of approach to less than "x" meters of the victim, his domicile, place of work or any other where he is, and the prohibition of communication of the victim by any means.

These measures are always agreed by the Judicial Authority, either when it grants the order of protection (art. 544ter LECRIM), as a precautionary measure as long as there is no prosecution and a firm conviction in its case (art. 544bis LECRIM), or as an accessory penalty in the sentence (Art. 57.2 SPC).

The follow-up to verify compliance with these prohibitions is carried out by members of the security Forces, and specifically by certain policemen with that specific function of victim protection, and with specialized training in the field.

These policemen belong to the State Bodies, the autonomic Policemen, and the Local Policemen (more than 30,000 policemen of the National Police and Guardia Civil, and more than 3,000 autonomic and local policemen). All of them with access to the Application Viogen where all the cases are recorded, the police actions of protection, and the valuations of risk.

In the coordinating police Force of the territorial demarcation that corresponds to the domicile of the victim, one receives the juridical car where it is agreed the protection of this one, and according to the existing agreements it proceeds to its allocation to any of those Bodies which assumes that protection.

Depending On the initial risk assessment VPR, there are already some performances, which will necessarily involve a personalized interview by the protective agent assigned to the victim, as well as a contact with the aggressor to inform him of the Protection provided by that one, compiling in these and other actions all the information necessary to proceed to a new valuation of the risk, which is called VPER evolution.

According To the level of VPER risk (not appreciated, low, medium, high or extreme), the relevant police measures are adopted. It also makes a study of the circumstances of vulnerability of the victim, its environment and others, and establishes with it a Customized Security Plan PSP with the measures and recommendations of self-protection best suited to your case.

The most common measures that are valued individually in the PSP are referred to changes in telephone routines with contacts and social networks, routines of commuting through daily activities, adopting self-protection measures of the victim and with the children, if any, information to their trusted environment, etc.

If no incident occurs, new contacts are made each time and the risk level is revalued. If an incident occurs, it revalued at that time and the police measures are adapted to the new situation.

The most common incident is the failure by the author of the prohibitions decreed by the Judicial Authority, which entails the commission of a new crime of breach of conviction, measure of security or precautionary measure of the art. 468 SPC, which is punished with a prison term of six months to a year.

This process continues as long as the agreed judicial measure, leaving everything registered in the Viogen System. At the end of the judicial measure, the case is inactivated in Viogen if a major risk is no longer observed, or only police follow-up is maintained until that risk falls, and this, even if there are no longer the legal prohibitions in force.

8. Police protection Measures.

In Instruction 4/2019 approving the current protocol for the police valuation of the level of risk of gender violence, the management of the safety of victims and the monitoring of cases in the Viogen System, police measures are established in Protection.

We quote some (not all) of each level of risk:

Level of Risk	**Compulsory Police protection measures**
Not Appreciated	Provide the victim with information on the resources available in their demarcation. Provide the victim with self-protection recommendations.
Low	Discreet telephone and/or personal Contacts with the victim. Communication to the aggressor that his case is subject to police control and scope of the agreed judicial measures. Withdrawal of the aggressor's weapons, if available.
Medium	Personal Interview with the victim. Occasional Control of the victim and his/her environment (counter surveillance to detect the aggressor). Accompaniment to the victim to appearances where there may be risk by coincidence with the aggressor. Periodic Verification of the enforcement of judicial measures by the aggressor (home and environment surveillance). Urge the Prosecution to follow the aggressor's compulsory monitoring via a telematic control device.
High	Frequent and random Control of the victim and his/her environment (counter surveillances to detect the aggressor). And Children's School. Random Control of the aggressor's movements and sporadic contacts with their environment
Extreme	Permanent Protection of the victim until the imminent threat cases. In-and out-of-school Surveillance of the victim's children. IntensiveControloftheaggressor'smovementsuntilitceasestobeani mminentthreat.

9. State Pact Forecast

In the year 2016 the Plenary of the Congress of Deputies of Spain, unanimously approved that the signing of a "Pact of State" between Government, the Autonomous Communities and the FEMP, and that the spirit of consensus between the political parties is regained, the powers of the State and civil society, with a firm commitment to combating gender-based violence.

It is reflected in 2018 with the determination of 292 measures, which are included in the SECOND National Strategy for the Eradication of violence on women 2018-2022.

Main axes include:

The promotion of actions directed to the whole society raising awareness about the damage caused by inequality and violent behaviours against women and their children. These actions will have as main recipient’s children, adolescents and young people, to internalize equality as an essential value for the coexistence between women and men. They can participate, and participate in these actions, the specialized police officers.

Improving the institutional response to victims of gender-based violence through the coordination and networking of all the Administrations and entities involved.

Improving the assistance, assistance and protection offered to women victims of gender-based violence and their sons and daughters.

With regard to the fulfilment of the Istanbul Convention, measures 102, 103 And 104 come to establish that the concept of gender-based violence must be extended to all criminal types contained in the IC, even if there is no relationship with the aggressor. Until this development occurs, the criminal acts contemplated will receive the answer established in the SPC.

And finally, the economic commitment to the policies for the eradication of violence against women by providing the corresponding support in the General Budgets of the State and other administrations.

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THE SPANISH CIVIL REGISTRY

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Abstract: *This article deals with matters related to the Civil Registry, it is composed of two parts, the initial one will be related to the Spanish Civil Registry, the historical regulations and its own registry evolution until its current institution: Directorate General of Registries and Notaries, for conclude everything related to the nationality and the conformation of the State. The part about the birth records must be covered and only mention the remaining registry functions, without deepening more than the indispensable value each one of them equally.*

Now as for the administration of Justice, which includes the functions of the work carried out by the Civil Registry, where the record of the events of the individuals that make up the State, allows the recognition of legal personality, from the cradle To the grave, Antonio Agundez would write, who as Judge of First Instance, also pointed out that by the registers, pass the citizens of the whole nation, the generation of generations

Keywords: *Nationality, Statehood, Registry acts, Civil Registry, legal personality.*

1. Introduction

The function of the Civil Registry becomes of utmost importance, when systematized, when it is ordered, and timely informed; this function exercised with such fullness allows life in society. Keeping an up-to-date record of the civil history of the people, allowing access to the documentary information of the nationals that comprise it, it will allow the meeting with the evident integral relevance of the Spanish State, who will be in a position to grant security and certainty to the relations legal, between government and governed.

One of the many factors that promotes the constant updating of the Civil Registry is immigration in Spain, so it is required to face the present reality, with a view to the future from a legal position, whose characteristics are among others; the certainty of each registry act, linked to an opportune service. The Civil Registry is therefore the institution that allows the State the necessary organization of the population nucleus. Under this condition, public order can be established, since the civil situation is of interest to the population link, to its position in society; in this understood everything concerning the civil state, it is also of public interest.[1]

Analysing the registration model in Spain will contribute to enhance the proposal of this thesis; with regard to the analysis of the legal regulation that empowers the institution, for the issuance of public documents that verify the civil status of persons,

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[1] Linacero de la Fuente, María, *Derecho del Registro Civil*, Caramo Producciones Editoriales, Barcelona España, 2002, p. 22.

changes in the organization and functioning of the registry activity may be indicated. Towards the last part we will review the Civil Registry Law of July 21, 2011, order in vacation legis, Law that repeals the current Civil Registry Law, as a response of the legislator to the complex Spanish population, immersed in globalization, composed of immigration, integration and nationality.

2. Civil Registry Law, Law of June 8, 1957

During the development of the social organizations, they did not demand an institution like the current Civil Registry. Those that came to exist in principle as a registry of people, did so for tax purposes or to recruit members of the military. The premise valid at a certain time and time maintained that all roads lead to Rome and on the legal level this is not the exception, remember the parallelism of concepts of status; *liberatis, civitatis, familiae*[2], present in all cases and as a whole, as the state of the person and its enormous relationship to the social state, linked at all times to personal legal capacity. Similar precedents may have been found in Greece as well as other peoples of antiquity; the census can be placed in the Bible, as for the population[3] count of those over twenty years and men, Moses[4] and his brother Aaron[5]; the Parties in the Middle Ages in relation to status define it as a condition or way in which they live or are[6]; but they are the Parochial Records, made since the church in the Middle Ages began to be the protagonist not only of the religious life of the States, but in those records that clerics carried throughout Christendom to document births, through baptisms, marriages and deaths, work that was a faithful reflection of family life and social organization. The Council of Trent of the year 1563, laid the foundations for this registration activity to be carried out in a homogeneous manner[7].

To exemplify the above, note the documentation that has been classified by the temple of San Martiño de Mondoñedo[8] in Ferrol – Galicia, which dates from the 6th century, is a monument that some consider the first cathedral built in Spain, experts also refer to probably it is in all the south of Europe, conserved until the present time. In this temple there are documents like the censuses made between 1623-1791[9], the digital

[2] Linacero de la Fuente, María, *op. cit.* p. 15

[3] Census is currently a statistical operation consisting of performing, with decennial periodicity, a complete count of the population with knowledge of its structure (age, sex, nationality, residence status, marital status, place of birth, migratory variables, studies in progress , level of instruction, relationship with the economic activity, branch of activity, profession, professional situation and socioeconomic status, among other data that are of public interest about the civil status of the persons.

[4] Book Fourth of Moses, NUMBERS, Chapter 1, Census of Israel at Sinai: 1: 2 Take the census of the whole congregation of the children of Israel according to their families, by the house of their fathers, with the number of the names, all the males by their heads. http://iglesia.net/biblia/libros/numeros.html

[5] Linacero de la Fuente, María, op. cit. p. 27

[6] Idem. The different treatment is: *free or servant or aforesaid; hijodealgo and those of lesser guise; clerics and laymen; Christians, Moors and Jews; male and female (another yes, of better condition is male than female in many ways); legitimate sons and of gain ...*

[7] Linacero de la Fuente María, op. Cit. p. 28

[8] http://www.galiciaaberta.com/

[9] http://www.mcu.es/archivos/docs/ArchivosIglesia.pdf

archive with the relation of these archives of the church, ordered by diocese is available at the electronic address of the Ministry of Culture of Spain. This task that for a long time the church exercised in fact, was conferred by right in the year 1539 through the Royal Edict of Villers-Cotterêts[10], which entrusted him with that administrative function in the French State until 1781, date in which it was created by Constituent Assembly, the Municipal Registry of Marital Status. Due to the influence of the laicization brought by the French Revolution, the existing parish archives became the property of the State.

In Spain, the Civil Registry was created in 1870, when the Civil Registry Law[11] and its Regulations were issued, in response to the freedom of religion proclaimed in the Constitution of 1869. As a general law, it was applied in Spain, except in some towns that did it later and others that already had a Municipal Registry, for example, in Arenys de Mar (Barcelona) since 1820 or in Sitges (Barcelona) they started it in 1840-1841. Only to place dates and other countries we comment that in France in 1792 and in Italy in 1866, they had civil registers[12].

The Law of 1870 required throughout its validity, of about a thousand adaptations and provisions that tried to fill the gaps and correct the deficiencies of the system[13].

The legal organization of this order, maintained the division of the Spanish State into municipalities, which empowered the judges of the Civil Registry to the simple collection and preservation of civil registries. So we can say that the judges did not have a legitimating function, because with the performance of their acts, they only contributed to be fedatarios before the facts that they knew. Reason by which before any request of modification to the registry, this could only be made before the existence of sentence coming from a judge authorized to review the request. Formal advertising, Francisco Luces Gil tells us, was total and disclosure was unnecessary, so in general the registration was limited, since there were important facts for the civil status outside the registry[14].

3. The Spanish Civil Registry

It is the public institution, constituted and regulated for the official record, by registration, of the existence, marital status and condition of the persons[15], and of those others, for purposes expressly required as means of proof and publicity[16]. Its function has its origin in the Spanish Constitution, article 149, in terms of the powers of the State, fraction 1 and the eighth paragraph of the same states[17]:

[10] King Francisco I establishes, by means of the Ordinance of Villers-Cotterêts, on August 10, 1539, that baptisms should be registered by parish priests in the French language, and no longer in Latin, and in duplicate.
[11] Luces Gil, Francisco, *op. cit.* p. 22
[12] http://www.scgenealogia.org/catalunya/investigar.htm#RC
[13] Aguiló Casanova, Claudio, *El registro Civil La organización y los hechos inscribibles*, Ed. Bosch, Barcelona, 2009. p. 7
[14] Ibidem, p. 30.
[15] Marital status as a condition of the person is understood as the qualities that range from; personality, name, sex, filiation, age, emancipation, and age, legal declarations of capacity, conditions relating to marriage, nationality and neighbourhood and absence and declaration of death.
[16] *Ibídem,* p. 8
[17] http://www.congreso.es/docu/constituciones/1978/1978_cd.pdf

Article 149. Powers of the State

1. The State has exclusive competence over the following matters:

8th Civil Legislation, without prejudice to the conservation, modification and development by the Autonomous Communities of civil, provincial or special rights, where they exist. In any case, the rules relating to the application and effectiveness of legal norms, legal-civil relations relating to forms of marriage, ordering of records and public instruments, bases of contractual obligations, rules to resolve conflicts of laws and determination of the sources of law, with respect, in the latter case, to the rules of regional or special law.

Being completely clear that this is an exclusive competence of the State, the ordering of public records and instruments, hence the importance of the Civil Registry, and the functions performed are relevant, as to each of the records and means proof of them.

Registration functions are vital for today's complex political organizations. In Spain the social complexity and its correspondence with the constant legal evolution of the European Union, serves as a requirement to solve both the adequate guarantees of legal constancy, and those that allow the presentation of evidence on the facts concerning the civil status. Either on the one hand that the Spanish State is interested in knowing the civil status[18] of its citizens, with purposes, statistics, electoral, census, fiscal and all those administrative activities; or product is the interest of the governed, whose request is that of a reliable public record of their marital status; both generate the registry activity.

The aforementioned functions are found in both the Civil Code, and the Civil Registry Act of June 8, 1957, this Act is composed of 102 articles, (both 101 and 102 have been repealed), the set is distributed in seven titles, with regard to the Regulation of the Law of the Civil Registry, approved by decree of November 14, 1958, it is composed of 408 articles, abrogating the ones included from 383 to 408, divided into eight titles. The titles in both orders are the following; Title I, general provisions: Title II, Registry organs; Title III general competition rules; the IV to the seats in general and how to practice their registration; for titles V, Vi and VII, of the registration sections; of rectification and other procedures; and economic regime, respectively, for Title VIII of the Regulations of the Registry, this includes the regulation of the doctors of the registry.

Unlike the previous 1870, this Law with a vast content on the functions of the Civil Registry, rated by Luces Gil as superior to most of the existing ordinances[19]. The law from its inception allowed the organizational modification, allowing the establishment of main registries, in the headquarters of the courts of first instance, with offices in the municipalities as subalterns; the regulations grant autonomy to the Central Registry to perform registration acts for citizens residing abroad; principles are established based on the accuracy and legality of the acts of registration; the

[18] The International Commission on Marital Status for the term civil status gives the following definition: In a broad sense, the civil status is the status (status) of the person in private law, between birth and death. The main elements considered that differentiate each person from another are: filiation, nationality, name, address, gender and capacity. http://www.ciec1.org/Etudes/Kluwer2007 - TraducESP-MAE-16.12.2008.pdf Preface, p. 5

[19] *Ibidem*, pp. 30 – 33.

administrative simplification product of this autonomy, in terms of advertising, represents in every act the realization with accuracy and certainty, on the documents that have a probative character, they are authentic titles of legitimation[20]. Advertising is restricted to those data that may be annoying to those registered, such as disclosure about the filiation of children born out of wedlock, abortion, or those causes of dissolution of the marriage bond, as established in Article 21 of the Regulation of the Civil Registry. Finally, regarding the economic regime as established in Title VII, included by Ministry of Law of December 28, 1986, in its Article 98, it is established that the seats of the Civil Registry, the burial licenses and the files are entirely free. relative to the Civil Registry not expressly excepted.

4. General Directorate of Registries and Notaries

The General Directorate of Registries and Notaries is an institution[21], which gives it its unique character[22]. The material law of the Civil Registry, provides that its integration is made up both of the Municipal Registries by the 1st Instance Judge, assisted by the Secretary, as well as by the Consular Registries, in charge of the Consuls of Spain abroad and by the Registry Central Civil As for the actions of judges as members of the judiciary, with administrative activity, as is the activity of the Civil Registry, article 117 section 4 of the Spanish Constitution specifies: The Courts and Tribunals will not exercise more functions than those indicated in the previous section and those that are expressly attributed to them by law in guarantee of any right[23]. The legal basis is found in Title II, Of the Bodies of the Registry, of the Civil Registry Law, in Article 9, where the organic dependency of the Civil Registry, direct is to the Ministry of Justice, the General Directorate of the Registries and Notaries, is the administrative body in charge of carrying out the registration procedures[24].

As for the structure within that same section, in article 10 referring to the organization of the Civil Registry, it indicates the integration by: the civil registries, on the number of these the Ministry of Justice reports that they are currently 431, of these 15 have exclusive competence to the registry procedures, composed by municipal judge or district, who in turn is assisted in his functions by a secretary; the Courts of Peace, there are 7,667, and 177 Spanish Consulates with registry functions[25]. Now this

[20] *Ídem.*

[21] The International Commission on Civil Status gives the following definition to the term civil status, applicable to this function; It is also the public service responsible for drafting the documents that record the events and events, to preserve them and issue extracts from the records (copies or extracts of minutes, family books, certificates, etc.) http: // www.ciec1.org/Etudes/Kluwer2007-TraducESP-MAE-16.12.2008.pdf

[22] http://www.mjusticia.gob.es/

[23] Sospedra Navas, Francisco, *Practica del Registro Civil*, Aranzadi, Navarra, España. 2007. p. 17

[24] The Inter National Commission of Civil Status, for the term civil status applicable to this function gives the following definition: Marital status is also the organization created to leave official record of the elements listed above, namely the mode of verification and registration of events or events that refer to the status of a person (birth, marriage, adoption, etc.), and maintenance of public records. http://www.ciec1.org/Etudes/Kluwer2007- TraducESP-MAE-16.12.2008.pdf

[25] http://www.mjusticia.gob.es/

registry function is found in the Civil Code[26], in Title XII, of the registry of civil status, in article 325, where the acts ... concerning the civil status of the persons will be recorded in the Registry for this purpose.

As for article 327 of the same normative body, the legal value of the seats is regulated by establishing as a principle that the minutes of the Registry will be proof of marital status. As the main function of the three that have been detailed, regarding the probative privilege that the institution has, whether normal or ordinary tests; we must make reference in the Law in citation to its corresponding article 2. Proof of the facts inscribed in the Civil Registry, constitutes the proof of the facts inscribed. Allowing other means of proof for cases of lack of registration or in which it was not possible to certify the seat.

The certifications are an official document whose purpose is to record the existence of facts that interest the applicant. They are public documents, as established by the Civil Registry[27] Law. They can be positive or negative; and the positive ones, in turn, can be literal if they understand the integrity of the entries, or in an extract when they contain the data that especially certify the registration.

Another function is the constancy and publicity of the facts, Article 6. The Registry is public for those who have an interest in knowing the seats, advertising is done by displaying the books, or issuing certificates, the interest is presumed in whom request the certification of them; general publicity may be restricted when it comes to data related to the privacy of individuals, and is carried out through the demonstration and examination of books and by certifications, which are public documents. And finally, we will say about the public faith with which the owner of the Civil Registry has, in acts on the civil status produced by declaration of will. Notoriety to this project is the modifications that this article 6 has suffered, as regards paragraph 4, which was added by article 3, fraction 2 of Organic Law 7/1992, of November 20, RCL \ 1992 \ 2474. Registration registrations may be subject to automated processing[28]. Only to establish a precedent as of that date since derived from this addition, Spain carries out international certifications[29], such as those established in the Hague Convention Suppressing the Legalization Requirement of Foreign Public Documents of October 5, 1961 (Apostille Convention), a subject that will be dealt with more extensively in the next chapter[30].

Understood the above, the academic article contains an open criticism of this resolution, it takes it to the level of Private International Law, to identify not only such serious errors, such as forgetting the best interests of the minor, but also weak points and legal incorrectness; it compares it with other resolutions emanating from other

[26] http://noticias.juridicas.com/

[27] Aguiló Casanova, Claudio, *op. cit.* p. 7

[28] Article 3. Modification of the Civil Registry Law

A fourth paragraph is added to article 6 of the Civil Registry Law of June 8, 1957 with the following wording: Registration registrations may be subject to automated processing. www.westlaw.es

[29] Ministry of Justice. Creates and regulates the Electronic Registry of Apostilles of the Ministry of Justice and regulates the procedure of issuing apostilles in paper and electronic format. BOE May 14, 2011, no. 115

[30] Calvo Caravaca, Alfonso Luis y Javier Carrascosa González, E*n Cuadernos de Derecho Transnacional* (Marzo 2011), Vol. 3, Nº 1, pp. 247-262. www.uc3m.es/cdt

countries, synthesizes the ramblings that exist in this useless and harmful resolution, and concludes with so many errors identified, evidenced, that the resolution will only serve to bureaucratize the internal system of the General Directorate of Registries. and of the Notary, regarding the treatment of this case and the future ones to appear.

Another example analysed of foreign resolution in registration matters, but with repercussions in the European Union, is the case of a minor who is not allowed to register his surnames, due to the prevailing norm in Austria[31].

Of equal relevance is the analysis of the Judgment of the Court of Justice of the European Union of October 14, 2008[32], especially because the author María Dolores Ortiz Vidal, identifies the diversity of legal systems of the member countries of the European Union in terms of the registration matter and its impact on Private International Law in Spain.

5. Structure of the Directorate of Registries and Notaries

The structure of the Directorate of Registries and Notaries is in four sections:

The first, of Births and general; The following acts and registrable facts are: birth as basic[33] personal sheet, filiation, name and surname, emancipation and age rating, judicial modifications of the capacity of the persons, declarations of absence and death, nationality and neighbourhood, as well as parental authority.

The second, Marriages; deaths; guardianships and legal representations, this section is competent for the main registries. The registration entries proceed for the inscriptions, annotations, reference notes, cancellations, and marginal indications on the matrimonial economic regime.

The third, deaths and fourth, guardianships and legal representations. Each one in relation to the civil status of the person.

6. Fundamental Principles of Civil Registry Law

The antecedents of the Spanish registry law are marked and the Parochial Registries have already been established as main; now we mention those of books taken by the secretaries of the city councils during the eighteenth century[34], both are a reference to place the Constitution of the year 1870.

The fundamental ideas or the basic guidelines of acting in the registry function, allow a better understanding of the registry law in civil matters. We must start from a vision of the whole as expected this work make it notice, in the content of each of its

[31] Ortiz Vidal, María Dolores, *Ilonka Fürstin von Sayn-Wittgenstein: Una Princesa en el Derecho Internacional Privado,* en Cuadernos de Derecho Transnacional (Octubre 2011), Vol. 3, Nº 2, pp. 304-316 www.uc3m.es/cdt

[32] Cuadernos de Derecho Trasnacional (Marzo 2009), Vol. 1, Nº 1, pp. 143-151, www.uc3m.es/cdt

[33] This position is the one that follows the article 7 of the Convention of the rights of the child: the child (...) will have right since it is born to a name; in the same sense, article 24, fraction 2, International Covenant on Civil and Political Rights of December 16, 1966, is pronounced.

[34] Sospedra Navas, Francisco, *op. cit.* p. 18.

parts, so the healthy claim is oriented to the interpretation of specific normative precepts, in order to enhance this research. So, we can suggest a series of them, which are the result of the analysis and positions of Luces Gil, cited by Aguila Casanova[35], the principles that make up the Civil Registry are: a). – Principle of legality, is that both access to the Register of the registrable facts, such as rectification and projection abroad through advertising are subject to rigorous legal standards. The normative precepts contained in both the Law and its regulatory standard, are intended to ensure that the Registry reflects the reality, allow to perform all the registration activity. It is established in article 1 of the Civil Registry Law[36], regarding the relationship of the registry activities; facts concerning the civil status of persons and when contemplated by the law itself. Francisco Luces Gil[37] in his work quoted here breaks this principle into three parallel routes; all registration act must be valid; if this validity is presented, the acts will therefore be exact; and if the previous ones are based on the law, the civil status of the persons may be recorded and publicized[38].

Similarly, in order to carry out this registration activity, the General Directorate of Registries and Notaries, updates the resolutions it issues and publicizes, so that the judges when issuing their judgments do so, considering the resolutions, such as the one that is transcribed in the significant part of this principle:

General Directorate of Registries and Notaries, Civil Matters, Resolution no. 2/2004 of 17 April JUR 2004 \ 187162, CIVIL REGISTRY: OWN NAME: change of name: Malena: name imposed with infringement of the regulations in force: the correction mechanism of article 212 Civil Registry Regulations, must respect the legal limits derived from the principles of prevalence of the child's interest and legal security and protection of legitimate expectations regarding the legality of the Administration's actions: acceptance by the Registry that registered the child born with that name, who, as a consequence, from that moment onwards He has been using and is known by him: possibility of being seriously affected and harmed if there is a change in his identity.

Jurisdiction: Administrative route.[39]

2.-The principle of officiality, as well as in the Real Estate Registry Law, governs the principle of praying, in the Civil Registry Law, the principle of officiality prevails, consequence of the marked public interest of this institution. This officiality is called impulse ex officio by Sospedra Navas, we place this in articles 26 and 27 of the Registration Law, addressed to the official and its duty to comply with all regulations and truthfulness, to give suitability to the acts or registrable acts. Function of greater or equal importance that of the Public Prosecutor's Office that must not only start from the guarantee of legality, but as the one obligated to give it that procedural momentum.

From the above it is possible to review the fourth recital of the Judgment of the Provincial Court of Cádiz, of March 21, 1994 AC 1994 \ 435, this difference is highlighted in terms of the official status as a principle in the Registry Law:

[35] Aguila Casanova, *op. cit.* p. 7 only refers to the list of inspiring principles of civil registration law, citing Luces Gil.
[36] Sospedra Navas, Francisco, *op. cit.* p. 23.
[37] Luces Gil, Francisco, *op. cit*, pp. 35 – 42.
[38] *Ibidem*, pp. 36-37.
[39] www.westlaw.es

This Chamber cannot but share the correct arguments of the Judge – a quo -, to dismiss such claim, since from the actual wording of articles 91 and 94 of the Civil Code it is clear that the alimony of underage children must be necessarily set by the Judge aware of the process of nullity, separation or divorce, although there is no request from the party, ruling in this matter, given its social significance and public interest, the principle of OFFICIALITY and not the request or praying, own of civil proceedings in which purely private interests are aired.

3.-The principle of respect for personal privacy, is to reconcile the advertising of the seats with respect due to personal privacy. Where you should seek respect for the disclosure of personal facts. In the first foundation of rights, the Supreme Court of the Civil Chamber issued the following Judgment of January 29, 1990 RJ 1990 \ 72, which is related to the principle that every person has to his civil registry about privacy:

On the factual basis that in the 1st Section of the Civil Registry of Barcelona a certain birth was registered that took place on September 18, 1967, and through marginal annotations were registered the successive procedures of legitimization and recognition of the inscribed, the aforementioned owner registry, promoted a declaratory trial of lesser amounts against the Public Prosecutor's Office with the request to have "by request the declaration of unconstitutionality of articles 6 and 51 of the Civil Registry Law and 17, 21 and 23 of its Regulations, as they are contrary to 10 and 18 fraction 1 of the Spanish Constitution, by allowing the disclosure of data related to annotations or entries in the Civil Registry relating to personal or family privacy without the prior hearing of the interested party or guardians, not containing article 18.1 enabling clause for the judicial authority to authorize non-consensual interference and declare, his right to request the cancellation of the marginal inscriptions permitted because their content does not alter the legal reality of the personal rights thereof, preventing further illegitimate interference.

4.-The principle of simplification and economy of procedures, in avoidance of superfluous procedures. Luces Gil refers to the successive amendments to the Regulation of the Civil Registry of 1969, 1977 and 1986 as a tendency for all registration procedures to be carried out with these characteristics. The Modification by article 1 of Royal Decree 510/1985, of March 6, RCL \ 1985 \ 905 should be added to the list. Along with the updates suffered by section 3 modified by single article 1 of Royal Decree 170/2007[40], of 9 February RCL \ 2007 \ 478. Regarding the refusal to extend advertising No advertising will be given without special authorization:

1.- Of the adoptive or unknown filiation or of circumstances that discover such character and of the change of the last name Expósito or other analogous or inconvenient.

2.- Of the rectification of sex.

3.- Of the causes of deprivation or suspension of parental authority.

4.- Of the archived documents, regarding the extremes cited in the previous numbers or to dishonourable circumstances or that are incorporated in a file that has a reserved nature.

5.- Of the abortion file.

[40] *Ídem.*

6.- Changes of surnames authorized in accordance with the provisions of the third paragraph of Article 208 of these Regulations.

The authorization will be granted by the Judge in Charge and only those who justify legitimate interest and well-founded reason to request it. The certification will express the name of the applicant, the only effects for which it is released and the express authorization of the person in charge. This, in the register directly under his charge, will issue the certification by itself.

Also, the additions by art. 1 of Royal Decree 1063/1991, of July 5 RCL \ 1991 \ 1727[41], to article 68 as regards the records in own activity of the consulates.

5.-The principle of gratuity, in its Considerations of the Resolution of August 7, 1981 RJ 1981 \ 3267, the General Directorate of Registries and Notaries:

That for the actions of the Civil Registry governs the general principle of gratuity established by article 98 of the Civil Registry Law, without other exceptions than those indicated in article 100 of the Law itself. That, therefore, the rectification file of errors must be estimated included in this general principle of gratuity, as confirmed by Article 370 of the Regulation of the Civil Registry.

6.-The principle of publicity, determines that the Registry is public for those who have an interest in knowing the entries. This interest is presumed, as established in Article 17 of the Regulation of the Civil Registry, this is who requests the certification, as the only form of publicity. The informative notes as much the only exhibition of the registry books lacks probatory value. Regarding the adjective law of registry, article 6 contemplates the Registry is public for those who have an interest in knowing the entries, with the exceptions provided by this or other laws.

7. International aspects of the Civil Registry

There is a set of international ordinances reported by the metasearch of Westlaw Editorial Aranzadi, under the search engine of the International Civil Registry Legislation, this list together with the articles of each legal provision related to this topic is found in the annex to this proposal, under the title International Provisions signed by Spain, which are related to the Civil Registry. In this section we will analyse the regulations considered relevant for the performance of the functions of the Civil Registry, directly applicable to minors in terms of name and surname.

For which we have expressed in previous paragraphs the public interest[42], by which every individual has a name and surname. This relationship of identification or individual to the person by his name and surnames, is correlated with the various elements such as: passport, national identification, residence permit, electronic signature, biometric identification, among others. This personal characteristic is also private; therefore, it is a subjective right linked to every human being.

The Spanish Private International Law establishes for the Civil Registry which facts that must be registered, both in the Civil Registry Law article 15, and in the Civil Registry

[41] *Ídem.*
[42] Nota supra 2.

Regulation article 66[43]; those that affect nationals, inter or extra territorially, regardless of the possible loss of nationality or their legal personality has been extinguished in the course of acquisition of Spanish nationality. On the other hand, deaths that occur in Spanish territory must also be recorded. Finally, the second paragraph of Article 15, states that events occurred outside of Spain, when demanded by Spanish law[44]. The Civil Registry must establish registration to all born in the territory of Spain[45]. In the case of nationals, this registration is in the nature of extraterritoriality as established in article 15 of the Civil Registry Law in absolute adaptation of article 11 of the Spanish Constitution[46]. So, the birth registration is the place of birth located in Spain or abroad. In Spanish law[47], the legal characterization name – surname, are as established in articles 109 of the Civil Code and 55 of the Civil Registry Law. We therefore transcribe the aforementioned articles, the source of consultation being the same up to now mentioned.

The International Commission on Civil Status (CIEC), an organization created in 1926, groups representations of the European Union, among which is Spain joins the commission in 1974.

The headquarters of the CIEC General Secretariat is currently in Strasbourg, France, the initial objective was to group the representatives of the civil registries. This objective has been extended to the representatives of the States, such as the hierarchical superiors of the Registry's general directorates, the Ministries of the Interior, of Justice, Foreign Affairs, academics, and those interested in promoting collaboration in matters of civil status.[48]

Between October 17 and 28, 1969, a cooperation agreement was signed with the Hague Conference on Private International Law. The purpose of this agreement is to avoid the duplicity of legal issues, contemplating any possibility of joint analysis, from the creation of mixed commissions, to the sending of reciprocal delegates to the assemblies.

This cooperation is extended with the United Nations High Commission for Refugees, between May 4 and 27, 1981 and with the European Union, there are precedents that begin in 1955 with the Council of Europe and those signed between 14 and 26 of July 1983, with the Commission of the European Communities, on the basis of the Convention of May 28, 1998 of the European Union on jurisdiction, the recognition and enforcement of decisions on matrimonial matters, the Commission has been consulted on possible incidents of the Convention in matters of civil status, participating in the legal analysis of the Regulation that has replaced the Convention.

The CIEC has established relationships with the national organizations of those in charge of the Civil Registry, as well as attending seminars and congresses of this organization, with the European Federation of Civil Registry Officials created in 2000[49].

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[43] http://noticias.juridicas.com/

[44] Calvo Caravaca, Alfonso Luis y Javier Carrascosa González, *Derecho Internacional Privado*, Tomo I. Editorial Comares, Granada España, 2011, 12da. Edición. p. 70.

[45] Nota supra 273

[46] Spanish Constitution, of 1978 in force.

[47] Calvo Caravaca, Alfonso Luis y Javier Carrascosa González, *op. cit.* p. 70

[48] Massip, Jacques and Frits Hondius collaborators, and Chantal Nast, *Text of the International Civil Status Commission* (CIEC), updated as of April 1, 2007. At http://www.ciec1.org/Etudes/Kluwer2007-TraducESP-MAE -16.12.2008.pdf, p. 5.

[49] *Ibídem.* p. 12.

As regards the name and surname of the CIEC in the document that has been quoted, it refers to Convention Number 4, made and signed in Istanbul on September 4, 1958, by which the signatory States are obliged to ... not grant changes in surnames or of names to the natives of another contracting State, except if they are also their own natives[50]. Spain acceded to this Agreement on January 15, 1977[51].

However, the CIEC document omits Convention No. 19[52], which was made in the city of Munich on September 5, 1980, in force for Spain from January 1, 1990, Convention on the Law applicable to names and surnames, where common rules of Private International Law[53] are established; it only applies to international situations and not to cases of interregional law. Criteria followed by some Spanish Autonomous Communities, examples; Aragon and Catalonia[54]. This is because Article 1 establishes in this regard that the name and surname of a person will be governed by the national law of the same.

Convention number 21 made in The Hague, on September 8, 1982, in force for Spain from July 1, 1988, relative to the issuance of a certificate of diversity of surnames; this document with official validity ... will have as its sole purpose to state that the various surnames that appear in it, designate, according to different legislations, a person. This precept contemplates the non-application of current laws applicable to surnames. Spain designated, as the competent authority to issue these certificates to: The Judge in charge of the corresponding Civil Registry.

8. Law of the Civil Registry, 20/2011, of July 21 – RCL \ 2011 \ 1432[55] BOE[56] July 22, 2011, no. 175, p. 81468

This Law is currently *vacation legis*[57]. It will come into force three years after publication in the Official Gazette of the Spanish State July 22, 2011, no. 175, with some considerations specific to the publication. They make up a total of 100 articles distributed in ten titles.

This Law since January 8, 2010, the date on which the legislative process began, with the initiative of the project by the Minister of Justice, until the publication thereof, under the title of the Civil Registry Act 20/2011, through The Official Bulletin of the Spanish State, we can notice in the presentation of this regulation, from the Preamble the legislator's interest in incorporating the Law into International Conventions: the

[50] *Ibídem.* p. 22.
[51] Boletín Oficial del Estado Español, BOE 18 enero 1977, núm. 15, p. 1166. www.boe.es.
[52] BOE 19 diciembre 1989, núm. 303, p. 39278.
[53] Calvo Caravaca, Alfonso y Javier Carrascosa González, *op. cit.* p. 65
[54] *Ídem.*
[55] The acronym, RLC corresponds to the Chronological Repertoire of Aranzadi Legislation, this compilation dates from 1930, it also contains the BOE, located in the Hemeroteca of the María Moliner Library of Social and Legal Sciences building. Getafe Campus, Carlos III University of Madrid.
[56] Acronym of Official Gazette of the Spanish State, available from microform edition since the year of 1711, print edition month in progress, located in the Hemeroteca of the María Moliner Library of Social and Legal Sciences building. Getafe Campus, Carlos III University of Madrid.
[57] Period between the publication of the law and the beginning of its effectiveness. Unless the law expressly provides for a certain Civil Code puts it in twenty days. www.westlaw.es Dictionary

Convention on the Rights of the Child of November 20, 1989, ratified by Spain on November 30, 1990; and under that same objective to the Convention on the rights of persons with disabilities, of December 13, 2006, ratified by Spain on November 23, 2007[58].

The above contributes in a special way to the objective of this investigation, with a consolidated administrative entity such as the current Spanish Civil Registry, it is possible to configure a modern, agile, accessible Civil Registry, applying the new technologies. The IT and communication technologies that will be applied to meet these objectives will replace the registration books with databases, with the registration certifications, that is, each birth registration will have a Personal Code of Citizenship. With the use of the database the certifications will be simultaneous, the issuance of certificates can be consulted in the network and the applications of procedures in the ordinary will decrease, allowing to consult the corresponding procedure at a distance.

The new model marks significant differences with the current one, in three aspects that we have mentioned in previous paragraphs and that by way of synthesis we classify in these three aspects:

a) Grant Autonomy to the registration body: Civil Registry, the reason is due to the application of the Civil Registry, this refers to the civil status of persons and in certain aspects, family law, the competent jurisdiction is civil[59];

b) configuration of a single Civil Registry for all of Spain with a new structure and whose centre is the person and its content the individual records where the data of the life of each individual will appear; Title III of the Law provides for an organization with a General Office for each Autonomous Community or City and another for every 500,000 inhabitants, with functions of receiving declarations and requests, processing and resolution of records, the practice of registration and , where appropriate, the issuance of certifications. The Central Office is responsible for acting in relation to the resolutions issued by the General Directorate of Registries and Notaries. As for the Consular Offices, their legal regime does not differ substantially from the one in force.

c) greater simplicity on the basis of which the old Sections of the Civil Registry and the corresponding books are deleted;

d) modernization of the Civil Registry through the incorporation of new electronic resources that bring the Civil Registry closer to citizens, these are; the electronic certification and the access of the Administration.

8.1. Nature and content of the Civil Registry

Under the previous title the Civil Registry Law begins from article 2, section 2, reminds us of the purpose of the Civil Registry, which is to officially record the facts

[58] Preamble I, last paragraph: Likewise, this Law incorporates both the Convention on the Rights of the Child of November 20, 1989, ratified by Spain on November 30, 1990, and the Convention on the Rights of Persons with Disabilities, of December 13, 2006, ratified by Spain on November 23, 2007.

[59] The nationality by residence is excepted, respect to which the reasons that advised to transfer this matter to the contentious-administrative jurisdiction persist with the entry into force of Law 18/1990, of December 17, on the reform of the Civil Code.

and acts that refer to the civil status of the persons and those others determined by the Law Article 9, indicates which are these registrable facts ... that affect the Spaniards and those referred to foreigners, occurred in Spanish territory. Events occurred outside of Spain will also be registered, when the corresponding registrations are required by Spanish law. When we said that under the new scheme of organization of the Civil Registry, the individual records of each individual were created, we refer to the content of the Civil Registry, which is the one composed of the set of individual records of natural persons, unique to Spain. Thus, in article 10, the application for registration and the practice thereof can be made at any of the General Offices of the Civil Registry, regardless of the place where the events or registrable acts take place. This will make it easier for citizens to access the registration application; and the documentation electronically, through the means of publicity foreseen in the Law.

Article 6, for each individual record will be assigned a personal code consisting of the alphanumeric sequence that the current computer system attributes to the national identity document. Citizens will have free access as a principle of publicity to the data, which appear in their individual register, article 15. The Law establishes in article 11, as a right of persons before the Civil Registry, the right to a name and to be registered through the opening of an individual record and the assignment of a personal code.

The election of the system of individual registration as a form of organization of the Civil Registry imposes the suppression of the old system of division of the Civil Registry in four Sections (births, marriages, deaths, guardianships and legal representations) and of the different books that each one of them had those Sections. Article 20. Structure of the Civil Registry.

8.2. Rights and duties before the civil registry

The rights indicated in article 11, under the title Rights before the Civil Registry, among some other rights of the persons before the Civil Registry are, in addition, the following: right to the registration of the facts that refer to their identity, state civil and other personal circumstances provided for in the Law, the right to access information requested on the contents of the Civil Registry, the right to obtain certifications, the right to privacy, the right to use the official language of the place where the Office is located, right the full recognition of the principle of equality, the right to promote the registration of facts aimed at the protection of minors, persons with limited capacity to act, persons with disabilities, and the elderly; right to rectification and modification of registry entries; right to interpose resources, and right to access the services of the Civil Registry with guarantee of the general principle of universal accessibility.

The Law also imposes certain duties on people before the Civil Registry. These duties are dealt with in article 12 of the Law. The duties of the persons before the Civil Registry are: to promote the practice of registration entries; to urge registration when it has constitutive character in legal cases; to communicate the events and acts that can be registered; present the necessary documentation when the corresponding data are not in the possession of the Public Administrations; Provide accurate and accurate data in registration applications; to cooperate in the proper functioning of the Civil Registry.

8.3. Electronic resources at the service of the civil registry

The qualification of the Civil Registry as electronic is presented in article 3 fraction2 and the intended modernization of that institution seeks to exempt the citizen from the burden of having to go in person to the offices of the Registry. Citizens will be able to promote the practice of registration entries and submit the required documentation electronically, as well as article 20, section 2. The incorporation of the electronic signature will allow citizens to access the services of the Civil Registry through it, it is contemplated as much Article 7 as the 10 in both in its fractions 2. Likewise, for those in charge of the Offices of the Civil Registry will have a recognized electronic signature. By means of this signature, the entries of the Civil Registry and the certifications issued from its content will be practiced.

In the Civil Registry, all the seats will be extended in electronic format and support, and must conform to the models approved by the General Directorate of Registries and Notaries, article 36. The Law itself provides for exceptional circumstances and when it is not possible to make seats electronic, the seat may be made on paper, but will be transferred to electronic format as soon as possible, article 36 section 2.

The communications between the registry offices in principle will be made under electronic means, in accordance with article 8, section 1.

8.4. Structure of the civil registry, under this new Law

As indicated, the Civil Registry is unique for all of Spain and electronic. The data will be processed automatically and integrated into a single database. Through this system, it is a question of combining the unity of information and the universality of access to information.

The electronic Civil Registry requires a different organizational structure from the previous one, which was based on a Civil Registry physically articulated in books kept in the Municipal Registries distributed throughout Spain, and now surpassed by the new organization as indicated. The new organization intends a simplification, where three elements are distinguished: General Offices, Central Office and Consular Offices, article 20 fraction 1, endowed with their own powers and functions, and all of them dependent on the General Directorate of Registries and Notary as the last responsible body of the Civil Registry, and whose instructions, resolutions and circulars are binding for each of these Offices, thereby guaranteeing unity of action.

The Law also contains ten provisions, of which the second Additional Provision, Legal Regime of those in Charge of the Central Office of the Civil Registry and of the General Offices of the Civil Registry, will allow the Civil Registry the integration of public officials other than those who make up the power of attorney. According to the Provision, the positions of Civil Registry Managers will be provided to career staff of Subgroup A1 who have a Law Degree or the university degree that substitutes it and between court clerks.

All this without prejudice to the right of citizens to effective judicial protection, leaving all acts of the Civil Registry subject to judicial control. In particular, the civil

jurisdiction is competent to deal with these matters, on the basis that the registration of the civil status of persons is subject to publicity, without prejudice to its proximity in certain aspects to family law.

8.5. Facts and registrable acts

1. Births

Article 44 is established, the births of persons are registered according to the provisions of article 30 Spanish Civil Code, a precept that is modified by the third final provision of this Civil Registry Law analysed in this section, to which we have referred cone the new Law in some occasions. According to the new article 30 Civil Code, ... the personality is acquired at the time of birth with life, once the entire detachment of the mother's womb has taken place[60].

According to the new text, the birth determines the personality, without needing to wait for the course of the twenty-four hours that required as a requirement of viability the previous regulation to grant the born personality for civil purposes. Consequently, according to the new text of Article 30 Civil Code, the child who dies before the expiration of twenty-four hours after birth has the capacity to acquire and, consequently, transmit heritage rights through inheritance.

In the inscription will be expressed the name given to the born and the corresponding surnames according to their affiliation article 49. Article 109 of the Civil Code, establishes that the parents can by common agreement decide the order of transmission of their respective first surname, before of the registration. If this option is not exercised, the provisions of the Law shall apply. The Civil Registry Law shall expedite and thereby facilitate the change of name and surname with respect to the current regulation that still leaves such matter in the hands of the Ministry of Justice or the Ministry of Justice. Judge of first instance in your case. The new regulation submits the question as a general rule to the competence of the Registrar of Civil Registry, as already discussed will be resolved in civil matters, according to the articles between 52 to 57. Article 57 establishes the Common Rules of Change of name and surname, in three paragraphs this is to those who apply, by consent of the will, its registration to the individual registration of the interested party, with constitutive character, the interested party must be over sixteen years.

2. Marriages

As of the entry into force of the Law, the celebration of civil marriage will correspond to the mayors or councillors in whom they delegate in article 58 fraction 1. In the cases of marriages celebrated outside of Spain, the competence corresponds to the Consul In charge of the consular office of the Civil Registry.

Once the marriage is celebrated, the mayor or councillor will extend the minutes with his signature, that of the parties and witnesses, and will send it, preferably by

[60] Civil Code, Royal Decree of July 24, 1889 – LEG \ 1889 \ 27, Amended by final provision 3 of the Civil Registry Act 20/2011, of July 21 RCL \ 2011 \ 1432.

telematic means, to the Civil Registry. The marriage will be inscribed in the individual registers of the contracting parties, this is already established in article 59.

The processing of the matrimonial file corresponds to the secretary of the City Council.

The Law of the Civil Registry in its opportunity to remove the traditional Family Books that the authorizing officer of marriage should deliver to the parties immediately and with the value of certification of the reality of marriage, according to article 75 of the Civil Registry Act of 1957

The final judicial resolutions of nullity, separation and divorce will also be registered. The court clerk must send by electronic means as a testimony of the same to the Office of the Civil Registry, which will immediately practice the corresponding registration, Article 61.

3. Deaths

The registration of death is mandatory article 62. This precept also maintains the requirement of prior registration to proceed with the burial or incineration. The declaration of death will be documented in the official form and, as in the previous regulation, the medical certificate of death is required in order to proceed with the registration of the same. The obligation of the management of the health centers to electronically communicate the deaths occurred in them to the Office of the Civil Registry is established, as well as in article 64. The registration of the death will close the individual registry. In no case, the personal code can be assigned again, article 62 section 4.

8.6. Rules of Private International Law

Law of the Civil Registry that will come into force in three years from its publication, includes a tenth title made up of articles from 94 to 100, this includes correspondence of International Conventions and Spanish domestic law. Article 94 states that the rules contained in the law will apply if there is no contrary to any international ordinance recognized by Spain and that has the internal character in its application. The documents regarding their translation and legalization must comply with the formalities established by Private International Law, article 95 Translation and legalization.

Article 96 regarding the title of foreign judicial resolutions, establishes as an obligation for the Civil Registry the registration of final judgments, provided that these have met the principles of security and legal certainty, in having been heard and expired in court , the terms and deadlines stipulated in the corresponding law have been respected and above all that the judgment is not manifestly contrary to the Spanish public order. Regarding the extrajudicial foreign Document, article 97, provides that it can be registered if it meets the requirements such as: being granted by a foreign competent authority; there is equivalence of functions between national and foreign authorities; In accordance with Private International Law, the act or act is related to the Spanish legal system, so it must not be contrary to the internal order.

The foreign certification must be done in accordance with the provisions of article 98 Certification of extended entries in foreign Registries, so the following requirements must be verified; competent authority; the record is consistent with facts and guarantees in Spain; be valid and comply with Spanish Private International Law.

The declaration of knowledge or will in article 99, considers about the facts and acts that affect the civil status of the persons, under declaration of knowledge or will, must conform to the corresponding laws and maintain harmony with the Spanish rules of private international law.

Lastly, Article 100 establishes the possibility of accreditation, among other means, by the reports of a Notary or Spanish Consul, or of a certificate of the content and validity of the law applicable to acts and acts related to marital status. Diplomat, Consul or competent authority of the country whose legislation is applicable.

9. Conclusions

The scope of the rules applicable to any registration act that the office of the Spanish Civil Registry performs are in harmony with International Law, the diplomatic corps accredited in the international community are entitled to integrate in accordance with the current internal legal order Spanish registration act that allows the Spanish community abroad to have the legal support established in the Spanish Constitution regarding their civil rights.

The current respect to the powers that allow the Directorate of Registries and Notaries contemplate issuing in the resolution's legal analysis of cases, which allow contributing to any source of Civil Law, which allows having direct references to review through the guidelines that have established precedents and that link to cases that although novel, are also considered with respect to Human Rights and Individual Guarantees of Spanish citizens and nationals integrated into Spanish society.

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REFERENDUM, MEANS OF EXERCISING THE DIRECT DEMOCRACY

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Abstract*: The referendum represents the most efficient and the clearest way of direct consultation of the popular will, regarding the most important matters that a society faces. For this reason, the hereby paper aims at an exhaustive analysis, in the light of constitutional and legal dispositions, of regulations concerning the organisation and the effects of the different types of referendums.*

Last but not least, I chose this topic due to its actuality (just in the last months being organised two popular consultations of this kind), but also because of the strong controversies this type of electoral exercise arises every time.

Keywords*: referendum, direct democracy, Constitution, national sovereignty.*

1. Introduction

Within a democratic regime, the consultation of the citizens is made via referendum. The referendum matter can not be otherwise tackled but by linking it to the exercising of the democracy. In its classical, scholastic meaning, democracy is understood as an assertion of the will of the majority. So, how can this be better determined if not by a wide, as wide as possible consultation?

In both political and constitutional doctrine, when the popular consultation is brought into discussion, one refers to two terms, which are sometimes complementary and sometimes antagonistic: plebiscite and referendum[1].

In ancient Rome, the plebiscite used to express the people's (the rascal rout) decision regarding a tribune's proposal. Just like in the referendum's case, the plebiscite is a popular vote given on a matter that is subject to consultation, either is regards a legislative project or a decision that is about to be made. But, generally speaking, the term of "plebiscite" has gotten a negative connotation, being considered that is serves to the legitimation of the authoritarian regimes and their decisions, by imposing the people a single election and by ignoring the alternatives that are inconvenient to the ones in power. Generally speaking, the consultation via

Plebiscite is not made on a text, but for the acknowledgement of the application of a person that has no runner up[2].

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[1] Mircea Criste, *Instituții constituționale contemporane (Contemporary constitutional Institutions),* Editura de Vest, Timişoara, 2011, pp. 34-35.

[2] For example, we may mention: the plebiscite organised by Cuza on the 10th- 14th of may, 1863 on the establishment of the personal regime, the plebiscite for the introduction of the constitution of Carol the 2nd from the 24th of February, 1938, the referendums organised by Antonescu following the Legionnaires' rebellion for achieving the personal power (the 2nd- the 5th and the 9th- the 16th of November, 1941), the consultation organised by Ceauşescu on cutting down the military expenses (the 23rd of March, 1986).

The citizens' consultation via referendum is, generally, seen as a minimal, necessary and essential democratic exercise, representing the direct and unambiguous manifestation of an electoral body regarding a matter of normative, including constitutional nature, organised at the initiative of the ones in power or at the initiative of the citizens.

The referendum is closely linked to the direct and semi- direct democracy regimes. The first one is a referendum democracy, by its very essence, while the semi- direct democracy combines the direct democracy with the representative democracy: if it is not possible to gather the whole voting population in a single place, one can still give them the chance to decide on important matters, by consultation via referendum.

If direct democracy is nowadays impossible to accomplish and it has vanished almost completely in its classical form, the semi- direct democracy, which combines the direct democracy with the representative one, is widely spread, either in its integral form (Switzerland representing the classical example in this respect) or in partial form (the majority of European states, including Romania). In the latter case, the techniques of popular consultation are only partially used, the mandatory referendum and the optional referendum, which are not organised at the initiative of the citizens[3].

2. Types of referendum

Firstly, considering the legal effects it produces, the referendum may be: a) consultative and b) mandatory. We shall return to this classification, in the following, given the fact that, in Romania, the organisation of a referendum is based precisely on this classification criterion.

Secondly, depending on the legal act on which the referendum is organised, there are: a) constitutional referendums; b) legal referendums and c) conventional referendums[4]. The constitutional referendum is organised for the passage of a constitution[5], the legal referendum is rather a popular veto right granted to citizens, while the conventional referendum aims at the ratification of an international agreement or the expression of the position of a state concerning a matter of international law[6].

Thirdly, depending on the aspect that the people is consulted upon, there are: a) referendums regarding legislative acts and b) referendums on determining the citizens' will regarding certain matters that are controversial in practice (for instance, the consultative referendums organised in countries such as: Romania, Greece, France, Switzerland etc.)

Fourthly, one can distinguish between the controlled referendum and uncontrolled referendum. The difference between these two shall be made according to the initiation

[3] Mircea Criste, *op. cit.*, pp. 124-125.
[4] Ştefan Deaconu, *Instituții politice (Political institutions),* Editura C. H. Beck, Bucureşti, 2012.
[5] The majority of the European countries adopt or amend the constitutions after organising a popular referendum (for instance, Romania, France, Spain, Italy, Portugal etc.).
[6] For example, the referendums organised in the member countries the European Union on the ratification of the Treaty, establishing a Constitution for Europe or the referendum organised in Great Britain on whether the state should remain in the European Union, whose result is known as Brexit.

of the referendum is exclusively in the hands of the one/ ones in power or the initiation of the referendum is also recognised to the population or opposition.

Fifthly, the referendum may be pro- hegemonic and anti- hegemonic. This distinction will be made depending on position of the one/ ones in power towards the positive or negative response. The conclusion one may draw from applying this classification is that the Power will resort to the great popular consultation when it has the certainty that the vote will confirm its option and it (the Power) will prefer to bring forward decisions behind the majority in Parliament when this probability is doubtful.

3. Referendum in Romania

According to Romanian Constitution (article 2), the national sovereignty belongs to Romanian people, who exercise it by its representative organs and by referendum. The organisation and carrying out of the referendum is regulated by organic law (article 74 paragraph 3 section d of the Constitution). In compliance with this law (Law no.3/ 2000, amended), the referendum may be national or local and the population may be consulted regarding one or more matters, as well as concerning a matter of national interest and a matter of local interest, separate ballots. The referendum is valid if at least 30 % of the number of the persons registered on the permanent electoral rolls participates to it (article 5 paragraph 2 of Law no.3/ 2000). The result of the referendum is valid if the valid options represent at least 25 % out of the persons registered on the permanent electoral rolls (article 5 paragraph 3 of Law no.3/ 2000).

The local referendum may be organised and carried out on some matters of special interest for the administrative and territorial units, set out on a proposal from the Mayor, from the President of the County Council, respectively or from one third of the number of the local councillors or county councillors, as appropriate (article 14 paragraph 1 of Law no.3/ 2000).

The national referendum represents the direct consultation form and means and the expression of the sovereign will of Romanian people regarding: a) matters of national interest, b) the revision of the Constitution and c) the dismissal of the President of Romania.

The dispositions of the Constitution regarding the national, independent, unitary and indivisible character of the Romanian state, the republican type of government, the integrity of the territory, the political pluralism and the official language may not be subject to any type of referendum. Also, in this way, the suppression of the citizens' rights and the fundamental liberties or their guarantees may not be reached[7].

a) *The referendum on matters of national interest* is regulated by article 90 of the Constitution and it may be carried out at the President's request, after the President having consulted the Parliament.

According the above- mentioned constitutional text, the President has the exclusive competence in determining the matters of national interest that are submitted to the referendum, even if the Parliament's consultation is mandatory. Thus, only the President

[7] Article 3 of Law no.3/ 2000 on organisation and carrying out of the referendum.

of Romania has the right to decide what the matters of national interest and, within these ones, to establish, by decree, the actual matter that is submitted to the referendum and the date set for the referendum. In this respect, the Constitutional Court has noted that the limiting list, by the organisation law and carrying out of the referendum, of the situations considered to be "matters of national interest" is likely to impede the President's right of consulting the citizens, knowing the fact that, over time, the national interest may differ, new situations may occur at all times, that can ask for the organisation of a referendum. Any regulation of the situations considered as being of "national interest" at the moment when the lawmaker adopts the regulation may subsequently turn into a limitation that affects the President's constitutional right to decide by himself regarding the matters on which the President wants to consult the people[8].

Nevertheless, the constitutional court has emphasised the need for supplementing the provisions of article 90 paragraph 1 of the fundamental law, for the purposes of exemption from the referendum requested by the President of the matters of national interest which, being approved by the people's will, would impose the revision of the Constitution. The Court noted that, by eliminating this possibility, a double consultation of the people for one and the same matter would be avoided: the organisation of a first referendum by which the people would express its point of view concerning a certain matter of national interest whose resolution requires the revision of the fundamental law, the onset of the revision procedure for the purposes of those enshrined following the popular consultation and, finally, the organisation of a new referendum for the approval of the law of revision[9].

Following the interpretation of the current text of article 90 of Constitution, it results that the Parliament consultation is a condition precedent to the President's decision, its carrying out being compulsory, meaning that the President of Romania may not initiate the referendum procedure without this consultation. Nonetheless, the Parliament is only consulted, the head of the state not being bound to take into account the point of view delivered by the legislative power by means of a decision.

After consulting the Parliament, the President of Romania shall deliver the decree by which he/ she sets out, specifically, the object of the referendum, by indicating the question or the questions the citizens are asked to answer to, as well as the referendum's date. In Romanian legislation there is no interdiction concerning the setting of the date of the referendum on the same day as another national or local elections. Furthermore, the Constitutional Court has decided that, according to Constitution, there is no other condition that forbids the organisation and carrying out of the referendum simultaneously with the presidential, parliamentary, local elections or the elections for the European Union or within a certain period of time, before or after the above- mentioned elections[10].

[8] The decision of the Constitutional Court no. 567 from the 11th of July, 2006, Official Gazette no. 613 from the 14th of July, 2006.

[9] The decision of the Constitutional Court no. 799 from the 17th of June, 2011, Official Gazette no. 440 from the 23rd of June, 2011.

[10] The decision of the Constitutional Court no. 1218 from the 12th of November, 2008, Official Gazette no.785 from the 25th of November, 2008.

The administrative measures regarding the organisation of the referendum are established by the Government, within 10 days from the date on which the referendum was announced.

After completing the electoral procedures, the results of the referendum, provided that the conditions regarding the validity, are confirmed by the Constitutional Court, by a decision that shall be published in the Official Gazette, First Part and in the media.

As far as the effects of the consultative referendum are concerned, they can only be mandatory, taking into consideration the fact that the will of the people may not be ignored by the elected persons, as it represents an expression of the national sovereignty. However, what distinguishes a consultative referendum from a decisional one is not the matter regarding the compliance or the non- compliance with the will of the people, but the character of the referendum effect- direct or indirect. As opposed to the decisional referendum, the consultative referendum produces an indirect effect, as it requires the intervention of other organs, most of the times of the legislative ones, in order to deliver the will expressed by the electoral body[11]. This interpretation is also based on principle of the constitutional loyalty, taken and interpreted by corroborating the constitutional dispositions of the article 1- "The Romanian State", article 2- "Sovereignty" and article 61- "The role and structure" (of the Parliament), which, in this respect, imposes that the authorities with decisional competences in the fields envisaged by the problematic that is subject to referendum (in this case, the Parliament) to take into consideration, to analyse and to identify ways of putting into practice of the will expressed by the people. Another vision on the effects of the consultative referendum would narrow it to a pure formal exercise, to an opinion poll[12].

Unfortunately, the Romanian Parliament has not considered to this day the implementation of the results of the consultative referendum from the 22nd of November, 2009, on the introduction of the unicameral Parliament and the reduction of the number of the members of the Parliament to 300, in which 72 % of the electing citizens pronounced themselves in favour of this idea. Indeed, if the results of the above-m mentioned referendum were put into practice, they would impose amendments to the fundamental law.

b) The referendum for the revision of the Constitution, provided by article 151 paragraph 3 of the Romanian Constitution, is subsequently to the adoption of the constitutional law by the Parliament and it has the significance of a popular confirmation of the fulfilled amendments, with a role of suspensive condition for the production of the revision- related legal effects[13]. This referendum must be organised within 30 days since the date of the adoption of the project or the revision proposal. The term is a revocation term, its expiration prior the organisation of the referendum having as an effect the invalidation of the decision adopted by the derived constitutional power.

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[11] The decision of the Constitutional Court no. 682 from the 27th of June, 2012, Official Gazette no. 473from the 11th of July, 2012.

[12] The decision of the Constitutional Court no. 80 from the 16th of February, 2014, Official Gazette no. 246 from the 7th of April, 2014.

[13] Ioan Muraru, Elena Simina Tănăsescu, *Constituția României. Comentariu pe articole (Romanian Constitution. Comment by articles)*, Editura C. H. Beck, Bucureşti, 2008, 1454.

In compliance with article 7 of Law no.3/ 2000, the question written on the ballot, when this type of referendum is organised, is formulated like this: "Do you agree with the law of revision of the Romanian Constitution in the form approved by the Parliament?". In order to answer to this question, the citizens who participate at the referendum shall pronounce themselves by applying the stamp with the inscription "Voted" on one of the two options, "Yes" or "No".

This type of referendum is also submitted to the validation of the Constitutional Court, which shall confirm, by decision, the results of the referendum[14]. The effect of the validation consists of the lack of the legal effects of any subsequent intervention of the state's authorities in the procedure of revision and entrance into force, after being published in the Official Gazette, of the amendments brought to the dispositions of the fundamental law, in the form they were subject to the people's approval by referendum.

c) The referendum for the dismissal of the President of Romania is a punitive[15] referendum, regulated by the paragraph 4 of article 95. In conformity with this constitutional text, if the proposal of suspension from office is approved by the Parliament, within no more than 30 days, a referendum for the dismissal of the President is organised.

Out of this text, we understand that the constitutional lawmaker has adopted the principle of the legal symmetry in the matter of the President's political liability: the citizens elect by universal, equal, direct and freely expressed. They are also the ones who have the possibility of the President's dismissal following the organisation of the referendum[16]. Therefore, the President's political liability shall be engaged in front of the electoral body, who elects him in that position, and not in front of the Parliament, which can only temporarily suspend him/ her from the office.

The term of 30 days, which, in this case, starts to run from the date of the delivery of the Parliament's decision of dismissal the President of Romania from the office, is a maximum constitutional term, which may not be exceeded. The non- organisation, within this term, of the dismissal referendum leads to the automatic return of the head of state in his/ her office.

The object and the date of the referendum, in this case, shall be established by Parliament's decision, while the detail elements concerning the electoral campaign, the way of carrying out of the referendum and the organisation of the polling stations shall be regulated by Government decision.

According to article 9 of Law no.3/ 2000, the question written on the ballot, when this type of referendum is organised, is formulated like this: "Do you agree with the dismissal of the President of Romania?". In order to answer to this question, the citizens who participate at the referendum shall pronounce themselves by applying the stamp with the inscription "Voted" on one of the two options, "Yes" or "No".

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[14] Since 1991, when the current Romanian Constitution was adopted, a single proposal for revision was successfully completed, as a consequence of its approval by the referendum organised on the 18th-19th of October, 2003.

[15] See, Laviniu Florin Uşvat, *Referendumul (Referendum),* Editura Universul Juridic, Bucureşti, 2012, p. 158.

[16] Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită – comentarii şi explicații (Romanian constitution revised- comments and explanations)*, Editura All Beck, Bucureşti, 2004, p.152.

The effects of this referendum shall be always mandatory, they depending on the will expressed by the electoral body via the referendum:

– in case all validation- related conditions regarding the popular consultation are met and

most of the citizens voted "Yes", the President of Romania shall be dismissed from the office, once the results of the referendum are validated by the Constitutional Court by decision;

– in case all validation- related conditions regarding the referendum are met and most of the citizens voted "No" or the referendum shall not be validated due to the fact that 30 % of the citizens registered on the permanent[17] electoral lists have not participated to the elections, the suspended President returns to his/ her activity with all the legal consequences arising from here for the rest of his/ her mandate, from the moment the Constitutional Court issues the decision regarding the setting of the election results.

In practice, since the entrance into force of the current Constitutions, the President of Romania has been subject to the procedure of the referendum for dismissal twice: on the 19th of May, 2007, when 74% from the expressed votes were against the dismissal, and on the 29th of July, 2012, when, out of the total number of the citizens with the right to vote (18.292.464), only

46,24% of Romanians voted. Thus, the referendum was not validated because at that time Law no. 3/ 2000 imposed as a validation condition the presence of at least a half plus one out of the number of the citizens registered on the electoral lists.

4. Conclusions

Presented in the specialty literature as a premise for a democratic exercise of power, in reality, the referendum is rarely a guarantee in this respect. The fact that most of the citizens that are asked to vote do not have the necessary speciality training for a serious analyse and for understanding all the consequences that arise from the voted text, the popular decision could be influenced a great deal by mass- media and by ideological propaganda.

Furthermore, when the referendum is organised in a hurry, without a sufficient presentation and without passing it by public debate of some specialists, the use of the popular vote is far from offering the chance of a democratic exercise[18]. In this respect, the term of 30 days provided for the referendum for the revision of the Constitution of Romania is a very short one, non allowing to make a mediation and a clarification, even it were only satisfactory for such an important project like the constitutional revision. That is why, the extension of this term to at least 2 or 3 months would be indicated, so that to allow a good understanding of the matter subject to the popular decision.

[17] See the Decision of the Constitutional Court no.3 from the 2nd of August, 2012, no. 546 from the 3rd of August 2012, by which the constitutional court revealed that non-participation at the referendum, in a deliberate manner, still accounts for a way of expression, indirectly, indeed, of the political view.

[18] Mircea Criste, *op.cit.*, p.38.

On a different note, right before the referendum, the modification of the electoral legislation or the rules regarding the carrying out of the referendum are not recommended. In this regard, we also take into account the Code of good practice on the referendum adopted by the European Commission for democracy by law (The Commission from Venice), which recommends the European countries the insurance of a stability concerning the legislation for this matter. Unfortunately, this recommendation has not been taken seriously by the Romanian authorities, considering, for instance, the numerous amendments brought to Law no. 3/ 2000 on the organisation and carrying out of the referendum, especially regarding the dispositions no.5 of this legislative act on the conditions of validity of the referendum[19].

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THE SUSTAINABILITY OF THE SOCIAL SECURITY SYSTEM: SPECIAL REFERENCE TO THE PENSION SYSTEM

Cătălina SMÎNTÎNICĂ*

Abstract. *The difficult economic situation, the political crisis of employment and demographic change constitute new conditions of the economic, political and cultural society that, although conjunctural, have allowed open the current debate on the present and future sustainability of the Social Security system in general and on the pension system in particular. Demographic change linked to the aging process occupies and is of concern to the European Union itself. The European Commission imposes social security reforms on Member States. The change suggested by the European Commission represents a drastic change in the Spanish Social Security system that poses serious problems of constitutionality and legality. The introduction of the sustainability factor implies a regression of the pension system that favours the development of private pension funds, assuming in the future an impoverishment of pensioners. This change is contrary to what is established in the Spanish Constitution, as it represents an attack on the very essence of the Social Security System as the basic pillar of the Social and Democratic State of Law in which Spain is configured. In fact, sustainability has been an argument to justify reforms that act on social spending in order to stabilize public debt and deficits. But pensions have to be sustainable because Social Security is protected by an institutional guarantee.*

Keywords*: Social Security, sustainability factor, sufficiency, public pensions, ageing.*

1. Introduction

Within the framework of the European Union´s economic and social policies, the long-term sustainability of public accounts with a focus on pension systems is highlighted as a priority. The starting point can be found in the 1997 Stability and Growth Pact[1], which adopted the development of the strategy proclaimed by the Stockholm European Council in March 2001 with a threefold objective: to reduce public debt, to promote economic growth and employment levels, and to reform social security systems, in particular pensions. In this way, the aim was to face two major socio-economic challenges: one, demographic change linked to the ageing of the population with an incidence on the increase in social spending in the upcoming decades, and two, the economic context of market liberalisation in a globalised world in which social spending threatens to damage competitiveness levels.

In 2010 the European Commission published a *Green Paper* on pensions which was followed by the *White Paper. An Agenda for Adequate, Safe and Sustainable*

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[1] Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact. Official Journal C-236 of 2.8.1997.

Pensions, 2012. Both propose to Member States a modification of their Social Security System to adapt them to one based on three pillars: the first, universal, public, compulsory and pay-as-you-go that guarantees minimum benefits; a second compulsory pillar of capitalization and private management linked to collective bargaining, which would be what in Spain is understood as a pension fund in the employment modality; and, finally, the third would be capitalization, individual and voluntary, managed by private entities. The central objective of the reforms that must be undertaken by States is the reduction of social expenditure, without considering the increase in revenues. Among the most interesting proposals for achieving this objective are those of delaying the pensionable age, reducing the amounts of pensions and linking these amounts to life expectancy at retirement.

The foregoing has justified the normative activity carried out in the regulation of pensions in Spain which, barely two years apart, has enacted two laws that directly introduce major changes. We are talking about Law 27/2011, of August 1, on updating, adaptation and modernization of the Social Security system[2] and Law 23/2013, of December 23, regulating the Sustainability Factor and the Revaluation Index of the Social Security pension system[3].

The reform imposed by the European Commission in relation to pensions represents a drastic change in the Spanish Social Security system that poses serious problems of constitutionality and legality. Problems that affect the very essence of the Social Security system, as the nucleus or heart of the Social[4] and Democratic Rule of Law in which Spain is constituted according to article 1.1 of the Spanish Constitution.

2. The concept of sustainability in its financial dimension: special reference to pension systems

The word "sustainability" is distinguished, always with a predominant character that is not exclusive, as an interpretative element of economic base. It is a noun loaded with intention, which offers greater inclination, in an imaginary balance, towards the negative than towards the positive. The use of this term has opened the debate on what will happen with Social Security in the coming days taking advantage of the situation created by the economic crisis and the lack of an employment policy, marked by high

[2] It can be consulted in the Official State Gazette under reference BOE-A-2011-13242.
[3] It can be consulted in the Official State Gazette under reference BOE-A-2013-13617.
[4] The constitutional expression "Social State" is the synthetic formula of the great political-social pact after the Second World War, fruit of a political formula of coexistence. This is of enormous importance insofar as it removes this social pact from all risk of circumstantialism by making it a structural element of the system, a basic pillar of the Constitution. The essential content of the Social State is found in art. 9.2 of the Spanish Constitution insofar as it not only proclaims that citizens are free and equal and have the right to participate in the organization of "public affairs" but it is absolutely necessary that this proclamation is not merely formal, but that it be something "real and effective". In order to achieve this, the Social State does not limit itself to recognizing a series of public liberties and political rights, but also recognizes a series of economic and social rights and tries to make them effective. This implies that the Social State does not limit itself to "observing the game" and ensuring that its rules are respected, but also intervenes in it. This intervention is presided over by a basic idea: the redistribution of wealth. ALARCÓN CARACUEL, M.R., "*La Seguridad Social en España*", Aranzadi, 1999.

levels of unemployment, without losing sight of the inexorable demographic change that is beginning to take place in the population structure of all the countries of the European Union and of Spain in particular.

With the introduction of the term "sustainability" has been released to the public opinion a doubt about whether pensions are guaranteed to the challenges of the new reality. This is where the language of economic nature comes to try to question the financial mechanism of distribution, which is own of the Social Security system. And that is why it is explained that the discussion about the sustainability of the system and on the reforms that are necessary turn around its financial dimension. But, it should be noted that the reference parameter used at European level is that of "adequacy", which has rather a social connotation of sustainability that reflects the adequacy of pensions. However, it is presented as an aspect subordinating in importance to financial sustainability. It seems that forgets the fundamental problem of not guaranteeing this social sustainability involves the transformation of the system into something different insofar as it jeopardises the main function played by pensions: combating poverty by dignifying living conditions in old age[5].

It is in the European framework that the notion of financial sustainability first arises. In the review of the Stability and Growth Pact of 2005 the Member States are encourged to establish financial goals in the medium-term to achieve a rapid evolution of public debt towards a stable level taking into account debt linked to the ageing process. This is why the sustainability gap takes into account the implicit debt linked to ageing in order to ensure that the State's inter-temporal budgetary commitments are respected and that public debt is secured in the long term.

Pension reform was an objective that has received increasing attention within the European Union, despite the fact that the European Union has no direct powers to regulate this matter. In accordance with Article 153 of the Treaty on the Functioning of the European Union, social security is a competence of States which is not conferred on the Union, which limits itself in this area to "supporting and complementing" its action[6]. Good examples of this are the European Commission's Green Paper and White Paper. This institution considers that adequate pensions cannot be guaranteed "unless women and men prolong their working lives and save more", and considers that the solution should come from prolonging the working life and increasing the labour market participation of older workers, a measure that is understood to be necessary for the sustainability and adequacy of pensions. It also refers to linking retirement age to life expectancy and promoting more secure and profitable supplementary retirement savings schemes.

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[5] SUÁREZ CORUJO, B., "Sostenibilidad de los sistemas de Seguridad Social en España y en la Unión Europea", GARRIDO PÉREZ, E. (coord.), and SÁNCHEZ-RODAS NAVARRO, C. (coord.), "*Protección social en España, en la Unión Europea y en el Derecho Internacional*", Ediciones Laborum, Spain, 2017, p. 287.

[6] According to settled case-law: "... *Community law does not restrict the competence of Member States to organise their social security systems (...) Consequently, in the absence of harmonisation at Community level, it is for the law of each Member State to determine, on the one hand, the requirements of the right or obligation to join a social security scheme...*". Among others: CJEC February 7, 1984, Duphar (C-238/82, ECR p. 523), June 17, 1997, Sodemare (C-70/95, ECR p. I-3395), April 28, 1998, Kohll (C-158/96, ECR p. I-1931).

In line with the European Union, Spain proceeds to approve Law 27/2011 of 1 August, which was the first response of Spanish law to echo the recommendations of the Green Paper and approves the progressive delay of the ordinary retirement age from 65 to 67 years. Age to become effective in 2027. It also modifies the period for calculating contribution bases from 15 to 25 years and there is a new scale for the rates applicable to obtaining the amount of the benefit.

In its preamble referred to the need to deal in the long term with "demographic trends in order to guarantee the financial sustainability" of the Social Security system, and acknowledged that the problems of the Spanish public pension system are more serious than in other countries due to the rapid increase in the elderly population and life expectancy, together with the serious economic employment situation. This Act, together with the incorporated modifications, in its article 8 established as the most significant novelty an automatic adjustment mechanism for the calculation of the pension suggested by the European instances.

Law 27/2011 did not regulate the sustainability factor, but only announced that in order to maintain the proportionality between contributions and benefits and ensure their sustainability, "from 2027 onwards the fundamental parameters of the system would be reviewed for differences between the evolution of life expectancy at 67 years of the population in the year in which the review was carried out and life expectancy at 67 years in 2027". In this way, future pensioners would bear part of the risk of ageing by linking the calculation of the pension to the evolution of life expectancy, regardless of the economic[7] situation. The idea behind this sustainability factor linked to life expectancy was that the retiree would receive benefits for a longer period of time, which would result in a higher cost to the system. This projection for the future of the automatic adjustment of pensions sought, first and foremost, to ensure the sustainability of the model in the future.

The adjustment measures implemented by the Government after 2012 mean that the focus is no longer only on the evolution of life expectancy, but also on a concern for the reduction of public spending, with an implicit purpose of widening the space for the development of private initiatives.

In the words of SUÁREZ CORUJO there was "a silent change" with Organic Law 2/2012, on budgetary stability and financial sustainability, in development of the reformed art. 135 of the Spanish Constitution. Article 11.5 of this law imposes a situation of equilibrium or budgetary surplus on the Social Security administrations, incorporating an automatic prevention mechanism in the event of a projected deficit in the long term of the pension system. Within this measure, the Government is authorized to revise the system by automatically applying the sustainability factor according to the conditions foreseen in Law 27/2011, thus linking life expectancy with

[7] In the opinion of APARICIO TOVAR, "the concrete regulation is an exacerbation of the contributory system already clearly understood in the logic of private insurance" and understands that "in substance, it is a matter of penalizing those who live the longest with the argument of equity, since it establishes that a similar contributory effort should correspond to an equal pension, but distributed over the longest years of life, then the pension will be reduced". APARICIO TOVAR, J., "La sostenibilidad como excusa para una reestructuración del Sistema de la Seguridad Social", *Cuadernos de Relaciones Laborales*, No. 33, Vol. 2, 2015, pp. 307-308.

the projection of a long-term deficit. Therefore, Law 2/2012 not only changes the moment of application of the sustainability gap, which advances it, but also focuses the attention of this factor not so much on the evolution of life expectancy as on the budgetary balance of the Social Security accounts.

It was not even enough time to assess the consequences of the 2011 reform which, in just two years, there was a new reform in the pension system, that is, Law 23/2013, governing the sustainability factor and the revaluation index. The preamble of this law is quite clarifying in the sense that, although it begins by referring to the evolution of life expectancy and the low birth rate, and to the exceptional circumstance of the increase in the number of pensioners "in the next few years", refers to the intense economic crisis "which has anticipated the appearance of the deficit in the Social Security accounts for several years", which justifies "if we want to maintain a system of public, pay-as-you-go and solidarity pensions, incorporate additional measures in line with the recommendations of the Toledo Pact and accelerate those already introduced as the sustainability factor".

In Law 23/2013 the sustainability factor appears as a piece of budgetary stability and financial sustainability, that is to say, with a substantially different purpose from that foreseen in Law 27/2011. The political option of not increasing public contributions to the pension system is to reduce their spending at the expense of reducing new pensions, which calls into question the intended intergenerational solidarity, and aims to promote private pension schemes for people who have some savings capacity, which will clearly not be the case in general, especially in view of the austerity policies at all costs that led to a fall in employment, with the consequent reduction in the capacity to sabe.

The strong tensions generated by the economic and employment crisis, which are of a temporary nature, should not be underestimated, but, despite their size and severity, they do not jeopardise the viability of the Social Security system, without prejudice to the need to adopt measures to stabilise the financial situation. In the opinion of SUÁREZ CORUJO, what could really be considered a threat or a challenge to the sustainability of the public pension system is the ageing process of the population. This opinion is nuanced in a double sense.

A first qualification is that the demographic change that begins to take place in the structure of the population is not so much the ageing of society as the substantial increase in the number of elderly people, generally identified as those older than 64. Population ageing tends to be understood as a result of the expected increase in life expectancy and the reaching of the ordinary retirement age of the *babyboom*[8] generation. The latter is decisive insofar as it will have to be taken into consideration when facing the challenge linked to ageing and considering reforms aimed at ensuring the long-term sustainability of the public pension system. The arrival of the age cohort of 65 years or more at retirement implies a considerable increase in the number of

[8] *Babyboom* is the consequence of the high fertility rates recorded in several European countries in the mid-1960s and which lasted until the 1970s. This post-World War II birth rate explosion is the main reason why the population over 65 years of age or older will increase in size in the coming decades. Along with the *babyboom* generation is the increase in life expectancy that causes the European population to be branded as aged.

pensioners who embrace a long, but limited, temporary period, this is, over the next three decades. However, after the effects on the pensions of the *babyboom* generation will be replaced by those of the *babycollapse* generation, that is, the number of elderly will begin to fall due to the low birth rate since the nineties. As far as Spain is concerned, the forecasts are that expenditure will remain the same, despite the fact that the number of pensioners will double, which will mean an obvious impoverishment of the pension if these forecasts are maintained.

A second qualification relates to the consideration of the ageing of the population as an exclusive problem of pay-as-you-go pension systems. It is paradoxical to think that the alteration of the population structure has an impact only on the pay-as-you-go system without spilling over into the level of collective well-being and economic growth. What is curious is that if we look at the estimates on the evolution of GDP in the long term we see that no fall is predicted, which implicitly means that the concurrence of other factors is assumed such as birth rate, migratory movements, productivity that will serve to mitigate the impact of demographic change.

The assessment of financial sustainability will depend on the ability of the public system to absorb the potential increase in expenditure stemming from an increasing number of pensioners without destabilising public accounts. Now, it is key to determine how this responsiveness of public budgets to demographic change is measured. One of the indicators[9] used to assess the sustainability of public pension systems is that which expresses the volume of this item in terms of GDP[10]. It is considered a good criterion insofar as it expresses the relative effort made in this area by countries with very different economies. This indicator shouldn´t be assessed in isolation, but its must be in mind its incidence on the fiscal sustainability of public accounts. Pensions are the most important item of expenditure but they are not the only public expenditure. This is where the revenue structure becomes relevant. It is true that the balance between income and expenditure of the Social Security, in particular of the pension system, is not essential insofar as the payment of pensions is an obligation of the State[11] and if there are not sufficient resources, indebtedness or borrowing will be used. But, the balance is convenient to transmit certainty, confidence in the system, key piece of the intergenerational commitment.

[9] The most frequent indicator used to highlight the risk of financial unsustainability is the so-called dependency ratio, which is the ratio, as a percentage, between the population under 16 years of age or over 64 and the population between those ages. But this is not the indicator that best reflects the impact that the structure of the population has on the pension system. Another indicator, which the European Commission recognises as more reliable from the perspective of demographic balance, is the total economic dependency ratio, this is, the ratio between the inactive population and the active population. This indicator is quite revealing, but it is insufficient insofar as there are other factors outside demographics that have a direct impact on the financial health of the system and, by extension, on the health of public accounts.

[10] GDP (gross domestic product) serves to reflect the share of national wealth produced in a year that is spent on pension payments.

[11] According to art. 41 of the Spanish Constitution, the public authorities are obliged to maintain the Social Security System, which must guarantee "sufficient social benefits in the face of states of need" and "adequate and periodically updated pensions" that achieve "economic sufficiency for citizens during old age" (art. 50 of the Spanish Constitution). Therefore, until the Constitution is changed, the sustainability of benefits in general and of pensions in particular of the social security system is an obligation of the State. APARIOCIO TOVAR, J., "Sustainability as an excuse...", *op. cit.* p. 291.

3. The concept of sustainability in its social and legal dimension: a basic approach

Sustainability has been an argument to justify reforms that act on the expenses of the system, this is, reducing the amount of benefits, in particular the retirement pension. But, what happens, then, with the sufficiency of the benefits of art. 41 of the Spanish Constitution and the economic sufficiency of senior citizens through adequate pensions of art. 50 of the same norm? The debate on sustainability, in reality, is interestingly misplaced, because, as long as the Constitution does not change, the pensions of the Social Security system are sustainable because that is what the constituent has commanded[12].

In this point, which was dealt with in a shorter way than the previous one but no less important, it is a question of making a conceptual approximation of what social sustainability is[13], without ignoring its legal legitimacy. We could define social sustainability as the ability of pension systems to provide sufficient resources for retirees to maintain an adequate standard of living, avoiding the risk of poverty for people who, because of their age, are in an economically vulnerable position.

In order to analyse the social dimension of sustainability, it is necessary to start from the observation that it responds to the logic of solidarity that inspires and articulates, as a sign of identity, the protective action of all Social Security systems[14]. Public pay-as-you-go pension systems are social protection mechanisms based on solidarity with the consequent redistributive effect and purpose. Therefore, financial sustainability is of little use if the measures underpinning it sacrifice the generosity of protective action beyond reason. Article 50 of the Spanish Constitution imposes a mandate on the public authorities to guarantee the economic sufficiency of citizens during old age, not through any instrument, but precisely through retirement pensions that must be adequate and periodically updated[15]. Its maintenance is an element that makes the very general image of the guaranteed public Social Security system recognizable, so that the suppression of retirement pensions or their maintenance without the conditions of adaptation and periodic updating in order to guarantee economic sufficiency would mean the distortion of the very essence of Social Security, altering one of its structural features and directly contravening the mandate of articles

[12] APARICIO TOVAR, J., "Sustainability as an excuse..." *op.cit.* p.291.

[13] The term "social sustainability" was used by the OECD. See OECD, *Pensions at a Glance 2015: OECD and G20 indicators,* OECD Publishing, Paris, p. 9. Available at: http://dx.doi.org/10.1787/pension_glance-2015-en.

[14] Solidarity is a legal principle that is expressed through precise techniques, such as the joint consideration of contingencies and the rupture of the synallagma between the contributions made by protected subjects and the benefits they receive. APARICIO TOVAR, J., "La sostenibilidad como excusa...", *op. cit.*, p. 294. The Spanish public social security system reflects a universal or general solidarity and not a professional or intergroup (corporate/mutualist) one. Article 41 of the Spanish Constitution is in tune with values of universal, intergenerational solidarity, the ultimate aim of which is the idea of redistribution of income, maintenance of a system of distribution and supplemented by non-profit-making public management. DUEÑAS HERRERO, L.J., "La viabilidad del Sistema de Seguridad Social: entre la solidaridad y el ahorro ¿Reparto versus capitalización?", *Revista Doctrinal Aranzadi Social*, Vol. II, Parte Estudio, 1996, BIB 1996/54, p. 5.

[15] The judgment of the Court of Justice of the European Union in the Brachner case (C-123/10), paragraph 44, states that: "... *like the pension itself, the subsequent updating of the pension is intended to protect persons who have reached statutory retirement age against the risk of old age by ensuring that they have the means necessary to meet, in particular, their needs as retired persons*".

41 and 50 of the Spanish Constitution. Both constitutional precepts are based on the concept of economic sufficiency that has to be generically of benefits and specifically of pensions, which in addition to being sufficient must be adequate, as the Constitutional Court recalls, the adequacy of pensions is one of the structural features of the Social Security institution (STC 78/2004). Sufficiency and adequacy are to be determined by the legislator taking into account the general context, economic circumstances, current availabilities and the needs of different social groups.

In this sense, the tightening of the requirements for entitlement to pensions and the rules for calculating them, the increase in contributions and recourse to other sources of income or the increase in the pensionable retirement age may result in legislative decisions necessary for the maintenance of the system and in this sense legitimate. But the legislative options on pensions will lose their constitutional legitimacy when they cease to guarantee access to the right to a pension and the economic sufficiency of pensioners. The sustainability factor must also ensure its current and future sufficiency. Note that the term "sufficiency" is always used, which is an indeterminate legal concept, but not of "minimum". The guarantee of existence is not something linked to the idea of Social Security if it only manages to dispense with a minimum subsistence limit, since it does not allow the full enjoyment of citizenship rights.

Law 23/2013 highlights the "saving" of social expenditure relating to pensions in order to meet the objective of controlling public deficit and this translates into a significant reduction in the rate of substitution of public pensions, space offered to private savings systems, especially pension plans, and in the loss of adaptation of pensions to their constitutional purpose of guaranteeing the economic sufficiency of pensions. This is why the constitutionality of this last reform is called into question, since the pursued objective of providing budgetary stability to the system and reducing public expenditure and deficit is superimposed on the mandates of objectives or aims of the legislator set out in articles 41 and 50 of the Spanish Constitution.

4. Conclusions

Law 23/2013 has adopted a certain policy option of reducing the expenditure on retirement pensions by configuring a sustainability factor[16] as an automatic instrument for adjusting the amount of retirement pensions in the social security system, applicable only once for the determination of the initial amount of these pensions, which links the initial amount of the retirement pension to the evolution of the life expectancy of pensioners, with the consequence that the increase in life expectancy will lead to the automatic reduction of the new pensions irrespective even of the specific financial situation of the pension system itself and of the impact of cyclical elements on it.

The application of the new annual revaluation index of all pensions already caused (art. 7 of the cited law 23/2013), which corrects the previous link between the periodic

[16] Law 23/2013 has already regulated this factor, which was originally to enter into force in 2019 but in view of Law 6/2018 of 3 July on the General State Budget for 2018, its entry into force has been postponed to a date no later than 1 January 2023.

updating of pensions and the evolution of the Consumer Price Index with subjecting the annual revaluation to budgetary stability, will generate a loss of purchasing power of the pensions. This will limit the system's capacity to ensure the economic sufficiency of pensioners, this is, the insurance implemented by the contributory principle of the legal system of defined benefit pay-as-you-go will be replaced by assistance to avoid poverty.

In the absence of a new reform, its results will be particularly burdensome for women because of their late entry into the labour market, who, in addition, perform jobs characterized by temporariness and partiality, and their interruptions due to domestic and family burdens will prevent them from covering long careers of contribution and thus obtaining benefits of an amount comparable to that of men.

The legislator could have introduced a retirement pension sustainability factor whose essential objective was not to operate on the amount of pensions but on the containment of expenditure or the increase in income by modifying other variables according to which the financial sustainability of the system is guaranteed and the economic sufficiency of the pensions caused and future pensions, which must be adequate and periodically updated in order to ensure that constitutionally required sufficiency.

The sustainability of the social security system in general, and of pensions in particular, must be seen as a problem of means and ends. Achieving budgetary balance cannot be the end but the means to achieve its sufficiency. Moreover, it is not lawful for a problem of means to lead to a questioning of the ends and, consequently, of the Social Security institution itself.

In the concept of sustainability of the Social Security system, the four dimensions must come together, this is, social, legal, financial and political. Social Security is a fundamental instrument for social cohesion and its preservation has repercussions in many areas. Therefore, its consideration should not be neglected in any of the dimensions mentioned.

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ASPECTS ON EUROPEAN COOPERATION IN RELATION TO UNLAWFUL LABOR MARKET

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Abstract*: Undeclared work often has a cross-border dimension. The nature of undeclared work may vary from one country to another, depending on the economic, administrative and social context. National legislation on undeclared work and definitions used at national level are different. Measures to combat undeclared work should therefore be adapted to take account of these differences.*

Article 151 of the Treaty on the Functioning of the European Union has set objectives in the field of social policies, promoting employment and improving working conditions, and in order to achieve these objectives, the Union has the freedom to take measures to encourage cooperation between Member States on improving working conditions, combating social exclusion, increasing the integration of excluded people into the labor market.

Keywords: *European cooperation, undeclared work, labor, national legislation.*

At European level, undeclared work is defined as "any paid activity that is legal in nature but not declared to public authorities, taking into account the differences in regulatory systems in the Member States", thus excluding all illegal activities[1].

In turn, the updated Labor Code defines in art. 15, undeclared work as:

a) the taking-over of a person without the conclusion of the individual employment contract in writing, no later than the day before the start of the activity;

b) the employment of a person without the transmission of the elements of the individual labor contract in the general record of the employees no later than the day before the commencement of the activity;

c) the recruitment of an employee during the period when he has the individual suspended employment contract;

d) the employment of an employee outside the working hours established under the individual part-time contracts[2].

The European Union has the competence to act in the field of undeclared work under the TFUE social policy articles. In particular, Article 151 TFEU provides that the Union and the Member States "have as their objectives the promotion of employment, the improvement of living and working conditions, adequate social protection enabling a high and sustainable level of employment and combating social exclusion ".

Article 153 of the TFEU sets out the areas in which the Union supports and complements the activities of the Member States, including working conditions, the integration of people excluded from the labor market and the fight against social

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[1] Commission Communication "Accelerating the fight against undeclared work" COM (2007) 628 of 24 October 2007 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0628:RO:HTML

[2] The updated Labor Code, published in the Official Gazette of Romania, Part I, until 10 April 2018.

marginalization. The proposal to intensify European cooperation on preventing and deterring undeclared work is based on Article 153 (2) (a) of the TFEU, which allows the European Parliament and the Council to take measures to encourage cooperation between Member States through initiatives aimed at increase knowledge, develop exchanges of information and best practices, promote innovative approaches and assess experiences, excluding any harmonization of the laws and regulations of the Member States[3].

The main objectives to be achieved through this initiative are to promote employment and improve working conditions, as set out in Article 151 TFEU. Given that the fight against undeclared work in different Member States is based on different types of competent bodies, the initiative needs to be extended to all national authorities, including those not active in the field of employment and in the field of but which are responsible or have a role to play in deterring or preventing undeclared work, such as tax, migration and customs authorities[4].

Undeclared work has serious budgetary implications through reduced tax revenues and social security. This has a negative impact on employment, productivity, compliance with standards on working conditions, skills development and lifelong learning. Undeclared work undermines the financial sustainability of social protection systems, deprives workers of adequate social benefits and generates lower pension rights and more limited access to healthcare[5].

A wide range of approaches and policy measures to combat undeclared work have been introduced in all Member States. Member States have also concluded bilateral agreements and have carried out multilateral projects on certain aspects of undeclared work.

Three different national law enforcement authorities are mainly involved in undeclared work: labor inspectorates, social security inspectorates and tax authorities. In some cases, migration authorities and employment services, as well as customs authorities, police, prosecutors and social partners are also involved.

To tackle undeclared work in a comprehensive and successful way, it is necessary to implement a policy mix in Member States facilitated by structured cooperation between the relevant authorities. Cooperation should include all national authorities that lead and / or are active in preventing and / or discouraging undeclared work.

To this end, a European legislative instrument is European Union Decision 2016/344 of the European Parliament and of the Council of 9 March 2016 on the establishment of a European platform to step up cooperation in the fight against undeclared work.

This Decision establishes the obligation to set up a platform to step up European cooperation on preventing and deterring undeclared work, which is made up of: the national law enforcement authorities as nominated by all Member States and the Commission. In addition, they can be added as observers:

– representatives of the Union's cross-sectoral social partners as well as of the social partners in sectors with a high incidence of undeclared work,

[3] European Union Decision 2016/344 of the European Parliament and of the Council of 9 March 2016 on setting up a European platform to step up cooperation on combating undeclared work.
[4] Article 151 TFEU.
[5] European Union Decision 2016/344 of the European Parliament and of the Council of 9 March 2016 on setting up a European platform to step up cooperation on combating undeclared work.

– a representative of the European Foundation for the Improvement of Living and Working Conditions and a representative of the European Agency for Safety and Health at Work,

– a representative of the International Labor Organization,

– representatives of the countries of the European Economic Area.

This platform contributes to better implementation of European and national legislation, reducing undeclared work and the emergence of formal jobs, thus avoiding a deterioration in work quality and promoting labor market integration and inclusion by:

(a) improving cooperation at European level between the various law enforcement authorities of the Member States in order to prevent and discourage undeclared work, including undeclared work, more effectively and effectively,

(b) improving the technical capacity of the various law enforcement authorities in the Member States to address the cross-border aspects of undeclared work,

(c) raising public awareness of the urgency of action and encouraging Member States to step up their efforts to tackle undeclared work.

In order to achieve these objectives, the platform exchanges best practices and information, develops experience and analysis, and coordinates cross-border operational actions.

In fulfilling its activities, this platform must fulfill the following tasks:

– to increase knowledge about undeclared work through concepts

common instruments, measuring instruments and by promoting common comparative analyzes and relevant relevant indicators,

– develops the analysis of the effectiveness of the various policy measures in reducing the incidence of undeclared work, including preventive and punitive measures, as well as deterrence measures in general,

– sets up instruments such as a knowledge bank on different practices / measures, including bilateral agreements used in Member States to discourage and prevent undeclared work,

– adopt non-mandatory guidelines for inspectors, good practice manuals and common principles on inspections to combat undeclared work,

– develop forms of cooperation to increase the technical capacity to address the cross-border aspects of undeclared work by adopting a common framework for joint operations for inspections and personnel exchanges,

– examine ways to improve the exchange of data in accordance with Union data protection rules, including exploring the possibilities of using the Internal Market Information System and the Electronic Information Exchange System on Social Security,

– develop a permanent training capacity for law enforcement authorities and adopt a common framework for joint training,

– organize peer reviews to track Member States' progress in combating undeclared work, including support for the implementation of country specific recommendations issued by the Council on combating or preventing undeclared work.

– Raises awareness of the problem by conducting joint activities, such as European campaigns and the adoption of regional or EU strategies, including sectoral approaches.

In the performance of its tasks, the platform will make use of all relevant sources of information, including studies and multilateral cooperation projects, and take into account the relevant Union instruments and structures as well as the experience of the relevant bilateral agreements.

When appointing their representatives, Member States should involve all authorities public services listed above, which have a role to play in preventing and / or deterring undeclared work, such as labor inspectorates, social security authorities, tax authorities, employment services and migration authorities, as responsible authorities law enforcement. They may also, in accordance with national legislation and / or practice, involve the social partners.

Every four years after the Decision enters into force, the Commission shall report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on its implementation. In particular, the report shall assess the extent to which the platform has contributed to the achievement of the objectives and to the performance of the tasks.

The decision on the transposition of the platform in Romania was signed by the presidents of both institutions and published in the Official Journal of the European Union on 11 March 2016 and the platform was officially launched in May 2016.

At national level, our country has transposed the Decision of the European Parliament and the Council through the Government Decision no. 50 of 30 September 2014 for the approval of the opinion on the Decision of the European Parliament and of the Council on the establishment of a European platform for enhanced cooperation in the prevention and deterrence of undeclared work published in the Official Gazette of Romania no. 724 of 2 October 2014.

This normative document emphasizes that undeclared work has serious budgetary implications because of the fall in tax revenues and social security contributions. It has a negative impact on employment, productivity and working conditions, skills development and lifelong learning. Undeclared work leads to lower pension rights and reduced access to healthcare.

The fight against undeclared work is based mainly on three types of competent bodies, namely:

– labor inspectorates to combat abusive behavior in terms of working conditions and / or health and safety standards;

– social security inspectorates for combating fraud relating to social security contributions;

– tax authorities to combat tax evasion.

Through this platform, procedural rules, work programs and periodic reports have been adopted, working groups have been set up to examine specific issues that rely on the expertise of professionals with specific skills, cooperate with expert groups and relevant committees at the level of the European Union whose activities are linked to undeclared work.

At the same time, the amendments to the Labor Code focused mainly on the situations that constitute undeclared work:

– the employment of a person without the conclusion of the individual labor contract in written form on the day before the start of the activity;

– the admission of a person without the transfer of the employment relationship to the general register of employees no later than the day before the start of the activity;

– the employment of an employee during the period when he has the individual suspended employment contract;

– the recruitment of an employee outside the work schedule established under the individual part-time work contracts. The sanctioning regime of undeclared work has also been tightened.

Conclusions.

Prior to the creation of the Platform, EU-wide cooperation remained far from comprehensive as regards both the Member States involved and the regulated issues, and there was no formal cross-border cooperation mechanism between the relevant Member State authorities to address the issues of work undeclared.

Enhanced cooperation between Member States at EU level is still needed to help Member States prevent and discourage undeclared work more effectively and effectively.

To this end, the "European Platform against undeclared work" was created in 2016. The platform's activities are evaluated every four years after the decision enters into force. The assessment is based on result indicators such as the quality of cooperation with other Member States, regular reporting and further research.

The evaluation will analyze the extent to which the platform has contributed to the objectives pursued. The report will be submitted to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

The Platform brings together organizations across the European Union, including employment, tax and social security authorities, who cooperate across borders and exchange information, knowledge and good practice.

The main objective of the platform is to transform undeclared work into declared work and to impose fairness and efficiency in the job market and social protection systems. It will contribute to better living and working conditions for citizens across the EU.

Concerning accompanying measures under the EU's Employment and Social Innovation Program: under the program, direct management will involve the award of contracts and grants for specific activities and the payment of grants to governmental and non-governmental organizations.

The primary risk relates to the ability of smaller organizations to effectively control expenditure and to ensure the transparency of operations.

The platform created on the basis of Government Decision no. 50 of 30 September 2014 will continue to contribute to better enforcement of EU legislation and national legislation, reduce undeclared work and the emergence of formal jobs, thus avoiding a deterioration in work quality, and promoting labor market integration and social inclusion through:

– improving cooperation at European level between different law enforcement authorities in the Member States in order to prevent and discourage undeclared work more effectively and effectively, including false self-employment;

– improving the technical capacity of the various law enforcement authorities in the Member States to address the cross-border aspects of undeclared work;

– raising public awareness of the urgency of action and encouraging Member States to step up their efforts to tackle undeclared work.

EU action has led to the formation of a specialized union team, replacing the use of delegates, where there may always be other people, implicitly supporting Member States' efforts to step up cooperation at European level to deter and prevent undeclared work, making it more effective and more effective, thus adding value to Member States' actions.

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THEORETICAL AND PRACTICAL ASPECTS REGARDING GOOD GOVERNANCE

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Abstract*: Today's politicians, especially those who hold public offices, by the exercise of their duties, aim to govern on a local or regional level. Also, most of them, even if not all, claim that, the measures and policies they promote provide the citizens with good governance, on a state level, but also in regard to national/international structures. In this context, this paper aims to analyze the concept of "governance" and especially "good governance" by analyzing the opinions of doctrine; we will also analyze the similarities between "good governance" and "good administration" in the modern times, as well as the modern meaning of the term "good governance". We also wish to research if the concept of "good governance" is specific to politics and the public sector or if it is involved in other areas of activity, specific to every domain. On the other hand, we aim to analyze if the concept of "good governance" and that of "state of law" are intertwined in any way or if they are two independent concepts which identify different aspects of the modern state and the activity within a state.*

Keywords: *good governance, state of law, good administration, regulation.*

Encyclopedia Britannica defines the term governance as "specifically used to describe the changes occurred in regard to the nature and role of the state as a result of the reform implemented in 1980 and 1990[1], also stating that the rule of law, along with good governance "acknowledged both on a national level and an international level, are essential to support economic growth, durable development and the eradication of poverty and famine"[2]. Also, by pointing out the necessity of state collaboration, the existence of partnerships between states but also between states and the European Union in order to achieve true development, the same resolution reinforced "the commitment for solid policies, for good governance on all levels as well as the rule of law"[3].

Thus, in regard to the most important international organization, along with foregoing all fundamental principles according to which all states of the world, not only the developing ones, should guide themselves by, it is stated that one of the main purposes of their actions – good governance on all levels of the state, in all areas of action. Thus, it is emphasized that "good governance is essential for durable development; that solid economical policies and solid democratic institutions which meet the needs of the people, as well as an improved infrastructure represent the base of sustained economic growth, for eradicating poverty and creating jobs; freedom,

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[1] Encyclopedia Britannica, Governance. Politics and powers, https://www.britannica.com/topic/governance, seen online, date of last access: 14.05.2019.

[2] A/RES/90/1 Resolution adopted by General Assembly 60/1. 2005 World Summit Outcome, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf, seen online, date of last access: 12.05.2018, point. 11 of the chapter "Values and principles".

[3] *Idem*, point 21 of the Chapter "Global partnership for development".

peace and security, internal stability, the respect of human rights, including the right to development, the state of law, gender equality and market oriented policies and a global commitment to rightful and democratic societies are also essential and strengthen each other"[4].

Good governance was also considered on a regional level, even if sometimes this concept was not expressly stated in documents. The preamble of Statute of the European Council[5] states that the founding of the European Council was based on a series of fundamental principles, thus stating that any authentic democracy entails the existence of principles such as: individual freedom, political liberty and the rule of law[6], principles which form the basis of all genuine democracy which can only be supported by good governance.

Also, the European Union states in its Treaty on the European Union, that it defines its common policies and actions and acts in order to ensure a high degree of cooperation in all areas of international relations[7], including with the purpose of "promoting an international system based on multilateral cooperation and good global governance"[8].

The provisions of article 15 first paragraph of the Treaty on the European Union[9] reaffirms the concept of good governance within the Union, by regulating the principle of transparency of decisions of all institutions, organisms, agencies in order to promote good governance and solid participation from the civil society.

Thus, nowadays when we consider how a state should be in relation to each individual, his fundamental rights and freedoms, the relation between public interest and private interest, the role of justice, we operate the phrase state of law.

Certainly, "the state can and must oversee any activity and must encourage general good under the form of law, such as each of his acts is based on the law which represents the manifestation of general will"[10].

A similar point of view is expressed by the Romanian Constitutional Court which, by its jurisprudence, stated that "the state of law ensures the supremacy of the Constitution, the correlation of laws and all other texts of law, the regime of separation

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[4] *Ibidem*. Indeed, as we have previously stated above, these provisions refer to countries which are currently developing and which must be supported in order to create a proper environment to use internal resources by the mentioned means; however, we appreciate that we must consider all the states of the world. Thus, even the states who are past this stage must permanently reevaluate their performances because, although they see it as a given which existed when they were constructed, over passing the boundaries of good governance is always at the discretion of those who govern.

[5] The statute of the European Council was signed in London, May 5th, 1949, subsequently changed several times. This statute was seen online at https://rm.coe.int/1680306052, date of last access 15.05.2019.

[6] *Idem*, point 3 of the preamble of this statute.

[7] See article 21 second paragraph letter h of the Treaty on the European Union, consolidated version, JOUE C 326, 26/10/2012, seen on-line at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_1&format=PDF, date of last access: 15.05.2019.

[8] *Ibidem*.

[9] See the Treaty on the European Union, consolidated version, JOUE C 326, 26/10/2012, seen on-line at: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012E/TXT&from=RO, date of last access: 15.05.2019.

[10] Vecchio, Giorgio del, *Lessons of judicial philosophy*, Europa Nova Publishing House, Bucharesti, 1995, p. 291.

of public powers within a state, which must act within the limits of the law, namely a law which expresses general will"[11].

Thus, the modern state must be built on strong foundation, namely the sovereignty of law and the equality of all citizens[12]; it must never be forgotten that "the state is the private person, seen as a juris species"[13].

In the simples phrasing, the state of law "is the subordination of the state to the law"[14]; Romania's Constitutional Court stated that we can even discuss the principle of the state of law[15] whose requirements entail the major purposes of state activity, seen as the ruling of law, a phrase which involves the subordination of the state to the law, ensuring the necessary means which allow law to censor political options and prevent the potential abusive and discretionary tendencies of ethnical structures[16].

Both the law and the state are inventions of us, humans. Although every person aims to enjoy freedom, as "it is just as natural and legitimate as its own existence"[17], as man is a zoon politikon, a homo socios, he will be able to enjoy unlimited freedom, as the necessity of social life requires such limitations. Since they live in a society, individuals accept, as a given, the necessity and existence of naming, by the use of legal procedures, leaders.

However, there should be a balance between the restraints of their own freedom and the dimension of the general interest on one hand and the freedom of the individual and the leadership of the state, on the other hand.

The one who provides his "good graces" in order to reach this equilibrium is the law[18]. The law is also the tool which ensures the respect of the rights and freedoms of the citizens by limiting the state and the framing of public authorities within the coordinates of law[19].

In regard to the UN, the state of law is considered to be a principle of governance which entails that "all people, institutions and entities, whether public or private, including the state itself, must obey the laws which are passed and made public,

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[11] See Decision no 22/27.01.2004 of the Romanian Constitutional Court regarding the unconstitutional exception of provisions of article 26 third alignment of Law no 112/1995 for the regulation of the legal situation of some living spaces, property of the state, as published in the Official Bulletin of Romania part I no 223/17.03.2004 or point 49 of Decision no 17/21.01.2015 of the Romanian Constitutional Court regarding the unconstitutionality objection of the provisions of the Law regarding the cybernetic security of Romania, published in the Official Bulletin of Romania part I no 79/30.01.2015.

[12] Vecchio, Giorgio del, *op.cit.*, p. 293.

[13] *Ibidem*.

[14] Deleanu, Ion, *Constitutional institutions and procedures – in Romania law and in compared law*, C. H. Beck, Publishing House, Bucharest, 2006, p. 390.

[15] See Decision no 70/18.04.2000 of the Romanian Constitutional Court regarding the unconstitutionality exception of the provisions of article IV point 7 of Government's Ordinance no 18/1994 regarding measures for strengthening the financial discipline of economic agents, approved with subsequent changes, by Law no 12/1995, published in the Official Bulletin of Romania, part I, no 334/19.07.2000.

[16] See point 49 of Decision no 17/21.01.2015 of the Romanian Constitutional Court regarding the unconstitutionality objection of the provisions of the Law regarding the cybernetic security of Romania, published in the Official Bulletin of Romania, part I, no 79/30.01.2015.

[17] Deleanu, Ion, *op. cit.*, p. 393.

[18] Deleanu, Ion, *op. cit.*, p. 391.

[19] See point 49 of Decision no 17/21.01.2015 of the Romanian Constitutional Court regarding the unconstitutionality objection of the provisions of the Law regarding the cybernetic security of Romania, published in the Official Bulletin of Romania, part I, no 79/30.01.2015.

enforced equally and independently and which are in agreement with international regulations and standards in the matter of human rights"[20].

The existence of any state of law is conditioned not only by those mentioned above, but also by leadership who ensured good governance of the state, as its very existence and content are not affected.

The governing of a state must not and cannot, in our opinion, be reduced to its governing by public authorities without respecting the limitations required by the dimensions of the state of law, generically speaking. It is necessary to consider the fact that all these authorities are acknowledged discretionary power[21].

Doctrine has shown that "where discretionary power ends and where the abuse of law begins, where the legal conduct of an authority, namely its right to appreciation ends, the violations of a legitimate and subjective right of the citizen begins"[22].

Certainly, there are situations in which public authorities, including those of the public administration act outside their legal background[23], thus forcing the limits of discretionary power. Such cases can lead to excess of power (when state authorities act outside their legal empowerment); misuse of power (when state authorities fulfill an act which falls among their duties but with another purpose than that stated by law); the abuse of power (when state authorities act outside their competence by acts which are not of legal character)[24]. In our opinion, it is obvious that when public authorities are in one of the above mentioned situations, we are no longer in the presence of good governance.

In our opinion[25], the governing of a state entails all leadership activities which must be performed within the limits of constitutional democracy, by respecting the requirements of the state of law and the principle of the separation of powers within a state.

We could distinguish between several dimensions of the concept of governance. Thus, there is the broad meaning of the term when governance is achieved by public authorities and institutions, thus expressing the three powers of the state, each with specific duties and the respect of their legal competence. Furthermore, we could identify

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[20] Point 6 of the third chapter of the General Secretary of the United Nations' report – T*he state of law and transition justice in conflict and post conflict societies,* p.4, seen on-line at: https://www.un.org/ruleoflaw/files/2004%20report.pdf, date of last access 20.05.2018.

[21] Apostol Tofan, Dana, *Discretionary power and the excess of power of public authorities*, All Beck Publishing House, Bucharest, 1999, p. 26, or Andreescu, Marius, *Power and democracy*, a study published in *Principles and constitutional values*, Universul Juridic Publishing House, Bucharest, 2016, p. 264.

[22] Iorgovan, Antonie, *Preface,* published in and for the paper *The discretionary power and the excess of power of public authorities,* All Beck Publishing House, Bucharest, 1999, p. 7.

[23] Andreescu, Marius, *op. cit.*, p. 263.

[24] Duguit, Leon, *Manuel de Droit Constittutionnel*, Paris, 1907, pp. 445-446, apud. Andreescu, Marius, *op. cit.*, p. 263.

[25] Doctrine has identified the so-called areas of governance; some of them were mentioned above. Thus, it is appreciated that „there are three areas or zones where the concept is particularly relevant" namely: *governance in 'global space'*, or global governance, that deals with issues outside the direct purview of individual governments; then we have *governance in 'national space'*, this time understood as the exclusive preserve of government, of which there may be several levels: national, provincial or state, an finally we can speak about *corporate governance* which comprises the activities of incorporated and non-incorporated organizations that are usually accountable to a board of directors. Plumptre, Tim & Graham, John, *Governance and Good Governance: International and Aboriginal Perspectives*, Institute On Governance, 1999, pp. 7-8, seen at: https://iog.ca/docs/1999_December_govgoodgov.pdf, date of last access: 14.05.2019.

a restricted meaning of the term, when governance is managed by the government, the main body of governing in any state or its corresponding institution in international and regional organizations, as is the European Commission of the European Union.

Although the role of a government is not reduced to governing, as most times it also has an active role in public administration, as is the case of the Romanian Government or even a legislative role, as is the case of the Swedish Government, the governing of a state is basically achieved by a government. We can even identify a local dimension of the concept of governance as local executive and legislative powers will ensure not only the administration of a local community, but also its governing within the nationally established limits in relation to national governing.

Regardless of its level, whether national, local or institutional, or the dimension of this concept as mentioned above, governing entails leadership activities which establish the guiding lines of that certain policy. On the other hand, governance might be translated by the power of the leaders provided that they are nothing more than the power of the nation itself, a power which is concentrated and fit to be exercised[26].

Thus, we believe that governing in not similar to administering, as the first activity sets the guidelines for the second, which has political meanings. This statement is also supported by executive power, where the fundamental reason of the Government[27] is setting the political guidelines of the nation, both national and international, within the limits set by the Parliament[28].

As opposed to this, public administration achieves the administration of a state and is led by the Government, whose purpose is fulfilling these political values[29].

As a consequence, discussing good governance does not mean to consider only the administrative aspects, but so much more than that. As we can identify political decisions, the guidelines of national, internal and international policy, in order to ensure a good and correct leadership of a state and its people, in case of good governance, we will be able to identify specific activities; however, good governing does not equal good administration.

When discussing good governance, specific to any state, we must consider principles such as: legal democracy and security, as administration must obey the law, the members of the Government must be liable for their acts, the courts must be independent and the citizens enjoy freedom, as their rights are guaranteed[30]. A similar opinion is expressed by A.V. Dicey who stated that one of the dimensions of the state of law, seen as fundamental principle of any constitution, is represented by the absolute supremacy of the law as opposed to the influence of the arbitrary, including the discretionary power of the government[31].

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[26] Miller, John Stuart, *About freedom*, Humanitas Publishing House, Bucharest, 2005, p. 46.
[27] Muraru, Ioan & Tănăsescu, Elena Simina, coord., *Romanian Constitution. Comments by articles,* C. H. Beck Publishing House, Bucharest, 2008, p. 940
[28] *Ibidem*
[29] Apostol Tofan, Dana, *Administrative law*, first volume, C. H. Beck Publishing House, Bucharest, 2009, p. 156.
[30] Kelsen, Hans, *Pure doctrine of law*, Humanitas Publishing House, Bucharest, 1992, 2000, p. 368.
[31] Dicey, Albert Vern, *Introduction to the study of the law of the constitution,* Liberty *Classics Publishing House,* Indianapolis, 1915, 1982, pp. 120-121.

Nevertheless, the concept of good governance is not a modern concept, nor is that of governance[32]. Doctrine distinguished between the two concepts – governance and good governance, as some authors believe they are connected. Thus, ii is stated that „any attempt to define it would lead to a long discussion of what is governance as well as to a normative search of what is "good"[33]. On the other hand, we must point out that „good governance is a term different from governance which is mainly a political and technocratic term without normative aspirations and suggests that governance should be "good" and not "bad"[34]. If, as mentioned above, the concept of governance, as well as that of good governance, leads to the idea of ruling a state, an authority or an organism, they must not be mistaken for the term of governance. Governing is not reduced to governance, thus we can discuss „the need for governance as a concept distinct from government that began to manifest itself when government became an organization apart from citizens rather than a process"[35]. In such a context, governance is seen as a form of organization, as a structure seen in any modern society as the state, in the modern meaning of this term, as is a government, for example[36].

Unfortunately, we were unable to identify any definition unanimously accepted by doctrine[37], international institutions or organizations[38] who attempted to identify the concept

[32] As an author outlined „governance is certainly not a new term". See Uchendu, Eugene Chigbu, *Addressing Good Governance In Africa. A Discussion Paper,* 2010*,* seen at: https://www.aggn.org/sites/default/files/field/publication-pdf/Article-AGGN_AdressingGoodGovernance.pdf, date of last access: 14.05.2019. The same author underlines that „this concept had been dealt with by Max Weber, who in the early twentieth century, without necessarily using the term, "outlined the functions of a bureaucracy that would facilitate development and called for strict observance of the rule of law and legal rationality – and also advised against a mixture of private interests with the public responsibilities of the bureaucrat", Bhattarai, Ananda Mohan, *Problems of Developing Countries in Promoting Good Governance*. Text from lecture at the National Judicial Academy, Nepal. December 29, p. 2, quoted by Uchendu, Eugene Chigbu, *op. cit.,* pp. 5-6.

[33] Ladi Stella, *Good Governance and Public Administration Reform in the Black Sea Economic Cooperation (BSEC) Member States* articol publicat în *International Centre for Black Sea Studies 2008 – Xenophon Paper,* p.11, seen online at: http://icbss.org/media/110_original.pdf, date of last access: 14.05.2019.

[34] Ibidem

[35] Plumptre, Tim & Graham, John, *op. cit.*, p. 2.

[36] The quoted authors underline the distinction made nowadays as opposed to the time of ancient Greek Society when the term government was seen as „simply a process for dealing with issues". However, the same authors mention that this confusion in regard to the meaning of the term governance is maintained in the present days, thus providing examples of the definitions of this term given by the Concise Oxford Dictionary. Thus, governance is an organizational structure – „the group of people with the authority to govern a country or state; a particular ministry in office", but also the leadership system of a state – „the system by which a state or community is governed", as well as the process by which an entity is led– „the action or manner of controlling or regulating a state, organization, or people". See the definitions of the term governance as provided by the Concise Oxford Dictionary, seen at: https://en.oxforddictionaries.com/definition/government, date of last access 14.05.2019, as well as Plumptre, Tim & Graham, John, *op. cit.*, p. 2.

[37] It is stated that „governance has been variously defined as the management of society by the people, or as the exercise of authority to manage a country's affairs and resources, but it has to be noted, however, that there has hardly been a consensus as to its core meaning and as to how it could be applied in practice". Simonis, Udo E. (2004): *Defining good governance: The conceptual competition is on*, WZB Discussion Paper, No. P 2004-005, Wissenschaftszentrum Berlin für Sozialforschung (WZB), Berlin, pp. 2-3, seen at: https://www.ssoar.info/ssoar/bitstream/handle/document/11037/ssoar-2004-simonis-defining_good_governance_-_the.pdf?sequence=1, date of last access: 14.05.2019.

[38] It was noted that such organizations define the concept of governance and offer points of identifications of the concept of governance, rather than that of good governance, although they aim to identify the content of the latter. Thus, for example, the World Bank outlines three aspects of governance: i) the type of the political regime, ii) the public management of economic and social resources, and iii) the capacity of government to design, formulate and implement policies. See World Bank, Governance: The World Bank's Experience (Washington D.C.: The World Bank, 1994) quoted by Ladi Stella, *op. cit.,* p. 11.

of governance; however „most authors agree that it has to do with taking decisions about direction"[39] and that „fundamentally, it is about power, relationships and accountability: who has influence, who decides, and how decision makers are held accountable"[40].

Certainly, regardless of the aspects covered by the definition of this concept, this is a term which does not have a standard meaning[41] in the diverse areas of the life of a society and whose content may undergo changes, thus adapting to the new social reality. Also, it is a concept that is „widely understood, when used with regard to government or the public sector, to refer to the institutional underpinnings of public authority and decision making"[42] this way „governance encompasses the institutions, systems, "rules of the game" and other factors that determine how political and economic interactions are structured and how decisions are made and resources allocated"[43].

If the concept of governance is difficult to accurately define in a unified manner, stating the same about the concept of good governance is at least pertinent. It is stated that this concept is an elastic[44] one that „has acquired the characteristics of a "container concept", which incorporates a variety of principles and is as general as concepts such as globalisation or global governance"[45]. Most generally, good governance refers to a list of admirable characteristics of how government ought to be carried out[46]. The diversity of definitions of this concept provided by different international organizations[47] is an argument for the diversity of meanings provided by doctrine, as well as the option to identify defining elements of this concept.

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[39] Plumptre, Tim & Graham, John, *op. cit.*, p. 2.
[40] *Ibidem*.
[41] Simonis, Udo E. (2004), *op. cit.*, p. 3.
[42] Grindle, Merilee S., *Good Governance: The Inflation of an Idea,* HKS Faculty Research Working Paper Series, RWP10-023, John F. Kennedy School of Government, Harvard University, p. 2., seen at: https://dash.harvard.edu/bitstream/handle/1/4448993/Grindle_GoodGovernance.pdf?sequence=1, date of last access: 14.05.2019.
[43] *Ibidem*
[44] Ladi Stella, *op. cit.,* p. 11. This author claims that good governance has become an elastic term rather than a concept in its own terms.
[45] *Ibidem*.
[46] Grindle, Merilee S, *op. cit.,* p. 2.
[47] Similarly, United Nations Development Programme (UNDP) considers that „Good governance refers to governing systems which are capable, responsive, inclusive, and transparent. All countries, developed and developing, need to work continuously towards better governance. Good, or democratic governance as we call it at UNDP, entails meaningful and inclusive political participation. Improving governance should include more people having more of a say in the decisions which shape their lives" (*Remarks by Helen Clark*, Administrator of the United Nations Development Programme, at the Fourth United Nations Conference on the Least Developed Countries High Level Interactive Thematic Debate on Good Governance at All Levels, Istanbul, 11 May 2011, quoted by Gisselquist, Rachel M., *Good Governance as a Concept, and Why This Matters for Development Policy*, Working Paper No. 2012/30, United Nations University, UNU-WIDER – World Institute for Development Economic Research, p. 6, seen at: https://www.wider.unu.edu/sites/default/files/wp2012-030.pdf, date of last access: 14.05.2019). As opposed, the European Commission preferred to identify a number of five principles which are the basis of good governance, each of them being equally important in establishing a democratic governance; the Commission points out the close connection between good governance and democracy. These five principles are: openness, participation, accountability, effectiveness and coherence. For more details, see Commission of the European Communities, *European Governance: A White Paper*, COM(2001) 428 final, Brussels, 25 July 2001, p. 10, seen at: https://ec.europa.eu/europeaid/european-governance-white-paper_en, date of last access: 14.05.2019

The numerous definitions of the concept of good governance demonstrates that each country will particularize it according to its own specifics, on one hand, as „good governance being a product of time and the individual historical, political and economic conditions of each country have to be taken into account when reforms are prioritised"[48]. On the other hand, the fact that it is identified and defined by different international organizations[49] leads to the idea of globalizing the principle of good governance.

The difficulty in creating a unified definition of the concept of good governance creates the premises in order to proceed to the identification of the principles or elements[50], or aspects[51] of good governance.

"Governance" opens new intellectual space[52] which allows us to discuss the role of the those who govern, especially in coordinating and solving public interest matters, as well as involving other actors from the public and private space in solving matters and identifying strategies in case of management incapacity of government, as well as finding solutions by which other structures or groups of the society, other than those in public government, can play a stronger role in solving the problems of a governance[53].

The idea of good governance can be the solution of every state when it wishes to strengthen itself or become a positive actor in the economical and political development[54]. Certainly, good governance[55] is a good idea and a concept which is necessary in today's society, both on a global, national or even local level which, by its forming elements can create the conditions necessary for every human being to enjoy their life and the world they live in.

However, this does not mean that it can be considered as a "magic bullet"[56] used when not only the leadership, but also us forget that "all those who govern aim for power and detest weakness, aim for certainty and detest danger, wish for glory and detest shame"[57].

The former UN Secretary General Kofi Annan describes good governance as a force ensuring respect for human rights and the rule of law, strengthening democracy, promoting transparency and capacity in public administration.[58]

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[48] Grindle, Merilee S., *Good Enough Governance Revisited* in Development Policy Review 25, no. 5 (2007): 553-574, quoted by Ladi Stella, *op. cit.,* p. 12.

[49] For more similar examples, see Gisselquist, Rachel M., *op. cit.,* pp. 6-8.

[50] Such forming elements of the concept of good governance are thought to be: constitutional legitimacy, democratic elections, respect for human rights, rule of law, political openness, predictability and stability of laws, tolerance, equity, public participation, public expenditures directed to public purposes, judicial independence, transparency, absence of corruption, active independent media, freedom of information, administrative competence, administrative neutrality: merit-based public service, accountability to public interests on issues of public concern. Plumptre, Tim & Graham, John, *op. cit.*, p. 11.

[51] Some authors have identified „the key defining properties of the concept", identifying three major features: good governance is predicated upon mutually supportive and cooperative relationships between government, civil society, and the private sector; good governance is defined as possession of all, or some combination of, the following elements: participation, transparency of decision-making, accountability, rule of law, predictability; good governance is normative in conception. Simonis, Udo E. (2004), *op. cit.*, p. 4.

[52] Plumptre, Tim & Graham, John, *op. cit.*, p. 14.

[53] See Plumptre, Tim & Graham, John, *op. cit.*, p. 14 and next.

[54] See Grindle, Merilee S. 2010, *op. cit.*, p.3.

[55] *Idem*, p. 15.

[56] *Ibidem*

[57] Xun Zi, *The path of ideal governance*, Polirom Publishing House, Iaşi, 2004, p. 53.

[58] Quoted by Ladi Stella, *op. cit.,* p. 11.

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THE DEED OF THE CREDITOR – CAUSE FOR EXONERATION FROM CONTRACTUAL CIVIL LIABILITY

Viorel TERZEA*

Abstract: *One of the situations in which the contractual debtor is exonerated from liability is when the contractual prejudice is related, under a cause and effect relationship, to the deed of the creditor. Still, the exoneration from liability may only occur when the deed of the creditor meets the characteristics of a force majeure or fortuitous case event.*

Keywords: *Deed of the creditor, exoneration from liability, damages, cause and effect relationship, guilt.*

1. Legal provisions

According to Art. 1352 of the Civil Code, the deed of the creditor exonerates the debtor from contractual liability when it meets the characteristics of force majeure, as defined by Art. 1351 of the Civil Code. By way of exception, the exoneration from liability shall occur even when the deed of the creditor only meets the characteristics of a fortuitous case, provided that either by law or by the parties' agreement, fortuitous cases is given the effect of exonerating from liability[1].

The legal provision referred to above must be correlated with the provisions of Art. 1517 of the Civil Code, according to which one party may not invoke the failure to fulfil its obligation by the other party if the failure to fulfil such obligation is caused by its own action and with those of Art. 1534 of the Civil Code, according to which if the creditor, by its culpable conduct, has contributed to the occurrence of the prejudice, the compensation owed by the debtor shall be reduced accordingly.

By comparing the abovementioned legal provisions, we note that the deed of the creditor has various effects in terms of contractual liability, depending on the moment it occurs:

a) if the failure to fulfil the obligation by the contractual debtor is due to a certain type of conduct of the creditor, then the deed of the debtor is not culpable, and it is not deemed guilty, and consequently contractual civil liability shall not apply [Art. 1517 of the Civil Code in conjunction with Art. 1530, final sentence, of the Civil Code];

b) if the deed of the creditor meets the characteristics of a force majeure event and leads to the interruption of the cause and effect relationship between the failure to fulfil the contractual obligation and the contractual prejudice, then the contractual debtor is

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[1] For details, see: A. Man, S. Golub, *The Fault of the Creditor*, Lumina Lex Publishing House, Bucharest, 2002, passim. For a monographic analysis under French law, see C. André, *La fait du créancier contractuel*, LGDJ Publishing House, Paris, 2002, passim.

exonerated from liability [Art. 1352 of the Civil Code]. The same effect occurs when, either by law or by the parties' agreement, fortuitous case has an exonerating effect, and the deed of the creditor only meets the characteristics of a fortuitous case[2].

c) if the deed of the creditor does not meet the characteristics of a force majeure event or, as the case may be, a fortuitous case, but it did contribute to the occurrence of the prejudice, together with the deed of the debtor, then the damages shall be reduced [Art. 1534 of the Civil Code].

The possibility of exonerating the debtor, in full or in part, if the prejudice is due, in full or in part, to the deed of the creditor was also admitted under the old Civil Code, even though there was not express provision in this respect[3].

Similar provisions are also found in the regulations of other states (i.e. § 254 para. (1) BGB[4], art. 1227 para. (1) of the Italian Civil Code[5] etc.), as well as in the harmonised regulations of contractual law [i.e. art. 80 CVIM[6], art. 8101 para. (3) of PECL[7], art. III.-3101 DCFR[8], art. 7.1.2. of the 2016 Unidroit Principles[9] etc.].

2. Scope

Unlike the provisions of Art. 1352 of the Civil Code, which refer both to tort liability[10] and to contractual liability, the rules provided for by Art. 1517 of the Civil Code only apply if the default invoked refers to a contractual obligation.

The deed of the creditor may be invoked regardless of the nature of the contract generating the non-fulfilled contractual obligations, as the law does not make a

[2] Similarly, L. Boilă, *Commentary on Art. 1352 of the Civil Code*, Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *The New Civil Code. Comments by articles*, second edition, C.H. Beck Publishing House, Bucharest, 2014, p. 1494.

[3] See I. M. Anghel, F. Deak, M. F. Popa, *Civil Liability*, Ştiinţifică Publishing House, Bucharest, 1970, No. 524, p. 328; C. Stătescu, C. Bîrsan, *Civil Law. General Theory of Obligations*, 9th edition, revised and updated, Hamangiu Publishing House, Bucharest, 2008, p. 333.

[4] „*Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party".*

[5] „*Se il fatto colposo del creditore ha concorso a cagionare il danno, il risarcimento e' diminuito secondo la gravita' della colpa e l'entita' delle conseguenze che ne sono derivate".*

[6] "*One party may not invoke a failure to fulfil an obligation by the other party if such failure to fulfil its obligations was caused by its action or lack of action.*"

[7] „*A party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance*".

[8] „*The creditor may not resort to any of those remedies to the extent that the creditor caused the debtor's non-performance*".

[9] „*A party may not rely on the nonperformance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk".*

[10] For a recent analysis of the effects of this cause for exoneration in the field of tort liability, see P. Pricope, *Civil Tort Liability*, Hamangiu Publishing House, Bucharest, 2012, p. 149 zet seqq.; Fl. Mangu, *Civil Liability. Constant Elements of Civil Liability*, Universul Juridic Publishing House, Bucharest, 2014, p. 215 et seqq.

distinction[11]. Still, on principle, the issue of a deed of the creditor that prevents the debtor from fulfilling its obligation may not be raised where the object of the debtor's obligation is an obligation *to give*, since, on principle, the ownership right or another real right is transferred or, as the case may be, arises as of the moment of expressing mutual consent, without being influenced by the creditor's conduct[12].

The contractual debtor may invoke the limitation provided for by Art. 1517 of the Civil Code regardless of the type of remedy to be used by the creditor[13], and the effect actually produced is to be analysed depending on the remedy invoked for the failure to fulfil the contractual obligation[14]. It is true that according to Art. 1352 of the Civil Code, the deed of the creditor is viewed as a cause exonerating from contractual liability, but the provisions of Art. 1517 of the Civil Code do not limit the possibility of invoking it only with regard to the remedy represented by contractual liability.

3. The basis for the fact that the creditor cannot invoke the failure to fulfill an obligation due to its own actions.

As regards the basis of limiting the creditor's prerogative of invoking the debtor's failure to fulfil an obligation, the literature in the field take several approaches.

A first opinion[15] shows that such interdiction established by Art. 1517 of the Civil Code is a specific application of the good-faith principle, enshrined by Art. 14 of the Civil Code and by Art. 1170 of the Civil Code and of the "*nemo auditur propriam turpitudem allegans*" principle[16] as regards the fulfilment of the contractual obligations.

According to another opinion[17], by virtue of the solidarity connection that must exist between the contracting parties, they should adopt such a conduct that allows for the observance of such principle, which requires that the parties must meet those obligations which aim at maintaining the solidarity connection, which also include the fair dealing obligation.

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[11] Namely, the provisions of Art. 1517 of the Civil Code may not be invoked when claiming the restitution of an undue payment, see Teleorman Tribunal, Civil Section, Decision No. 846 of 31 October 2016, *www.rolii.ro*, last accessed on 01.04.2019.

[12] See also Fl. Mangu, *Annulment, termination and reduction of the obligations- (II) Conditions*, in „Pandectele Române ", Bucharest , No. 2/2014, p. 36.

[13] See also D.-A. Ghinoiu, *Commentary on Art. 1517 of the Civil Code*, in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *op. cit*., p. 1695.

[14] Similarly, C. E. Zamşa, *Effects of civil obligations,* Hamangiu Publishing House, Bucharest, 2013, p. 98, p. 102.

[15] D.-A. Ghinoiu, *Commentary on Art. 1517 of the Civil Code*, in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *op. cit*., p. 1694.

[16] For an analysis of this rule, see also I. Deleanu, *Juridical Fictions*, C.H. Beck Publishing House, Bucharest, 2005, p. 338 et seqq. It was stated that the "nemo auditur..." principle may only be applied when there is no express legal provision regulating the exercise of certain rights or the fulfilment of certain duties (see C. Zamşa, *op.c it.*, no. 98, p. 102).

[17] L. Pop, *Contractual solidarity and the parties obligations during the performance of the contract*, in "Revista Română de Drept Privat" No. 1/2017, p. 325 et seqq. See also Ch. Jamin, *Plaidoyer pour le solidarisme contractuel* , in „Le contrat au début du XXI ème siècle", Etudes offertes à J. Ghestin, LGDJ, 2001, rééd. LGDJ-Lextenso éditions, coll. Anthropologie du Droit, 2014, p. 441 et seqq.

The same opinion states that such an obligation will also rest with the creditor and shall be materialised in the fact that the creditor must abstain from aby conduct that could lead either to the debtor's inability to fulfil its obligation, or to making it significantly more difficult for it to fulfil such contractual obligation.

It is possible that the contract concluded between the parties expressly or implicitly provides for certain obligations for the creditor, whose fulfilment is necessary for the due compliance by the debtor of the obligations assumed by it. In such a situation, the creditor's failure to fulfil its obligations is an infringement of the principle of mandatory force of the contract enshrined by Art. 1270 of the Civil Code.

If there is no imposed contractually obligation for the creditor to fulfil a certain obligation, then the creditor's obligation not to prevent, through its conduct, the fulfilment of the debtor's obligation may be deduced from the principle of good faith, which must exist during the performance of the contract (Art. 1170 of the Civil Code).[18]

An opinion is that[19] the concept of "fair dealing" in contracts is not independent from good faith, being only an objective and more limited side of the concept of good faith. Similarly, it was also stated that[20] the role of good faith is much more extended, as it represents an essential instrument in measuring the conduct of the parties, in other words, it facilitates the implementation of "justice-fairness".

Another opinion[21] stated that the concepts of fair dealing and good faith cannot be confounded, as they are different by reference to their different purpose, scope and effects. In this respect, it was stated that the fair dealing obligation refers to a general behavioural duty, while good faith refers to an explicit, well defined contractual obligation.

Regardless of the approach adopted with regard to the basis of the interdiction to invoke the failure to fulfil an obligation provided for by Art. 1517 of the Civil Code, the main effect will be the same, namely the debtor shall be exonerated from liability if the failure to fulfil the obligation was caused by the deed of the creditor.

However, the basis of the abovementioned interdiction is relevant if the creditor is held liable for its conduct, which made it impossible for the debtor to fulfil its obligation.

4. Conditions

In order to be able to invoke the limitation of the creditor's exercise of its material right to the remedies for failure to fulfil, as per Art. 1517 of the Civil Code or the exoneration from liability as per Art. 1352 of the Civil Code, all of the following conditions must be met: there must be an action or a lack of action by the creditor and a connection between the deed of the creditor and the contractual prejudice invoked by the creditor.

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[18] Similarly, According to Art. 1:201 PECL ("Good faith and fair dealing") „*each party must act in accordance with good faith and fair dealing".*

[19] M. Floare, *Good and bad faith in negotiating and performing ordinary law contracts*, Universul Juridic Publishing House, Bucharest, 2015, p. 112.

[20] J. Ghestin, G.Loiseau, Y.-M.Serinet, *La formation du contract. Tome 1: Le contrat-le consentement*, 4e édition, Ed. LGDJ, 2013, Paris, No. 457, p. 340

[21] R. Jabbour, *La bonne foi dans l'exécution du contrat*, Ed. LGDJ, 2016, Paris, No. 143, p. 124 et seqq.

Although the marginal designation of Art. 1517 of the Civil Code refers to the failure to fulfil ascribable to the creditor, namely the existence of a guilt of the creditor, upon analysing the contents of the same article we note that the limitation of the material right of the creditor may be invoked whenever the deed of the creditor prevented the fulfilment of the contractual obligation, without being necessary to determine the culpable nature thereof[22]. Therefore, the limitation of the creditor's right, imposed by Art. 1517 of the Civil Code may be invoked even if the failure to fulfil an obligation by the creditor (which is a condition for the fulfilment of the debtor's obligation) is due to a force majeure event[23].

As a rule, the legal provisions mentioned above shall apply if the creditor directly prevents the fulfilment by the other party of its contractual obligation, but it does not exclude the possibility for the creditor's conduct to influence the fulfilment of the contractual obligation or the consequences of the failure to fulfil it (i.e. the creditor had the obligation to provide certain information to allow the debtor to properly fulfil its obligations, but the creditor improperly fulfilled its obligation to provide such information)[24].

In addition, the deed of the creditor, which prevents the debtor from fulfilling its obligation, may consist either in an action or in a lack of action (i.e. the creditor does not provide certain information that was necessary for the debtor to duly fulfil its obligations). Similarly, the harmonised law on sales provides that[25] the provisions of Art. 80 of CVIM apply even if the purchaser provides inaccurate or incomplete information regarding the transport of the purchased goods, when the purchaser fails to fulfil its obligation to cooperate for the proper fulfilment by the purchaser of its corresponding obligation (i.e. the purchaser does not obtain an import licence, no exact information regarding the place of delivery is provided, etc.) in case of an unjustified refusal by the purchaser to accept a delivery of substitute goods, etc.

For the limitation provided for by Art. 1517 of the Civil Code to apply, it is not necessary for the deed of the creditor to meet the requirements of a force majeure event, as the law does not impose such a requirement[26]. If the creditor's conduct was caused by a deed of the debtor preceding such conduct, then the limitation imposed by Art. 1517 of the Civil Code is no longer justified.

The specialised literature[27] states that, when the deed of the creditor consists in the failure to fulfil its own contractual obligations, then such a situation is not subject to Art. 1517 of the Civil Code, as the debtor has the obligation to invoke the proper justifying reason by reference to the particulars of the creditor's non-fulfilment.

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[22] I.-Fl. Popa, in L. Pop, I. Fl. Popa, St. I. Vidu, *Civil Law Lecture. Obligations*, Universul Juridic Publishing House, Bucharest, 2015, No. 120 p. 184.

[23] H. Schelhaas, in St. Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts*, second edition, Oxford University Press, 2015, p. 834.

[24] O.Lando, H.Beale, (eds.), *Principles of European Contract Law, Parts I and II (Combined and Revised)*, prepared by the Commission of European Contract Law, Kluwer Law International, The Hague/London/Boston, 2000, p.360.

[25] I. Schwenzer, in Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, fourth edition, Oxford University Press Publishing House, 2016, No. 3, pp. 1156.

[26] Similarly, I. Schwenzer, in Schlechtriem & Schwenzer*, op. cit.*, No. 5, p. 1158.

[27] Fl. Mangu, *Annulment, termination and reduction of the obligations- (II) Conditions*, cit supra, p. 34-35.

Such a limitation of the debtor's right to invoke that fact that it was prevented from fulfilling its own obligations may only be held if all of the conditions imposed by law for invoking a justifying reason for the failure to fulfil an obligation are met (i.e. the objection of failure to fulfil cannot be invoked in case of obligations which, although they are mutual, are not interdependent).

Basically, in the situation mentioned above, if the debtor's failure to fulfil its obligations is justified, then one of the essential requirements triggering the remedy of failure to fulfil is missing, therefore, the other conditions imposed by law will not be worth analysing.

As regards the second condition related to establishing a connection between the deed of the creditor and the contractual prejudice invoked by the creditor provided for by Art. 1517 of the Civil Code, it is a cause and effect relationship, as it reflects the efficiency of the cause represented by the deed of the creditor. Therefore, if the deed of the creditor influenced the occurrence of the contractual prejudice, the abovementioned requirement is not met, therefore the limitation of the exercise of the creditor's material right among the remedies for failure to fulfil shall not be applicable. The relationship between the two elements mentioned above may be direct (i.e. the seller does not deliver the commodity due to the fact that the purchaser failed to obtain all authorisations necessary for the delivery of the commodity) or indirect (i.e. the purchaser does not provide the necessary information for acquiring certain components of a machinery, and due to the delay in acquiring such components, the machinery that had to be delivered in full has deteriorated)[28].

5. Applications

In the judicial practice, the defences based on the provisions of Art. 1517 of the Civil Code were regarded as substantiated in the following situations:

a) in case of a claim filed by the attorney-in-fact for the payment of the fees, based on the argument that the principal did not provide the documents necessary for the fulfilment of the mandate if the attorney-in-fact had the obligation to previously inform the principal of the need to be provided with such documents, but it did not fulfil such obligation to inform[29];

b) in case of a claim filed by a trainee for the performance of a training contract having as its object the performance of the legislation classes for the purpose of obtaining the driver's licence, if the failure to fulfil the obligation of providing legislative training was due to the fact that the trainee did not attend the scheduled classes and did not collaborate with the Driving School representatives in order to take the legislation classes[30];

c) in case of a claim filed by the creditor of maintenance having as its object the termination of the maintenance contract when the failure to provide

[28] I. Schwenzer, in Schlechtriem & Schwenzer, *op. cit.*, No. 4, p. 1157.
[29] Harghita Tribunal, Civil Section, Decision No. 811 of 5 October 2016, *www.rolii.ro*, last accessed on 01.04.2019.
[30] Iasi Tribunal, Civil Section, Decision No. 783 of 4 May 2017, *www.rolii.ro*, last accessed on 01.04.2019.

maintenance was due to the creditor's fault, who refused, without justification, to receive the maintenance[31];

d) in case of a claim whereby a seller requested the payment of the commodity delivered, if the purchaser, although it invoked the non-compliance of the commodity, did not return the goods received to the purchaser in order to be able to benefit from the non-compliance warranty, in which case the decision was that the purchaser had to be compelled to pay the price, in compliance with Art. 1350 of the Civil Code in conjunction with Art. 1531 of the Civil Code, for the implementation of the provisions of Art. 1719 para. (1) point (b) of the Civil Code[32] etc.

6. The effect of exonerating from liability

The main effect of the existence of the deed of the creditor which has a cause and effect relationship with the debtor's failure to fulfil its obligation is the exoneration from liability of the debtor, provided that the creditor invoked the remedy for failure to fulfil the obligations, represented by contractual liability [Art. 1352 of the Civil Code].

In order for such an exonerating effect to occur, the deed of the creditor must meet the characteristics of a force majeure event, as defined by Art. 1351 of the Civil Code. By way of exception, it is possible for the same exonerating effect to be recognised also for the deed of the creditor that meets the characteristics of a fortuitous case, but only where the fortuitous case has, according to law or the parties' agreement, the same legal regime as the force majeure event.

The exoneration from liability shall apply if the failure to fulfil the contract is final, and not temporary (Art. 1634 of the Civil Code). It was also shown that[33] the exonerating effect shall apply only where the debtor's fault is presumed[34], as if such a presumption does not exist, if the unlawful deed of the debtor and the cause and effect relationship between it and the prejudice whose repair is claimed by the creditor was established, then invoking the creditor's deed would only be relevant as regards establishing the extent of the damages.

The exonerating effect is conditional upon the existence of a cause and effect relationship between the deed of the creditor and the contractual prejudice, which means that such prejudice must be caused in full by such deed of the creditor.

If the contractual prejudice was caused, in part, by the deed of the creditor, it must be established, in advance, which were the other factors causing such prejudice, in order to determine the consequences with regard to contractual liability:

a) if the contractual prejudice was caused both by the deed of the creditor and by other fortuitous events, then the debtor may be fully exonerated from liability;

[31] Giurgiu Tribunal, Civil Section, Decision No. 147 of 20 February 2017, *www.rolii.ro*, last accessed on 01.04.2019.
[32] Sibiu Tribunal, Second Civil Section, Decision No. 323 of 22 March 2018, *www.rolii.ro*, last accessed on 01.04.2019.
[33] Similarly: M-L. Belu Magdo, *Contractual civil liability in the New Civil Code,* Hamangiu Publishing House, Bucharest, 2017, No. 44, p. 179.
[34] Please note that Art. 1548 of the Civil Code establishes a presumption of fault in case of failure to fulfil the contractual obligations.

b) if the contractual prejudice was caused both by the deed of the creditor and by the deed of the contractual debtor, a distinction must be made between the dividable and undividable obligations. In the case of dividable obligations, if a correlation may be established between the various components of the dividable obligations (i.e. the recurring obligations of a distribution contract) and the deed of the creditor, then the debtor is exonerated from liability only in part, corresponding to such obligation.

In such a case, the debtor has the obligation to fulfil the part of its obligation that was not prevented by the deed of the creditor[35]. In addition, if the creditor is not entitled to refuse to perform a partial payment, as the provisions of Art. 1490 para. (1) of the Civil Code are not applicable, as the fragmentation of the payment is due to the deed of the creditor, who prevented the performance in full of the obligation assumed by the debtor. If the debtor refuses, without justification, to fulfil that part of the obligation that is not prevented by the deed of the creditor, then the creditor may resort to the remedies of failure to fulfil for the part of its obligation not fulfilled due to the debtor's fault, however subject to the particularities imposed by each remedy.

Thus, for example, in the situation analysed above, starting from the assumption that the object of the obligation assumed by the debtor is dividable, the creditor may request only the partial termination of the contract, provided that the obligations that may still be fulfilled are significant by reference to the contract concluded [Art. 1549 para. (2) of the Civil Code].

However, if the obligation is undividable, in the situation analysed above, the partial exoneration from liability shall not apply, instead the debtor shall be entitled to obtain a reduction of the damages owed [Art. 1534 para. (1) last sentence, of the Civil Code].

If neither contracting party has fulfilled its obligations, and this caused a prejudice to the other party, then the liability shall not be shared, as there is no cause for exoneration of liability[36]. In the case analysed above, the court may perform a judicial compensation of the mutual claims, in compliance with Art. 1617 of the Civil Code.

7. Limitation of the creditor's right to invoke the remedies of non-fulfilment

If there is a deed of the creditor that prevented the debtor from fulfilling its obligation, the creditor may not invoke the remedies of non-fulfilment of the contractual obligation [Art. 1517 of the Civil Code].[37]

In order for the abovementioned limitation to apply, first the debtor must invoke and prove the existence of a deed of the creditor that prevented it to fulfil its obligation. Therefore, such limitation cannot be invoked *ex oficio* by the court of law, since the provisions of Art. 1517 of the Civil Code protects a private interest.

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[35] Similarly, see H. Scelhaas, in St. Vogenauer (ed.), *op. cit.*, No. 8, p. 835.

[36] C. Larroumet, S. Bros, *Traité de droit civil. Les obligations, le contrat – A jour de la réforme du 10 février 2016,* 8e édition, Eonomica Publishing House, Paris, 2016, No. 732, p. 847.

[37] See also I. Fl. Popa, *Annulment and termination of contracts in the New Civil Code*, Universul Juridic Publishing House, 2012, p. 150. The harmonised law provides, in Art. III.3:101 para. (3) DCFR „*The creditor may not resort to any of those remedies to the extent that the creditor caused the debtor's non-performance".*

If the creditor invokes the remedy of non-fulfilment by way of a legal action, when the debtor may invoke the limitation resulting from the deed of the creditor by way of a defence on the merits, requesting the verification if the conditions imposed by law for exercising such right are met.

If the creditor opted for exercising other remedies of non-fulfilment, the effect of invoking the deed of the creditor shall be individualised depending on the type of remedy invoked:

a) in case of a legal action for annulment if the non-fulfilment of the obligation by the debtor is partly due to the deed of the creditor, such a situation may lead to the conclusion that the non-fulfilment is not serious enough to justify the annulment[38];

b) the creditor may not invoke the objection of non-fulfilment since one of the conditions for invoking it is that the non-fulfilment must be due to the deed of the party invoking the objection of non-fulfilment[39].

It was also stated[40] that if the debtor may resort to the procedure of formally notifying the creditor as per Art. 1510 of the Civil Code, then it cannot invoke being prevented from fulfilling its obligation due to the deed of the creditor. Such a solution was justified by the principle of solidarity, which requires each party to exercise its contractual rights and obligations in order to satisfy their mutual interest, which requires safeguarding the contract, if possible.

We must note that the essential effect of formally notifying the creditor is, firstly, that the creditor assumes the risk of the inability to fulfil the obligation [Art. 1511 para. (1) of the Civil Code], and secondly, when the creditor refuses, without justification, to duly fulfil its obligations, the obligation relationship shall terminate, either when the court validates the real offer, or when the creditor accepts the commitment of the debtor[41].

Based on the wording of the provisions of Art. 1510 of the Civil Code, the procedure of formally notifying the creditor is optional, which means that the creditor may either opt for this procedure or invoke being prevented from fulfilling its obligation due to the deed of the creditor[42].

Such an interpretation is necessary to ensure the compliance with contractual equity, since the implicit obligations to be met by the contracting parties include the consequences arising from equity [Art. 1272 para. (1) of the Civil Code].

From an objective standpoint, equity requires the application of the rule of exact compensation, subject to the principle of equal treatment[43], which means, for the discussion at hand, the possibility for the contracting parties to resort to all legal

[38] O.Lando, H.Beale, *op.cit.,* p.410.

[39] D.-A. Ghinoiu, *Commentary on Art. 1517 of the Civil Code*, in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *op. cit*., p. 1695.

[40] Fl. Mangu, *Annulment, termination and reduction of the obligations- (II) Conditions*, p. 36-37.

[41] I.-Fl. Popa, in L. Pop, I. Fl. Popa, St. I. Vidu, *op. cit*., No. 502, p. 538-539.

[42] Similar provisions may also be found in Art. 7110 and Art. 7111 PECL, and Art. IIII.-2:111 and Art. III.-2:112 DCFR. Also, the harmonised contract law states that, in the situation mentioned above, the debtor may exercise any remedy of non-fulfilment, including claiming damages (see Ch. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR),* full edition, 2009, vol. I, p.785).

[43] C.Zamşa, *Commentary on Art. 1271 of the Civil Code*, in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *op. cit*., p. 1695.

remedies to sanction the unlawful deed of the other contracting party. In this respect, it was stated[44] that the existence of equal contractual relationships requires that a primary objective of positive law is that of restoring the balance between the contracting parties, so as the contract is not a means of exploiting one of the contracting parties.

We must also note that, when the factor preventing the fulfilment of the obligation due to the deed of the creditor, which meets the characteristics of force majeure, refers to a significant obligation assumed by the debtor, and the impossibility to fulfil the obligation is total and final, the contract shall be terminated as of right [Art. 1557 para. (1) of the Civil Code].

If the creditor's deed is materialised in the failure to fulfil a contractual obligation, whether explicit or implicit, leading to a non-fulfilment by the debtor, then the debtor may not be limited to resorting only to formally notifying the creditor, but it may also resort to the other remedies of non-fulfilment provided for by Art. 1516 of the Civil Code.

If the creditor invokes the remedies of non-fulfilment as regards the part of the obligation that was not fulfilled as a result of the creditor's deed, then the debtor may invoke the limitation provided for by Art. 1517 of the Civil Code, provided that it proves the existence of a direct relationship between the creditor's deed and the partial failure to fulfil the obligation[45].

If the deed of the creditor was not the only element causing the failure to fulfil the obligation, as the deed of the debtor also contributed to its failure to fulfil the contractual obligation, the question is raised whether the creditor may resort to the remedies of non-fulfilment?

It was stated that[46] the remedies of non-fulfilment may also be invoked if the non-fulfilment is mutual, involving both the deed of the creditor and that of the debtor, as it was considered that this would prevent a potential abuse or right materialised by *venire contra factum proprium.*

We must mention that, in the situation presented, if the creditor resorts to the remedy of damages, the compensation owed by the debtor shall be reduced accordingly [Art. 1534 para. (1) of the Civil Code].

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[45] Similarly, D.-A. Ghinoiu, *Commentary on Art. 1517 of the Civil Code*, in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *op. cit*., p. 1695.

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SOME ISSUES FROM THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF ROMANIA REGARDING THE SPECIAL PARLIAMENTARY COMMITTEES

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Abstract. *Parliamentary committees are internal working organs of the Chambers of Parliament, whose work is preparatory by nature, in order to provide the deliberative forum with all the necessary elements for the decision to be taken. The specialized debates that take place in committee meetings shall be finalized by drawing up reports or opinions to prepare and facilitate the work of the Chambers and the debates to be held in their plenary. Given the nature of the internal working bodies of the parliamentary committees, the legal nature of the reports or opinions adopted by them is a preliminary, recommendatory act adopted in order to suggest a certain conduct in the decision-making plenum of each Chamber or of the reunited Chambers. Reports and opinions are binding only on the basis of their request, not from the perspective of the solutions they propose, the Senate and the Chamber of Deputies being the only deliberative bodies by which Parliament fulfils its constitutional powers.*

Keywords: *Constitutional Court, constitutionality review, jurisprudence*

1. Introduction

According to art.64 par. (4) of the Constitution, *„Each Chamber constitutes its standing Committees and may institute inquiry or other special committees. The Chambers may set up joint committees"*. In the jurisprudence of the Constitutional Court, parliamentary committees have been defined as internal working organs of the Chambers of Parliament, whose activity is preparatory by nature, in order to provide the deliberative forum with all the elements necessary for the adoption of the decision[1].

In recent years, the issue of setting up special committees and their work has been brought to the attention of law specialists and the general public considering the establishment of The special joint committee of the Chamber of Deputies and the Senate for the systematization, unification and the ensuring of legislative stability in the judiciary, set up by Decision of the Parliament of Romania no. 69/2017[2]. On this committee and its work, as determined by the decision on its establishment, the Constitutional Court was referred repeatedly, by invoking, for example, the failure to comply with the provisions of different constitutional texts, such as art.1. par.(5) on the

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[1] Decision no.48 of 17 May 1994, published in the Official Gazette of Romania, Part I, no.125 of 21 May 1994, or Decision no.209 of 7 March 2012, published in the Official Gazette of Romania, Part I, no.188 of 22 March 2012.

[2] Published in the Official Gazette of Romania, Part I, no.776 of 29 September 2017.

principle legality and quality of normative acts, art.61 par.(2) on the principle of bicameralism, art.64 par. (4) with reference to the special joint commissions of the two Chambers, art.65 regarding the sessions of the Chambers, art.74 on the legislative initiative and art. 75 on the notification of the Chambers.

2. The establishment and works of the special parliamentary committees

A criticism of unconstitutionality related to art. (1) par.(5), corroborated with art. 65, 74 and 75 of the Constitution, regarded the fact that a Joint Special Committee cannot be established for the purpose of amending the Criminal Code / Criminal Procedure Code / Justice Laws, as these laws are debated and adopted, according to the Constitution, in separate sittings by the Chamber of Deputies and the Senate[3], while the Joint Special Committee is set up only in relation to draft legislative proposals that are subject to debate and adoption of the joint plenary of the Parliament. In this respect, the Court found that the Basic Law does not contain an express or implicit provision in the sense that special joint committees may be set up only for situations in which Parliament works in joint sittings, establishing only the possibility of their constitution. Such a general constitutional regulation, referring to the Parliament's legislative function, took into account the criterion of consistency, completeness and unity of the legislative act, and not that of Parliament's working mode in a joint or separate sitting. It is obvious that a Joint Special Committee can better accomplish the proposed objective through direct co-operation between deputies and senators, materialized both by drawing up their own proposals and by bringing together legislative proposals/bills in different phases of the parliamentary procedure. Moreover, there is no dissipation of the parliamentary effort by simultaneous or successive submission of other legislative proposals / bills, which could contain parallel/antithetic provisions, which could thus affect the unity of the parliamentary effort to develop a coherent and comprehensive legislative proposal with respect to that law. Also, the Court held that in the adoption of a coherent and reasoned law from the point of view of the organization of the working procedure, the Parliament must show suppleness and flexibility within the limits set up by the Constitution and the parliamentary regulations. Therefore, the constitutional reasons for the consecration of the special joint commissions are obvious, and the Parliament is the one deciding the opportunity of their constitution.

In its case-law[4], the Constitutional Court also held that a special committee, as its name implies, requires a special procedure, distinctive from the general one, its competence rendering unnecessary the general procedure of endorsing or adopting a report. Since the special committee is drafting a report on a legislative proposal / bill, it is useless for a standing committee to draw up a second report because it would lead to the creation of a procedure that would duplicate the initial reporting obligation. The special joint committee does not have the right of legislative initiative, so its role is to draw up a

[3] Decision no.828 of 13 December 2017, published in the Official Gazette of Romania, Part I, no.185 of 28 February 2018.
[4] Decision of the Constitutional Court no.828 of 13 December 2017, cited above.

report on a bill / legislative proposal, which means that *ab initio* the competence of the standing committee is excluded from this special procedure. Therefore, in this situation, the Permanent Bureaus of each Chamber should apply the special procedure, and the report on the legislative initiative naturally should be requested from the Joint Special Committee. Thus, in the debate and adoption of the report, any of the members of the Joint Special Committee, either deputies or senators, may propose and vote on amendments, regardless of whether the procedure is before the Chamber of Deputies or the Senate, and the presenting of the report to the Reflection or to the Decision-making Chamber its being carried out under the same conditions. That reason therefore indicates that, in the proceedings of the Joint Special Committee, each of its members has the same rights and duties, regardless of the fact that it produces the report in the proceedings before the Chamber of Deputies or the Senate. In fact, in parliamentary practice, there were several situations in which special joint committees were set up even in legislative areas in which Parliament works in separate sittings, either for the approval of complex legal acts or for drafting legislative proposals[5].

The Court also held that, once established such a committee, it must be equipped with tools and procedures to make it functional and effective. Otherwise, it would behave like any other standing committee and thus would be unable to meet the significant social need that actually underpin its establishment.

On the criticism of unconstitutionality related to art. 61 par. (2) of the Constitution, the Court found that, in itself, the creation of a special joint committee does not violate the principle of bicameralism. In its case-law, the Court found that a violation of the principle of bicameralism occurs only when the Second Chamber brought to the bill / legislative proposal a new / distinct legal configuration compared to the one voted in the first Chamber[6]. In this case, the Court found that the drawing up of a legislative proposal by the special joint committee does not amount to any duty of the Parliament to debate and adopt it in one single Chamber. The Code of Criminal

[5] For example, see: Decision of the Parliament of Romania no.23/2002 on the establishment of the Commission for the drafting of the legislative proposal on the revision of the Constitution, published in the Official Gazette of Romania, Part I, no.453 of 27 June 2002; Decision of the Parliament of Romania no.18/2003 on the establishment of the Joint Commission of the Chamber of Deputies and the Senate for the elaboration of legislative proposals on electoral laws, published in the Official Gazette of Romania, Part I, no.467 of 30 June 2002; Decision of the Parliament of Romania no.7/2006 on the establishment of the Joint Committee of the Chamber of Deputies and the Senate for the elaboration of the legislative proposal regarding the election of the Chamber of Deputies and the Senate, of the President of Romania, the election of the local public administration authorities, the financing of the electoral campaigns and the election of the MEPs, published in the Official Gazette of Romania, Part I, no.417 of 15 May 2006; Decision of the Parliament of Romania no.9/2009 on the establishment of a Joint Special Committee for the debate in emergency proceedings of the Criminal Code, the Criminal Procedure Code, the Civil Code and the Code of Civil Procedure, published in the Official Gazette of Romania, Part I, no.154 of 12 March 2009; Decision of the Parliament of Romania no.31/2009 on the establishment of a special joint commission of the Chamber of Deputies and the Senate for the elaboration of the package of national security laws, published in the Official Gazette of Romania, Part I, no.459 of 2 July 2009.

[6] See, to that extent, Decision no.710 of 6 May 2009, published in the Official Gazette of Romania, Part I, no.358 of 28 May 2009, Decision no.89 of 28 February 2017, published in the Official Gazette of Romania, Part I, no.260 of 13 April 2017, Decision no.377 of 31 May 2017, published in the Official Gazette of Romania, Part I, no.586 of 21 July 2017, or Decision no.534 of 12 July 2017, published in the Official Gazette of Romania, Part I, no.593 of 25 July 2017.

Procedure, the Criminal Code and the laws of justice are adopted in separate sittings of the two Chambers [authentic bicameralism] and only the laws expressly provided by the Constitution are adopted in a joint sitting [attenuated bicameralism].

At the same time, the Court held that the extension of the scope of the law or of the measures adopted to achieve a specific aim in the legislative process conducted in the Chamber of Deputies cannot have the valences of a breach of the principle of bicameralism. Under these circumstances, we cannot speak about a genuine misappropriation of the original purpose of the law, but a clearer and more comprehensive regulation in order to develop the original purpose of the legislative proposal. Although they have a certain quantitative weight, the law texts introduced in the decision-making procedure of the decision-making Chamber must also have the meaning of a significant qualitative input, capable of causing the violation of the principle of bicameralism by cumulative meeting of the two conditions laid down in the case-law of the Court: on the one hand, the existence of major legal differences between the forms adopted by the two Chambers of Parliament and, on the other, the existence of a significantly different configuration between the forms adopted by the two Chambers of Parliament. Therefore, a legislative proposal can receive both formal and content improvements, without substantially altering the form and the content of the law to be adopted, because exactly through these active contributions of each Chamber manifest itself the role of the bicameral structure of the Parliament as a sovereign legislator[7].

The Court also ruled[8] that bicameralism does not mean that both Chambers will decide on an identical legislative solution, since in the Chamber of Decisions there may be inherent deviations from the form adopted by the Chamber of Reflection, of course, without changing the essential object of the draft law / legislative proposal. To deny the decision-making Chamber's ability to move away from the form voted in the Chamber of Reflection would mean a limitation of its constitutional role, and the decision-making character attached to it becomes illusory. There would be a genuine mimetism in the sense that the Second Chamber would identify itself, as regards the legislative activity, with the first legislative Chamber, without being able in any way to remove itself from the legislative solutions chosen by the first Chamber, which is, in the end, contrary to the very idea of bicameralism. Therefore, the violation of the principle of bicameralism cannot be claimed as long as the law adopted by the decision-making Chamber relates to the main aspects that the proposal / bill has taken into account in the form taken up by the Reflection Chamber. In this respect, the changes brought to the form adopted by the Reflection Chamber should include a legislative solution that preserves its overall conception and is appropriately adapted by establishing an alternative / complementary legislative solution that does not deviate from the form adopted by the Reflection Chamber, as this is more comprehensive or better articulated within the framework of the law, with the realization of certain corroborations inherent to any change.

[7] See 9. Decision no.514 of 5 July 2017, published in the Official Gazette of Romania, Part I, no.857 of 31 October 2017, par.40.

[8] Decision no.765 of 14 December 2016, published in the Official Gazette of Romania, Part I, no.134 of 21 February 2017, pars.37 and 38.

3. Competence of the special parliamentary committees in case of a review of the law by Parliament

Analysing one of the objections regarding the Law amending and supplementing Law no.303/2004 on the statute of judges and prosecutors[9], the Constitutional Court has established[10] that, in the review procedure under art. 147 par. (2) of the Constitution, the Joint Special Committee retains the power to debate and to adopt the report. It can be noticed that, since the law was adopted by means of a special procedure through a special joint committee, even more so in its review procedure following a decision of the Constitutional Court, it is necessary to follow the same procedure. Even though Parliament's Decision no.69/2017 did not provide *expressis verbis* for this hypothesis, it is easy to understand that the process of examining, amending and completing all normative acts affecting the judiciary with a view to reforming the judicial system, the objective for which the joint special committee has been created, is finalized by adopting the laws in question. The legislative process on these laws therefore ends after their final adoption, implying both the agreement with the Constitutional Court's unconstitutionality decisions in the context of the *a priori* constitutionality review, as well as the ruling on the request for reconsideration formulated by the President of Romania. It is only at this moment that the special joint commission's mission is completed, thus exhausting the special parliamentary procedure for adopting the laws in question. As the Court has pointed out in its case-law, the standing bureaus of each Chamber must apply the special procedure, so, naturally, both the report on the legislative initiative and the law drawn up following the review provided for in art.77 par.(2) or art. 147 par. (2) of the Constitution shall also be requested from the special joint committee. Accordingly, the Court held that the parliamentary procedure applicable to the review is a continuation and an extension of the special legislative procedure initiated by Parliament's Decision no.69/2017.

Subsequently, the Court tallied its position above[11]. Thus, in an *a priori* constitutionality review, where the case-law of the Constitutional Court invoked, as it its embodied in the above considerations and breached on a review of a law following a request made by the President of Romania pursuant to the provisions of art.77 par. (2) of the Constitution of Romania, republished, the constitutional litigation court found that, unlike the procedure for the review of the law opened under art.147 par.(2) of the Constitution, in order to agree with the decision of the Constitutional Court, in the procedure of a review of the same law, opened due to the request, under art.77 par. (2) of the Constitution, of the President of Romania, the Standing Bureau of each Chamber has not notified the same joint special commission, but their owe standing committees,

[9] The current Law no.242/2018 on the amendment and completion of the Law no.303/2004 on the statute of judges and prosecutors, published in the Official Gazette of Romania, Part I, no.868 of 15 October 2018.

[10] Decision no.252 of 19 April 2018, published in the Official Gazette of Romania, Part I, no.399 of 9 May 2018.

[11] Decision no.562 of 18 September 2018, published in the Official Gazette of Romania, Part I, no.825 of 26 September 2018.

respectively the Legal committees. Thus, according to the author of the unconstitutionality referral, it would result an alleged conflict between the decisions of the Constitutional Court and the parliamentary procedure applied for the resolution of the request for reconsideration formulated by the President of Romania under art.77 par. (2) of the Constitution.

The Court considered that such a conclusion, although apparently justified, is based on an inaccurate premise, respectively that there is an equality between how parliamentary committees work, as organs of work of Parliament and the legislative parliamentary procedure, as determined by the Basic Law. In this respect is relevant the constant case-law of the Constitutional Court analysing the work carried out by the standing, special or investigative committees in the parliamentary procedure.

Thus, since 1994[12] and in so far, the Court has, in essence, acknowledged that, in order to fulfil the constitutional role of the Parliament, it may constitute, on the basis of art.61 par.(4) of the Constitution of 1991 and of art.64 par.(4) of the Constitution as revised in 2003, standing, inquiry or other special committees, these being "viewed and defined as working bodies of the Chambers, which are set up in order to carry out the tasks entrusted to them precisely in view of preparing their work. Thus, the elements that make up the concept of parliamentary committee are the preparatory character of their work, the fact that they are internal organs of the Chambers, which, through their activity, can provide them with all the elements necessary to make a decision. (...) For this reason, their organization and functioning are thoroughly regulated, according to art.61 par. (1) of the Constitution, by the Regulation of each Chamber. The constitutional provisions only express this subordinate, preparatory role of the activity of the committees, differentiated according to their typology, which is also contained in the provisions of art.61 par. (4) of the Constitution: *«Each Chamber constitutes its standing Committees and may institute inquiry or other special committees. The Chambers may set up joint committees.* »"

Given the nature of the parliamentary committees as internal working bodies, the Court has further stated that the legal nature of the reports or opinions adopted by them is that of a *preliminary, recommendatory act* adopted in order to suggest a specific conduct, taken by decision, to the plenary of each Chamber or of both Chambers. Reports and opinions are binding only as regards their request, not from the perspective of the solutions they propose, the Senate and the Chamber of Deputies being the only deliberative bodies by which Parliament performs its constitutional powers. That is why the Court concluded[13] that "a situation in which a parliamentary committee, for various reasons, cannot carry out its work, namely to draw up a report or an opinion, is not such as to prevent the plenary of each Chamber from debating and deciding directly over the problems that fall within its remit. In essence, the specific nature of the works of a Chamber of Parliament is to take a collective decision, by a majority vote, after a public debate. Any other conclusion would equate, on the one hand, with an overshadowing of the role of Parliament's working committees by attributing far greater effects to the acts that these working bodies adopt, a circumstance which goes

[12] Decision no.48 of 17 May 1994, published in the Official Gazette of Romania, Part I, no.125 of 21 May 1994.
[13] Decision no.209 of 7 March 2012, cited above.

beyond the constitutional and regulatory framework in which they work, and, on the other hand, would entail a diversion of the role of Parliament as a whole, as the supreme representative body of the Romanian people, which enjoys a legitimate origin, being the exponent of the interests of the entire nation. However, these assumptions are totally unacceptable from the point of view of the constitutional principles that the Court is called upon to guarantee"[14].

Summarizing, some essential ideas defining the relationship between the Parliament and the parliamentary committees are detached as follows: a) the Constitution expressly provides, in art.64 par. (4), the right of each Chamber to establish standing committees, inquiry or other special committees, as well as the right to set up joint committees by both Chambers, the regulation of their work being left exclusively to the two Chambers, through their own regulations; b) the parliamentary committees are internal working bodies of the Parliament, their role being subordinated to its activity and materialized in the elaboration of the preparatory works, necessary for the decision taken by the sovereign legislative authority of the country; c) the reports or opinions drawn up are preliminary, recommendatory, namely documentary material and are not binding to the Parliament.

Considering the full competence of this special committee with regard to all implicit and pre-emptive procedures for the final adoption of the legislative bills / proposals which are the object of its activity, the Court stated, by Decision no. 252/2018, that, including in relation to the application of art.77 par.(2) of the Constitution, "the Standing Bureaus of each Chamber should apply the special procedure, and the report on the legislative initiative should *naturally* be requested from the joint special committee".

The Court has thus highlighted the *rule* of special jurisdiction that a special committee has in a given area, in accordance with the provisions of the normative act on its constitution. The meaning of this conclusion can only be the confirmation of such a special competence throughout the legislative procedure, until the final adoption of that law, but without thereby establishing an unconditional prohibition on Parliament from making a different assessment, at the procedural stage of the notification of a parliamentary committee for the preparation of a preparatory act, depending on certain specific factors. Such interpretation of the considerations of the Court's decision, in the regulatory and factual context described above, would inevitably lead to a conflict between the constitutional norms of art.147 par. (4) and art.64, which regulates the principle of parliamentary autonomy. However, since neither the Constitution nor any infra-constitutional text, enshrined in the parliamentary regulations, establishes *expressis verbis*

[14] In the same sense, see, by example, Decision no.209 of 7 March 2012, cited above; Decision no.81 of 27 February 2013, published in the Official Gazette of Romania, Part I, no.136 of 14 March 2013, pt.3.2; Decision no.611 of 3 October 2017, published in the Official Gazette of Romania, Part I, no.877 of 7 November 2017, pars.63 and seq.; Decision no.720 of 15 November 2017, published in the Official Gazette of Romania, Part I, no.52 of 18 January 2018, pars. 28 and seq.; Decision no.33 of 23 January 2018, published in the Official Gazette of Romania, Part I, no.146 of 15 February 2018, pars.80-82; Decision no.61 of 13 February 2018, published in the Official Gazette of Romania, Part I, no.204 of 6 March 2018, par.89; Decision no.206 of 3 April 2018, published in the Official Gazette of Romania, Part I, no.351 of 23 April 2018, pars.62 and seq.; Decision no.388 of 6 June 2018, published in the Official Gazette of Romania, Part I, no.532 of 27 June 2018, pars.28 and seq.

the duty of the Parliament to notify a specific parliamentary committee in a certain special legislative procedure, we can draw up the conclusion that, enjoying the autonomy within art.64 of the Constitution, it cannot be subject to such requirements. The interpretation of the considerations of the Court's decision can only have a positive meaning, in order to produce legal effects and not conflicts between two fundamental norms.

By virtue of the principle of parliamentary autonomy and in compliance with statutory rules, the Parliament and, in particular, the Standing Bureau, may decide, depending on the circumstances specific to each situation, to refer to a standing or special committee, considering a set of factors, starting from the subject of a legislative proposal to the overcrowding of one or other of the committees, in relation to the urgency of the adoption procedure or other factual circumstances, such as overlapping of parliamentary committee meetings with plenary sittings or other parliamentary activities previously approved. In managing the various situations that may arise in concrete terms, the Standing Bureau needs to be efficient and flexible by assigning a specific work to a competent parliamentary committee, so that, subject to regulatory procedures and rules, the requirement of operability imposed by the procedure must be carried out as a matter of urgency, as it is the procedure for reviewing the law under art.77 par.(2) of the Constitution. In this respect, as we have pointed out, the Court has held the fact that, with a view to adopting a coherent and substantive normative act, from the point of view of organizing the working procedure, the Parliament must be flexible within the limits of the Constitution and the parliamentary regulations.

4. Conclusions

Considering the case-law of the Constitutional Court, the way in which the Parliament, through the Standing Bureaus of the two Chambers, decided to assign a particular work to one of its committees cannot be constitutionally relevant, as it is important, in constitutional terms, for the Parliament, the sole legislative authority of the state, to debate and adopt the law, in the limits established by the Basic Law. Internal procedures prior to the final act of passing the law, such as referral to competent committees or their work, cannot place the act of legislation itself outside the constitutional framework. Thus, in accordance with their own statutory provisions, which, in their turn, are adopted in accordance with the provisions of art.64 of the Constitution, which enshrines the principle of regulatory autonomy in parliamentary activity, it cannot be argued that the Parliament has applied a vicious, unconstitutional procedure.

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SPECIAL RULES REGRDING THE EVIDENCE OF OWNERSHIP FOR IMMOVABLE PROPERTY TAKEN OVER IN AN ABUSIVE MANNER BY THE STATE

Alexandru Radu TOGAN*

Abstract: *The Civil Code establishes rules for therestitution action of a right, and the named rules find extensive application. The exceptions are few, strictly regulated by law. In the real estate field, for goods that were abusively taken over by the state between March 6th, 1945 – December 22nd, 1989 under the communist regime, derogatory rules have been implemented, with the goal to enable those entitled to restitution to reparatory measures. By doing so, a crystallization of the estate legal order is prefigurated and, also, the special rules permit a relief of the courts, in front of whom many cases regarding the restitution of assets that were abusively taken over by the state are pending for many years. Laws that provide remedies often prove to be too optimistic, mentioning too short deadlines for implementation, given the socio-legal context and the lack of certainty in the real estate legal order.*

Derogatory rules regarding the proof of ownership for the real estate that was abusively taken over by the state involve the possibility of the holder of real estate rights to prove the existence – and extent – of his rights not only with a legal act that constitutes or transmits certain rights, but also by simple declarative acts related to property, that do not prove, by themselves, the existence of real estate rights, but can justify a presumption in this direction, than can suffice in order to establish a real estate right. There is a clear tendency to facilitate the burden of proof in this domain, in order to eliminate the negative consequences that have resulted from the communist-era, during which assets were abusively taken over by the state, without a clear legal frame to provide a procedure to do so.

Keywords: e*vidence, property, restitution, immovable assets, abusive.*

1. General considerations

Ownership of tangible goods can be considered the most complex form of manifestation of a subjective right[1]. The owner, under the powers he holds, may exercise the possession, use and disposal of his assets, in an absolute, exclusive and perpetual manner, and such powers may not be limited, and the owner may not be deprived of his property[2]. Of course, a society in which these prerogatives are exercised freely is impossible to imagine, as limitations are inherent, since the rights and freedoms of an individual stop where they would be subjected to interference with

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[1] P. Roubier, *Droits subjectifs et Situations juridiques*, Paris, 1963, p. 29.
[2]Cornelius Bîrsan, *Civil Law. Main real estate rights*, ed. III, ed. Hamangiu, Bucharest, p. 51 et seq.

the rights of others, affecting them. In this context, certain limitations regarding ownership may exist, as long as they are justified and proportionate[3].

However, the communist era was a period of deadlock, during which the fundamental rights have been distorted of content. Especially, invasive measures have been taken regarding property rights over real estate. After the fall of the communist regime, in the context in which ownership cannot become extinct by barring period, with no possibility of losing the right by not exercising it, measures that allowed restitution to the rightful persons who were deprived abusively of those assets have been implemented.

In the domain of restitution of assets abusively taken over between 6 March 1945 – 22 December 1989, in accordance with the legal provisions of Law no. 10/2001 and Law no. 165/2013, entities involved in these tasks issue orders or decisions approving the restitution of that property or, where appropriate, provisions or decisions rejecting a notice or demand for restitution of the assets. In those cases where restitution is not possible in nature, although the ownership of the holder has been established, compensatory measures will be proposed, according to the law no. 165/2013, by equivalent, consisting of goods, services or monetary damages.

Regarding the rules of evidence, article 25 paragraph 4 of Law no. 10/2001 states that the decision – or, where appropriate, the provision – approving the restitution of property is sufficient to prove ownership of the person in whose favor the measure was ordered. Consequently, such decision or provision of the competent institution will have the probative force of an authentic document and will be enforceable for the person entitled to regain possession, requiring that the named person to be diligent and solicit the registration in the land registry within three years, starting from the receipt of the decision – namely, the provision – according to article 25 paragraph 6 of Law 10/2001. Regarding the provision of *enforcing the property* that exist in the favour of the person entitled, by norms of application of Law no. 10/2001, it was stated that this act has the characteristics of an administrative act of power, that has the power to establish the real estate right, proving the necessity for restitution. To properly enforce the ownership of the beneficiary of the act, it is required to request the formalities of inscription in the land registry. Their implementation of the registration measure will be based on the administrative act, that proves by itself the rights of the person entitled to restitution and will give the holder protection provided by the new Civil Code[4].

In the judicial procedure to be followed, the provisions of Law no. 10/2001 does not prohibit the possibility of the court to request and administer evidence in the legal stage – which is, by hypothesis, subsequent to the administrative stage – and to consider otherwise would mean to undermine the principle of free access to justice

[3] Art. 556 Civil Code: limits of the right to private property:
(1) Property right may be exercised within the limits of their subjective material. These are physical limits of the property, which is the subject of ownership, with the restrictions established by law.
(2) The law may limit the exercise of the ownership right.
(3) Exercise of ownership may be limited by the will of the owner, unless otherwise provided by law.

[4] Regarding administrative provisions adopted in the restitution of the assets abusively taken over during March 6, 1945 – December 22, 1989 underlying the registration of ownership in the land, see Oliviu Puie, *Cadastre and land registration*, Universe Law, 2019, p. 158.

enshrined in art. 21 of the Romanian Constitution and would mean the court failed to fulfil its prerogative to take active part in finding the truth. The role of the court is not limited to checking the evidence in the administrative stage that analysed the notification, because it would be contrary to the principle of finding the truth for the good administration of justice.

General rules for the procedure regarding real estate restitution and the means to prove a real estate right are established by the Civil Code. According to art. 565 Civil Code, for the buildings listed in the land registry, proof of ownership is permitted only with the land book extract. For the formalities of registration, the person making the request must prove his ownership, this giving legitimacy to request the inscription in the land registry. Because art. 885 of the Civil Code cannot be fully enforced and applied, being suspended in most territorial areas of the country[5], the registration of the real estate serves only to ensure the opposability, but the real estate right is transmitted or constituted at the moment of conclusion of the contract or emission of the act, even without the formalities on the land registry. Of course, the right exists, but it is not opposable to third parties without the named formalities in the registry. According to art. 888 Civil Code, entry in the land register can be justified by a document issued by the administrative authorities, where the law provides this solution. Therefore, pursuant to the laws for restitution of the property in the land registry system, in the cases where the law provides that the formalities serve only for opposability, the document that certifies ownership is generating real estate rights, even without achieving publicity formalities.

For the assets that were abusively taken over by the state, under Law no. 10/2001, given the extended period that may have elapsed since the buildings were taken over, the legislature has departed from the rules of the common law proving the proof of ownership, art. 24 of this Law mentioning that in the absence of evidence to the contrary, the existence and, where appropriate, the extent of the right of ownership is presumed to be that listed in the act which stated the measure of abusive takeover by the state[6].

It is a clear derogation from the general law, justified by the fact that property titles, although they may have existed at the moment of abusive takeover, it is possible that during the communist era, they were distorted, destroyed, lost or no longer reflect the real, actual, situation of the real estate right. In the Romanian case law[7], although the constitutive effect land registry system is applicable (or, at least, is envisaged to fully function)[8], under Law 10/2001, proof of ownership is extended, being possible to fully prove the real estate right by the terms of the takeover act, not only through

[5] For an analysis of the different effects of the land registry effects, see Alexandru-Radu Togan, *An analysis of the effects associated to the inscriptions in the Land registry and the solution adopted in the Romanian legislature*, Bucharest University Annals, Law, 2018, p. 196 and seq.

[6] In this matter, the admitted proof is not limited to documents, certain simple presumptions being applicable – abusive takeover presumption established by art. 2 of Law no. 10/2001, the presumption of ownership extent provided for by art. 24 para. 1 of the law and the presumption of possession under the title owner of the person indicated in the law ordering the abusive takeover. See Civil Decision No. 340 A of May 20, 2016, CAB, Civil Division III.

[7] See C. Appeal Cluj, s. I civ., Civ. decision Nr. 2644 / A / 2016 Bulletin jurisprudence. Annual repertoire in 2016, ed. Legal universe, Bucharest, p. 70.

[8] For a study on the legal effects arising from the entry in the land register, see Alexandru Radu Togan, *op.cit.,* p. 196 et seq.

certified documents that are mentioned in the land registry[9]. In accordance with this decision, even if some buildings were not included in the land registry (case in which the property rights would have been easily proven with the land registry extract), the legislature's intention was to make it possible to prove ownership with a wider range of documents, or even with mentions included in the administrative act of takeover[10].

2. Legal presumptions established for real estate restitution

Article 24 para. 1 of Law no. 10/2001[11] establishes a presumption that the person mentioned in the law or in the administrative authority act ordering the takeover is considered the owner. The presumption, though energetic, shall operate only if there is no evidence to show that a person other than the one mentioned it was owner of the property[12].

This presumption enables the holders of real estate or their successors, in the case of abusive takeover, to reobtain the rights, even though, from a formal, strict point of view, they do not own at the moment (or have never owned) titles proving their rights[13].

The Civil Code regulates the situations where the owner of the property may invoke his right against other persons claiming rights over the same goods, in articles 563 et seq. Regarding the correlation between the action for real estate restitution mentioned in the Civil Code and the actions to defend the ownership of property of abusively taken over goods, regulated by special laws, certain differences can be observed.

From a historical perspective, the communist regime had in Romania, the effect to distort, almost to destruction the system of private property, especially in real estate. Even if laws that aimed to nationalization or expropriation were implemented, in numerous occasions, takeovers were made improperly without legal justification, by administrative decisions, sometimes even without preparing documentation in this regard.

After the fall of the communist regime, it was attempted to repair the harm already done to the former owners who had been wrongfully dispossessed. Based on a lack of vision and clarity to bring things to an end, many laws have been established with a transparency and a practical application that are questionable, at the least.

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[9] On special rules of evidence, see also Oliviu Puie, op.cit., P. 422 et seq.

[10] In the categories of documents that can justify ownership, see section. 23.1 of the Methodological Rules for the enforcement of Law no. 10/2001.

[11] Art. 24 para. 1 of Law no. 10/2001: In the absence of evidence to the contrary, the existence and, where appropriate, the extent of ownership, is presumed to be that recognized in the law or authority ordering the takeover measure enforced abusive or unfair takeover measure.

[12] High Court of Cassation and Justice held that under art. 24 of Law no. 10/2001, real estate right on immovable property that is not mentioned in the land registry can be proven in this area by other means of proof than those allowed by common law disputes. – see High Court of Cassation and Justice, In Decision no. 8007/2006. In practice C. Appeal Suceava, s. Civ., Decision. no. 554/1999, decided that the regimen prescribed by Law no. 18/1991 – under which the evidence possibility is extended – it is possible to establish ownership based on a relative presumption. It was considered, however, that an agricultural register made without contradictory procedure, is not enough to determine the legal status of real buildings.

[13] The Latin phrase *probation diabolica* expresses the difficulty in proving ownership if the proof of ownership would not be possible unless the one who makes a request for restitution would provide evidence regarding the existence of his own rights, as well as the evidence of all titles of the previous owners, back in time to the owner that can justify primary entitlement for the right concerned.

In the case of Maria Atanasiu and Others v Romania[14], The European Court of Human Rights has found a series of problems on the procedure for reassignment of property rights and for compensation for people whose assets were abusively taken over by the state, which led the Court to suspend requests against the Romanian state for a period of 18 months, *pending the adoption by the Romanian authorities of measures capable of providing adequate redress to all those affected by the laws of repair*. The Court also decided that the Romanian state must take the necessary measures to guarantee the rights set forth in Article 6 of the Convention and in Article 1 of Protocol No. 1, in all similar cases brought before it and mentioned that the legal frame in Romania does not insure a sufficient effectiveness[15].

3. Particular conditions for evidence for abusive take over

Regarding the proof of property, the Law no. 10/2001 attempts to facilitate burden of proof for those entitled to (re)establish ownership. This is justified, on the one hand, by the socio-juridical context, which was problematic and difficult, causing the loss of many documents during the communist regime and, secondly, by the fact that, in many cases, there is no actual act of estrangement by which that right was itself transferred from the property of the person entitled to restitution.

In relevant case law, it has been considered that ownership was proven under Article 24 of Law no. 10/2001, in the event that a company was mentioned in the notes on Expropriation Decree no. 230 / 12.20.1986, in the tax certificate no. 973 / 04.17.1987 issued by the local office of a particular community in the evaluation of property and compensation payment schedule no. 151 / 22.06.1987, in the minutes of the handover of the building for demolition, being presumed to be the owner and to have the property over the concerned real estate goods.[16] Justification for such measures comes from the fact that in some circumstances, the former owners were unable to previously constitute a title over the real estate goods prior to the abusive takeover of buildings or were unable to preserve evidence of the existence and extent of their property rights. Of course, special rules of evidence in this domain do not require a plurality of legal documents such as in the above-mentioned decision, but through a corroboration of such acts, the conclusion that can be drawn from these assumptions enjoys a greater force.

Although a remedy for these probatory difficulties was established, the law grants prevalence of documents proving ownership and extent of ownership, but, alternatively, it establishes certain presumptions that can generate property title, even

[14]ECHR, Section III, judgment of October 12, 2010, published in the Official Gazette of Romania, Part I, no. 778 of November 22, 2010.

[15] Decision dated February 26, 2019, of the European Court in the case of Ana Ionescu and Others v. Romania.

[16]Court of Appeal – Civil Section III, Civil Decision no. 274 A of April 27, 2016 – The Court held that based on the provisions of art. 24 of Law no. 10/2001, the rules of evidence in restitution of properties abusively taken over by the state contains certain exceptions from the common law, establishing a presumption of ownership targeting the existence and the extent of the right, in favour of those who are mentioned in the law of the authority ordering the takeover measure.

in the absence of a property title *per se*[17]. The person that claims to be entitled to the remedies, issuing a notification, has the burden of proving that he, or an ancestor that he inherited, had at a previous moment ownership of the real estate concerned. Such proof must be unquestionable, and the invoked quality of entitled person must be supported by the evidence referred to in art. 23 and 24 of Law no. 10/2001.

The value of these documents is to give the opportunity to prove ownership in relation to the rebuttable presumption that the legal document generates by itself, confirming an operation in which the person invoking reparatory measures is entitled to the ownership position. Thus, the legislator establishes a relative presumption in favor of persons entitled, given the socio-historical context of the period covered by the restitution laws[18]. For this presumption to take effect, it is necessary that that person making the claim does not present a *stricto sensu* title of transmission or constitution of real rights, and also, it is necessary that there is no evidence to justify a contrary presumption of ownership[19]. Based on these principles, it is concluded that the lands that were abusively taken over by the state, under Law no. 10/2001, must be returned to the former owner who requested restoration of property rights, on the original location, if they were not legally assigned to others[20].

4. Solutions given in the case law

Initially, the Supreme Court held that the if the land over which ownership was established following the procedure laid down in special laws, proof of this right in the restitution claim can be made only with a property title and not with certificate of property that does not indicate the material extent of the land[21].

Judgements made by the courts went even further, interpreting that the presumption of property that can operate for the person how was stripped abusively of his real estate goods, or to his successors, can be generated even by mentions in the agricultural books, that were made prior to the abusive takeover. Thus, the real estate can be recovered in the restitution process based on an inscription in the agricultural books.

For the hypothesis that, for a particular building, formal takeover by the state cannot be proven (i.e.: there is no administrative decision that justifies the takeover, but the building is reflected in state ownership after what is claimed to be the abusive takeover), the notification requesting repossession can be admitted based on the fact that that because the real estate is in state ownership, without just cause, it generates a rebuttable

[17]Under section. 23.1 lit. d) of the Methodological Norms of Law 10/2001, approved by Government Decision no. 250/2007, the documents that can be used to prove ownership is not limited to acts that transfer the property, but *includes any legal documents evidencing ownership of the person entitled or of the previous owner at the time of the abusive takeover*. It may be included in this category of documents, history fiscal role, the report prepared upon taking over, any act issued by the authority at the time, etc. see also Court of Appeal – Civil Section III, Civil Decision no. 90 A of February 17, 2016.

[18]See Court of Appeal – Civil Section III, Civil Decision no. 46 A of February 3, 2015.

[19]Court of Appeal – Civil Section III, Civil Decision no. 44 A of January 27, 2016.

[20]Court of Appeal – Civil Section III, Civil Decision no. 96 of February 18, 2016.

[21]Supreme Court, Civil Division, Decision no. 2426/1993 in Law Review No 2426/1993 9/1994, p. 87 and Supreme Court, Civil Division, decision n. 2467, *ibid,* p. 86.

presumption of wrongful takeover[22]. The rules of evidence in restitution of properties abusively taken over by the state present exceptions to the common law, based on the provisions of Article 24 of Law no. 10/2001, that institute a so-called presumption that the person mentioned in the "enactment or authority act ordering the takeover measure" not only has the quality of owner, but also, he is the owner of the entire plot of land mentioned in the act. A list of evidentiary acts that can be used to prove property was made by norms of Government Decision no. 250/2007 (paragraphs 23.1-23.4).

It can be concluded that, although in real estate domain, in general, the terms for the restitution of a certain right are quite rigid, for the abusively taken over real estate, there are certain derogatory rules that broadens the possibility of proving ownership, giving those entitled a mechanisms to prove the rights that they were deprived improperly from. In the case of abusive takeover of land, it was considered that incomplete entries in the Agricultural Register – in which only a part of the plot was mentioned – cannot be used against the person entitled to restitution, because how the Agricultural Registry is competed is not a responsibility of the claimant, and the incomplete or faulty manner in which the registry is competed should not affect the claimant's situation[23].

Of course, the burden of proof for the person entitled to restitution, it should be noted that according to the provisions of section 23.1 paragraph a) and d) of the Methodological Norms from 2007 for the implementation of the Law no. 10/2001, the entitled person must prove ownership by means mentioned in par. a), and must also prove the continuity of the ownership up to the moment of the abusive takeover, as mentioned in par. d). In this context, if the applicant does not prove ownership over a land surplus (over what is mentioned in his title) nor the fact that this area was taken over by the state without a just cause, the claimant may not be given full restitution of land as Law no. 18/1991 does not establish the rebuttable presumption of wrongful this hypothesis[24]. The law establishes certain facilities regarding the burden of proof, but at the same time it must not be used abusively by those entitled, because abusive takeovers justify remedies such as restitution or compensation, but should not generate situations where the returned areas are greater than the areas that were owned prior to the takeover[25]. Mechanisms established by Law no. 18/1991 must ensure fair compensation, without becoming an unjustified enrichment method for the person entitled to the refund.

The fact that in the agricultural registries the land area acquired is not expressly mentioned cannot lead to the conclusion that in this case a restitution is not possible, because the guilt of the authorities cannot justify a deprivation of certain rights for the persons entitled[26]. Of course, although this solution is justified by the need to protect real estate property rights, easing burden of proof, including the extent of ownership, not only its existence, can cause problems in the overlapping land as the application of

[22]Court of Appeal – Civil Section III, Civil Decision no. 31 January 18, 2017.
[23]Court of Appeal – Civil Section III, Civil Decision no. 126 A of February 14, 2017.
[24]Court of Appeal – Civil Section III, Civil Decision no. 485 of May 29, 2017.
[25]Valeriu Stoica, The main real estate rights. Civil Law, ed. III, CH Beck, 2017, p. 485 et seq.
[26]Court of Appeal – Civil Section III, Civil Decision no. 379 A of April 27, 2017.

the stated legal provisions, for the same land, could reach cadastral overlap, but this issue goes beyond the present study[27].

5. Broadening the means of evidence in the matter of abusive takeover

Law no. 231/2018 amending and supplementing Land Law no. 18/1991 extended the evidence means that can be used to determine the properties[28]. The law was published in the Official Journal no. 679/2018 and is in force as of August 9, 2018. This acts amends art. 23 of the Land Law no. 18/1991, stating that the authentic witness statements can be used as evidence to determine the properties related to the land surfaces consisting of houses and annexes, as well as the surrounding yard and garden. It thus, introduces an addition, compared to the previous form of the law, that admitted only written documents *ad probationem:* property documents, entry in the land, in the agricultural or other land documents, entry into cooperative farm as evidence. There is a clear trend of broadening the scope of means by which the existence (and the extent) of the ownership is proven, establishing derogatory rules, if not substantially different to the law in the field.

In the matter of abusively taken-over assets, it appears that the legislature adopted measures that are designed to ensure an effective remedy, not claiming titles that strictly prove the constitution or the transfer of the right, considering that a declaratory act of ownership, or other evidence, including statements of witnesses, will suffice. These changes to the laws concerning the land laws have a rational justification in seeking to provide effective remedies, but problems arise from a lack of vision, from an inconsistent application of the provisions, from their vagueness and from the lack of determination to bring the whole procedure to a final form. The goal would be that the legal changes will always be consistent with the spirit of the law, with its purpose, and by doing so, it can contribute to shaping the real estate legal frame in Romania.

Knowledge involves, first of all, the existence of stability. To have a full understanding of real estate transactions and of the patrimonial status of certain goods, it is necessary to ensure a logical (and legal) succession in the transfer and transformation of the real estate rights. The communist period has left a strong impact in real estate, producing problems that even after 30 years since the fall of communism were not completely relieved.

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[27] For a detailed analysis of this problem, see Oliviu Puie, op.cit., p. 508-516.

[28] Under the new regulations, art. 23 paragraphs (2) and (2 ^ 1) of the Law no. 18/1991 shall be amended as follows:

"(2) The area of land related to houses and annexes, and yard and garden around them are those registered as such in property acts in the land registry, in the agricultural registry or other documents of land, the entry into cooperative farm or in their absence , by any means of evidence, including statements authentic witnesses. "

(2 ^ 1) If estrangement construction related areas of land under par. (2) The parties are agreed on alienation proven by any evidence, including statements authentic witnesses ".

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THE ANALYSIS OF THE FORMS OF VIOLENCE WITHIN FAMILY RELATIONS

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MOTTO: *„Violence belongs to the weak"*
Mahatma Gandhi

Abstract: *By combining the two visions, practice and scientific research, the article focuses on the latest national and European official statistics on the situation of domestic violence, family violence and women in Romania and within the EU. The analysis of these statistics has conceptually led to a series of conclusions on the effects of these forms of violence on victims and on society in general, when it comes to its cost at the individual and collective level. Since the study uses several concepts of family violence, we have found it appropriate to present, their definitions, their forms of manifestation, the factors that favor them and their effects on women's health in particular.*

Keywords: *family violence, domestic violence, violence against women, causes and effects of violence occurring within the enlarged family environment.*

I. Introduction.

Violence and violent behaviors are major issues of the current society affecting all categories of persons, regardless of their age and social status.

Violence, in general, is defined by the World Health Organization[1] (WHO) as being: "*the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation*".

Violence in extended family environment, so-called by us in order to include all three concepts on which we shall expand our analysis, is not a private problem, but a phenomenon with a powerful impact over the entire society (*economic costs, medical consequences, powerful effects upon children*) and of the community of those involved (*neighborhood, entourage, school, friends and extended family*).

From this reason it is important that information materials, but also the studies conducted, such as the present one, to reflect the reality of the social phenomenon and

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[1] WHO – https://www.who.int/violence_injury_prevention/violence/en/ (04.07.2019).

to draw the attention upon the fact that these cases are not exceptional, they are part of the everyday life.

By dealing with the phenomenon of violence as an issue affecting us all, we contribute to a society disapproving this phenomenon and shows no tolerance for aggression, regardless of the environment in which it occurs.

II. Domestic violence. Family violence. Violence against women. Regulatory framework, definition, forms, causes for occurrence, effects, statistics

A. Regulatory framework and subjects of violence. The forms of violence on which we shall focus in this study are also components of violence, in general, but with a certain specificity: they represent the most hidden and subversive forms of violence, taking into consideration the fact that they occur between persons who are in affective and/or family relations.

Thus, as one can notice from the above abstract, the current study refers to three different concepts of violence, namely: the family violence (FV), the domestic violence (DV) and the violence against or upon women (VAW). Although, in most cases, between these three concepts it is placed the sign of equality, being treated as synonyms, they express different factual and legal realities. In order to perform a conclusive investigation and to extract the appropriate conclusions it is necessary the clarification of the three syntagma, as well as their conceptual delimitation.

Currently, in Romania there are two national laws and multiple European normative acts stating the phenomenon subjected to our analysis; the national regulations are:

- The **Criminal Code**, which by Art 199-200 (Title I – *Offences against the person*, Chapter 3 – *Offences against a family member*) incriminates two offences which have as **main** special legal object the family relations, namely the offence of *family violence* and the offence of *murder or harm of the newborn child committed by the mother*. From the analysis of these texts, it results that the legislator chose to include within the phenomenon of the family violence **only the physical violence**, by excluding other forms of violence which could be committed within the family environment;
- **Law No 217/2003** on the prevention and combat of domestic violence, amended and republished on 21 July 2018, representing the general framework on domestic violence in Romania, framework referring to conceptual delimitations, the assuming of certain principles of action regarding this social phenomenon, as well as action measures in different forms and areas. The above-mentioned law delimits 7

forms of domestic violence, namely: **verbal, psychological, physical, sexual, economic, social and spiritual violence**[2].

By comparing the two regulations, we notice the two major differences:

1. The special law refers to a larger area of forms of domestic violence unlike the Criminal Code; the Criminal Code individualizes as offences of family violence only the physical ones, unlike the Law No 217/2003 which classifies as domestic violence all the above-mentioned forms of violence. Beside the physical violence inflicted upon a family member, the Criminal Code incriminates as offences, but in a general manner, without including them within the area of family violence, a part of the sexual, verbal and psychological violence; thus, the offence of rape within the family may be included, depending on the subjects of the offence and the relations between them, in Art 218 Para 3 Let a)[3], b)[4] and c)[5] but, according to all of the above, this form of aggression is not included in the Chapter regarding the offences against a family member, because the special legal object of the offence of rape is represented by the sexual relations, the state of freedom in assuming a sexual relation and only **secondary**, related to a qualified form stated by Art 218 Para 3 Let b) of the Criminal

[2] According to Art 4 of the Law No 217/2003 republished in 2018, these forms of violence are defined as following: a) *verbal violence* – addressing in an offensive, brutal language such as the use of insults, threats, degrading or humiliating words and expressions; b) *psychological violence* – the imposition of will or personal control, the provocation of tensions and psychological suffering in any way and by any means, by *verbal threat* or in any other way, blackmail, demonstrative violence on objects and animals, ostentatious display of weapons, neglect, control personal acts of jealousy, constraints of any kind, *unreasonable pursuit, supervision of the dwelling, workplace or other places frequented by the victim, making telephone calls or other types of communication by means of distance transmission, which by frequency, content or timing are causing concerns, as well as other actions with similar effect*; c) *physical violence* – bodily injury, snoring, hair loss, puncture, cutting, burning, strangulation, biting, in any form and intensity, including masked as the result of accidents, poisoning, intoxication, and other actions having a similar effect, subjection to exhausting physical activities or to high-risk activities for life or health and physical integrity, others than the one mentioned by Let e); d) *sexual violence* – sexual aggression, imposing degrading acts, harassment, intimidation, manipulation, brutality in order to maintain forced sex, marital rape; e) *economic violence* – prohibition of professional activity, deprivation of economic means, including deprivation of the primary means of existence, such as food, medicines, objects of first necessity, the act of intentionally forbidding the property of a person, banning the right to possess, use and dispose of common goods, unjust control over common goods and resources, refusal to support the family, the imposition of hard and harmful work to the detriment of health, including a family member minor, as well as other actions with similar effect; f) *social violence* – imposing the isolation of the family member, community and friends, prohibiting the attendance of the educational institution or the workplace, banning/limiting the professional achievement, imposing the isolation, including in the common dwelling, the deprivation of access to the living space, the dispossession of identity documents, intentional privacy, access to information, and other actions with similar effect; g) *spiritual violence* – underestimating or diminishing the importance of meeting moral-spiritual needs by prohibiting, limiting, ridiculing, penalizing the aspirations of family members, accessing cultural, ethnic, linguistic or religious values, forbidding the right to speak in their mother tongue, and teaching children to speak in the mother tongue, imposing unacceptable adherence to unacceptable spiritual and religious beliefs and practices, as well as other actions having similar effects or similar repercussions.

[3] Art 218 states the offence of rape. Art 218 Para 3 Let a) refers to the fact that the victim is placed under the care, protection, security, education and treatment of the aggressor.

[4] Art 218 Let b) of the Criminal Code refers to the case in which the victim and the sexual aggressor are direct relatives, brother and sister. The notion partially covers the notion of family member, described by Art 177 of the Criminal Code.

[5] Art 218 Let c) of the Criminal Code refers to the situation in which the subject is a minor person.

Code, it is expanded upon a certain category of family relations, including only direct relatives, brothers and sisters[6].

In this context, though the *marital rape* enjoyed a special regulation in the former Criminal Code, currently it is considered as included within the simple form of the rape (Art 218 Para 1 of the Criminal Code). Also, the offences of **sexual aggression** within the family shall be framed in Art 219 Para 2 Let a), b) and c) of the same code, having qualified forms as the rape; and in this case, only **secondary**, the special legal object is represented by certain family relationships, compared to the qualified form envisaged by Art 219 Para 2 Let b) of the same code.

Also, the offence of **threat** against a family member, referring to a form of verbal, physical or emotional violence shall be framed in Art 206 of the Criminal Code, without having a qualified form or a special regulation for the threats expressed within the family. It must be noted the fact that the offence of threat, as defined by Art 206 of the Criminal Code, reflects only a part of the verbal and psychological violence which can be manifested during a family relation, but without putting the sign of equality between them. Finally, the psychological violence as defined by the special law is found in a similar manner in Art 208 of the Criminal Code as **harassment**, the offence included in Chapter 7 – *Offences against personal freedoms*[7], presenting a general feature, without being included within the category of family violence. This is why we can state that, generally, the other forms of violence (verbal, psychological, economic, social and spiritual) defined by the special Law No 217/2003 are not stated by the Criminal Code as family violence, some being typified in general, without having as active or passive subject a family member.

2. After the modifications brought to the special Law No 217/2003 in 2018, its name was changed from the Law on the prevention and combating of **family violence** into the Law on the prevention and combating of domestic violence, which creates obvious discrepancies between the two national laws stating this area. The modification of the name, but also of the definition, was made with the ratification by Romania of the Istanbul Convention, but this modification left aside the Criminal Code. We consider that it is very important for the two laws to be in agreement, not only on their names, but also on the establishment of a unitary framework regarding the forms of violence.

a. Thus, according to Art 199 of the Criminal Code, the offence of family violence has as active and passive subject a family member. The notion of *family member*, according to Art 177 of the Criminal Code, states that: 1. The blood relatives or adopted persons up to 4th degree including, plus ascendants and descendants regardless their degree; 2. The spouse; 3. As well as the persons who have established relations similar to those between spouses or between parents and children, if they cohabit.

According to the definition given by the Law No 217/2003 republished in 2018, domestic violence includes, depending on the persons against whom is used, an

[6] Alexandru Boroi, *Infracțiuni contra vieții*, All Beck Publ.-house, Bucharest, 1999, p. 230.
[7] Ion Dobrinescu, *Infracțiuni contra vieții persoanei*, Romanian Academy Press, Bucharest, 1987, p. 133.

expanded area of persons unlike the one stated by the Criminal Code; for the persons defined by the Criminal Code, the special Law also adds: 1. The brothers, parents and children from other relations of the spouse or ex-spouse; 2. The persons who have established relations similar to those between spouses or between parents and children, current of ex-partners, regardless if they have cohabited or not with the aggressor, ascendants and descendants of the partner, as well as their brothers and sisters; 3. The guardian or other person performing de facto or de jure the rights of the child; 4. The legal representative or other person caring for a person suffering from a psychic disease, intellectual disability or physical handicap, except those who fulfil these attributions as professional duties. Have also been considered victims of domestic violence the children witness to any of the forms of violence mentioned in the text of the special law[8].

These differences between the subjects mentioned by the Criminal Code and the special law creates difficulties in the unitary and efficient application of the national norms regarding the family violence[9].

b. Beside the expansion of the area of subjects of domestic violence, another significant difference is represented by the fact that the special law no longer conditions the granting of the protection order and no longer considers the relation victim-aggressor **from the perspective of their cohabitation, but only from the perspective of the effective relation between the subjects of the aggression**[10] (which counts is the existence of an affective relation and multilevel support, either that is manifested as a civil partnership or as a formalized relationship).

Among the European regulations applicable in Romania in this area, we shall mention only three:

- The **Convention of the Council of Europe** on the preventing and combating violence against women and domestic violence adopted in Istanbul on 11 May 2011, so-called the **Istanbul Convention**; it has been ratified by Romanian Law No 30/17 March 2016[11];
- Numerous recommendations and opinions have been adopted in the EU by the European Parliament but, among the regulations with mandatory force we mention the **Directive 2011/99/EU on the European protection order** of the European Parliament

[8] According to Art 5 Para 2 of the Law No 217/2003, republished in 2018.

[9] ***, *Violența domestică. Manual de bune practici pentru magistrați şi lucrători de poliției*, printed by Risoprint, Cluj-Napoca, 2016, p. 49.

[10] Previously to the modifications regarding this matter, the Constitutional Court issued the Decision No 264/27 April 2017 ascertaining that the phrase "*in case they cohabit*" used in Art 5 Let c) of the Law No 217/2003 as being unconstitutional, related to Art 1 Para 3, Art 22 and Art 26 of the Constitution. Mainly, in order to rule this decision, the Constitutional Court started from the premise that the right to life is essential for every person and that the purpose of issuing a protection order is the very protection of this right. Also, the Court also invoked the jurisprudence of the ECHR, such as the cases *Talpis v Italy* or the famous case *Opuz v Turkey*, but also the European regulations, such as the definition of the domestic violence stated by the Istanbul Convention, which does not limit the granting of civil protection to the simple fact of cohabitation of the victim with her aggressor.

[11] Law No 30/2016 on the ratification by Romania of the Istanbul Convention, published in the Official Gazette No 224/25 March 2016.

and of the Council[12] and the **Regulation (EU) No 606/2013** of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters[13].

B. The definition of the three concepts. Each of these normative acts defines violence between family members by emphasizing certain common aspects or certain specificities.

Thus, as above-mentioned, the Criminal Code circumscribes to family violence only the physical violence, committed with intent, with oblique intent and from guilt[14]; are subject to family violence of a physical nature, the following offenses committed against a family member: hitting and other violence (Art 193 of the Criminal Code), bodily harm (Art 194), hitting and violence causing death (Art 195), bodily harm out of guilt (Art 196) and the two forms of murder – simple murder – Art 188 and qualified murder – Art 189 of the Criminal Code. It refers to any act of physical aggression, from the simplest hitting, pushing up to the most serious ones which may result in the victim's death.

From the 2017 statistics drafted by the Public Ministry it resulted that most offences of family violence are circumscribed to the objective side of the offence of hitting and other violence (Art 193) followed by the ones of murder (Art 188-189) and far from them the offence of rape (Art 218 of the Criminal Code). This statistic is similar to the one issued by the Romanian General Inspectorate of Police according to which almost half of the criminal offences registered each year by the police fall under Art 193 *Hitting and other violence* of the new Criminal Code.

We continue to reproduce a part of the Public Ministry statistics for 2017:

No.	Name of the offence	Number of defendants sent to trial	Number of victims	Among the victims, the number of minors:	Among the victims, number of spouses:	Among the victims, number of concubines:
1.	Hitting and other violence (Art 193 CC)	550	586	35	213	93
2.	Murder (Art 188-189 CC)	206	213	18	43	48
3.	Rape (Art 218 CC)[15]	72	80	56	3	3

[12] The above-mentioned Directive was published in the OJEU of 21 December 2011, entering into force 20 days after its publication (according to Art 24).

[13] The Regulation was published in the OJEU L 181/4 of 29 June 2016.

[14] According to Art 199 Para 1 of the Criminal Code, it represents an offence of family violence the actions stated by Art 188-189 and Art 193-195 committed against a family member, case in which the special maximum of the penalty stated by the law shall be increased by a quarter. (2) For the offences stated by Art 193 and 196 committed against a family member, the criminal action can be initiated ex officio. The reconciliation removes the criminal liability.

[15] In this case, unlike the other types of offences, it is registered an extremely large number of minor victims of who, most were the sons and daughters of the authors – 44, of who 37 were minors, as well as the brothers and sisters – 14, of who 12 were minors.

In percentages, these numbers show that the most usual forms of violence are those of easy and medium nature, circumscribed either to minor injuries, which do not require the issuance of a medical certificate, or of some which can reach a maximum of 90 days of medical care (so that the labeling of the offence be the one stated by Art 193 – hitting and other forms of violence), followed by those of maximum seriousness entailing the victim's death; also, most of the violence of this type occur within the couple, either a formal couple or a concubinage, the summed percentages being the following: 52,5% represents couple violence involving the offence mentioned by Art 193 of the Criminal Code; 42,7% cases of murder in the couple and just 7,5% cases of rape in the couple.

But, what it does not result from these statistics is the repeatability of the phenomenon, because generally, the victims do not complain from the first hit, after the first aggression, but after a certain period of time, period in which the aggressions become something usual.

According to a study conducted in Canada, **family violence** represents: "*any form of aggression, abuse or intimidation, directed against a family member, a blood relative or against other persons within the family environment*"[16]. This definition includes as subjects of the aggression any family member cohabiting in the same domestic unit, blood relatives and other persons who, without being relatives are, in fact, part of the family environment. It is an enlarged definition of the notion of family, which emphasizes on the affective relations existing in fact, but also on the ones of kinship, whether people are living together (such as those in a close family) or not (within blood relatives).

Another definition is the one stated by the Recommendation of the Committee of Ministers of the Council of Europe R (85) 4, according to which family violence represents: "*any act or omission which prejudices the life, the physical or psychological integrity or the liberty of a person or which seriously harms the development of his or her personality*". This definition is closer to the provision of our national Criminal Code, by referring only to relations of kinship within the close family, correlated with the idea of *domus*, of home. In this case, the definition is closer to the idea of domestic violence.

The concept of domestic violence is, in our opinion, broader than the domestic violence it embraces, but extends to violence against children, the elderly or other relatives, without necessarily occurring in domestic space.

Moving to the second notion, according to Art 3 Para 1 of the Law No 217/2003 modified, the concept of *domestic violence* means any intentional inaction or action of physical, sexual, psychological, economic, social or spiritual violence occurring in the family or domestic environment or between spouses or ex-spouses as well as between current or former partners, regardless of whether the aggressor lives or has lived with the victim. It is the definition borrowed from the Istanbul Convention, to which the

[16] ***, *Tratat Correctional Service*, Canada, f.ed.,1988, p. 3; Mertus J., *Considerații generale legate de fenomenul violenței domestice. Studiu despre drepturile umane ale femeilor*, Chişinău Press, 2005, p. 111.

Romanian legislator intended to add the idea that the aggression may occur as well by an inaction, because the Convention refers only to violent "actions"[17].

From this definition it results that the notion of domestic violence is limited to the violence between the partners and to any type of violence occurring within a domestic unit – called *home*, between persons who have developed affective relations, based on mutual support.

Regardless of the way in which these forms of violence are cataloged, both have certain characteristics that make them different both to each other and to other types of violence incidentally or in other contexts and show a dynamic and a distinct type of manifestation based on the type of relationship existing between the victim and the aggressor.

Both express a serious phenomenon, a community, social and of public health issue; but, what it has been noticed is the fact that among the victims of domestic violence are 95% women. Worldwide, between 40% and 70% of the women killed are victims of domestic violence[18].

Thus, we are in the presence of the third form of violence, namely the violence against women. This is the most persistent and perverse form of violence among all three.

The **violence against women (VAW)** remains a poorly documented topic throughout history because some types of VAWs, such as rape or sexual harassment, have not been reported due to social standards, shame or pressure from close people.

Though the history of VAW if difficult to analyze, there are some historical data, which leads us to the conclusion of the persistence of this form of violence, since ancient times. For instance, in Antiquity, in the Roman Empire, men had the right to hit their wives even causing them death; subsequently, in the Middle Ages, women suspected of witchcraft were burned at the stake, being condemned by the state or the church. In modern times, in order to provide two examples, in Italy and Spain there were legalized under different forms the so-called crimes for honor[19]: 1. In Italy, until 1981 the Criminal Code provided for the possibility of retaining as a mitigating circumstance the killing of a woman for reasons of honor, which implied the reduction of the punishment; 2. In Spain, until 1963 the criminal codes[20] maintained the privilege of the minimum punishment applied to the man who has killed his wife surprised in fact of adultery, while for women was maintained until 1978 the discrimination on the need for her to require public recognition of the husband's adultery to be punished[21]. The same macistic cause also was taken into consideration for

[17] According to Art 3 Let b) of the Istanbul Convention.

[18] Partnership for Equality Center, *Ghid de informații şi bune practici în domeniul egalității de şanse între femei şi bărbați*, p. 51, 2004; *Family Violence Professional Education Taskforce*, 1991.

[19] According to WHO, almost 5000 women are killed each year by their family, in the name of a so-called "honor" – https://www.who.int/news-room/fact-sheets/detail/violence-against-women, (12/02/09), apud. Susana Vicente (sociologist – specialized in gender-based and development issues), *Una aproximación a la Violencia de Género. Derecho a una vida libre de violencia*, in *Critica* Magazine, No 960, March-April 2009, p. 24; Crimes of "honor" take the lives of thousands of women each year, especially in West Asia, North Africa and some parts of southern Asia.

[20] We are talking about the Criminal Codes of 1870, 1928 and 1944, the last one being revised in 1963.

[21] Maria Jose Cruz Blanca, *Dreptul penal şi discriminarea pe motive de sex. Violența domestică în codificarea din Codul penal*, in L. Morillas, *Studii penale despre violența în familie*, Edersa Publ.-house, Madrid, 2000, pp. 19 and next; Eduardo Demetrio Crespo, Luis Arroyo Zapatero, *El uxoricidio por adulterio en la legislación penal española anterior a la democracia*, in the International Symposium on the custom and honor to kill, Ahader Publ.-house, Diyabarkir, 2003, pp. 214 and next.

the privilege of killing the child and the honoris causa abortion in the situation where, following the adultery, a child was born[22]. In other words, as would the great doctors in criminal sciences would say, *the obedience of the woman was explicit in the case of official morality and legislation in force until very close times*[23].

Starting from these ascertainments, a broad stream of opinion was formed, gathering all historic, legal, sociologic or criminological specialists and many more, stating that the VAW is connected to the idea of seeing women as an object of men's possession and who must serve his needs. It is another form of saying that violence against women has as main source the patriarchal relations between men and women, to which is added a worldwide status quo in which the gender-based inequalities are present and perpetuated[24].

This is why the first alarm on the violence against women was given starting from the idea of discrimination in the relations between the two sexes. With the adoption of the CEDAW[25] was taken the first step which allowed the identification of the violence against women as a manifestation of the discrimination and as a violation of her fundamental rights.

This idea represents the main reason for which, during the Fourth World Conference on Women, Beijing 1995[26], the UN has recognized the fact that the violence against women is an obstacle in reaching the equality, development and peace and that it violates and endangers the human rights and fundamental freedoms, by admitting that the relations between men and women were, throughout history, in many moments, inequal. By supporting these opinions, the Action Platform[27] adopted on this occasion, has defined the violence against women as being: "*any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life*"[28].

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[22] Eduardo Demetrio Crespo, Luis Arroyo Zapatero, *op. cit.*, pp. 214 and next.

[23] Luis Arroyo Zapatero, *Dreptul penal spaniol şi violența în cuplu*, in Criminal Law Magazine No 3/2008, p. 197.

[24] Rosa Maria Peris Cervera (General Manager of the Institute for Women), *Patriarcado, ¿Organización ya superada? ¿Origen de la violencia machista?*, in *Critica* Magazine, No 960, March-April 2009, pp. 18-20; ***, WHO, *Comprender y abordar la violencia contra las mujeres – Panorama general*, on the website https://www.who.int/reproductivehealth/topics/violence/vaw_series/en/ (03.07.2019), p. 3; Maqueda Abreu, María Luisa, *La violencia de género. Entre el concepto jurídico y la realidad social*, in *Revista electrónica de ciencias pénale y criminología*, no 08-02 (2006), pp. 08:2, 3; see also the opinions expressed by Marina Subitras y Martori, professor of sociology at the Universitat Autònoma de Barcelona, opinion expressed during the debates on the project of law in the Spanish Chamber of Deputies during the Extraordinary Session No 8 of 7 September 2004, pp. 2-4, as well as the opinion of Luis Arroyo Zapatero, professor of criminal law, expressed during the same event, No 70 of 8 September 2004, p. 11; Laurenzo Copello, *Patricia, Violencia de género y Derecho penal de excepción: Entre el discurso de la resistencia y el victimismo punitivo*, p. 2097.

[25] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted and opened for signature by the UN General Assembly Resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981. Romania ratified the Convention at 7 January 1982.

[26] World Conference on Women held by the UN in 1995.

[27] Beijing Action Platform adopted during the Fourth World Conference on Women in 1995.

[28] Declaration on the Elimination of Violence Against Women, adopted by the UN General Assembly in December 1993.

Enriched with the latest information brought by specialized studies in following years, underlining the idea of discrimination and gender-based relations, the definition given by the Istanbul Convention proves that the violence against women is "*a violation of human rights and a form of discrimination against women and refers to any gender-based violent action resulting in or having as effect the bodily harm or physical, sexual, psychological or economic sufferance of women, including threats of such actions, constraints or arbitrary deprivation of freedom, regardless if it occurs in public or in private life*"[29].

Kofi Annan, UN General Secretary, has stated in a report in 2006, published on the United Nations Development Fund for Women website (UNIFEM)[30] that: "*Violence against women and girls is a problem of pandemic proportions. At least one out of every three women around the world has been beaten, coerced into sex, or otherwise abused in her lifetime with the abuser usually someone known to her.*".

The latest UN reports[31] draw the attention and raise an alarm signal upon the universality of this phenomenon, no country in the world being immune to it. From the latest statistics provided by different international organisms (WHO, World Bank or the European Journal of Public Health) it results that currently in the world:

- At least one woman out of three has been beaten, forced to sexual intercourse or abused during her life, according to a research based on 50 surveys worldwide;
- One fifth of women say they have been sexually abused before the age of 15;
- Annually, 500.000 women die as effect of pregnancy or birth – a number with little variation in the past 20 years;
- Violence against women kills more women than car accidents and malaria together, according to the estimations of the World Bank;
- Nearly 70% of the victim were killed by their life partners, according to WHO;
- The proportion of women in developing countries who are victims of violence during pregnancy varies between 4% and 20%, according to the European Journal of Public Health;
- In 48 World Health Organization surveys around the world, between 10% and 69% of women reported having been physically abused by their intimate partner at some point in their lives;
- The systematic rape used as war weapon marked millions of women and teenage girls and infected them with HIV/AIDS;
- At least 60 million girls "are missing" from the population of numerous states as effect of selective abortion or negligence;
- At least 130 million women were subjected to genital mutilation and other 3 million are annually exposed to the risk of being the victims of such degrading and dangerous practice.

[29] According to Art 3 Let a) of the Istanbul Convention.
[30] United Nations Development Fund for Women (UNIFEM) – Declaration of Kofi Annan, Secretary General of the United Nations.
[31] United Nations (statistics – Department for Public Information), the Fourth World Conference on Women, Beijing, China, 4-15 September 1995; Action Platform and Beijing Declaration published in 1996.

Not even Europe, the cradle of an advanced and always avant-garde civilization, was not and is not exempt from this scourge. According to the Report drafted by the FRA specialists (Agency for Fundamental Rights of the European Union)[32], based on the interview taken from 42.000 women of all EU Member States, the violence against women, especially the gender-based violence disproportionally affecting women, represents a violation of human rights, which the EU cannot neglect. The investigation has revealed a picture of widespread abuse that affects the lives of many women, but which is systematically insufficiently reported to the authorities. In this respect, it has been statistically observed, at the level of EU Member States, that one out of 10 women has suffered some form of sexual violence since the age of 15 and one in 20 has been raped. More than one woman out of five has been subjected to physical and/or sexual violence by her current or former life partner and more than one woman out of 10 states that she has been subjected to a form of sexual violence by an adult before turning the age of 15.

Nevertheless, it must be mentioned that only 14% of the women have stated to the police the most serious incident of couple violence and only 13% have stated to the police the most serious incident of violence caused by other person than their life partner.

The publication of these results shows unequivocally that it is time for violence against women to be tackled on the basis of the clear evidence provided by this investigation and many more[33] in the 28 EU Member States as well as in other European and international bodies (The Council of Europe and the UN, being just some of them). The findings further emphasize the need to ensure the implementation of existing EU measures for victims of crimes, notably through the Directive No 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA[34]; they also serve to highlight the importance of targeted EU legislation and policies targeting the phenomenon of violence against women, such as the European Protection Order and the Mutual Recognition of Civil Protection Measures, a previous paragraph, the two documents being already applicable in our national legal order.

Mainly, the report[35] presents the first results of the most comprising investigation conducted at the level of the European Union on different experiences of women related to violence. It is hoped that these aspects identified and analyzed together with the data provided by the online data exploration tool – will be taken over by those women and men who can support and initiate change to combat violence against women.

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[32] FRA, *Raport privind cazurile de violență domestică înregistrate în țările U.E.* Charter of the Fundamental Rights of the European Union.

[33] Partnership for Equality Center, EU Strategy…*op. cit.*; Partnership for Equality Center, Family Violence…*op. cit.*

[34] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA – published in OJEU – L 315/57 of 14 November 2012.

[35] Morten Kjaerum, *Raport anchetă privind violența domestică*, edited by the FRA. The author was the General Manager of the European Union Agency for Fundamental Rights (FRA) in Vienna, between 2008-2015. Currently, he is the President of the European Council on Refugees and Exiles (ECRE).

As a conclusion, one can notice that including the VAW[36] has different forms of manifestation; without being limited to them, we need to mention the most familiar ones:

- Physical, sexual and psychological violence occurring within the family, including the beatings, domestic sexual abuse of girls, violence related to dowry, marital rape, genital mutilation of women, extra-marital violence and violence resulted from exploitation;
- Physical, sexual and psychological violence occurring within the community, including rape, sexual abuse, sexual harassment and intimidation at the workplace, in educational institutions and in other locations, trafficking in women and forced prostitution;
- Physical, sexual and psychological violence committed or ignored by the state, regardless of where it takes place;

But, what fundamentally differentiates the violence against women from the other forms of violence is its cyclicity. It consists in 4 stages identified as such: 1. Between a victim and an aggressor (most often his own partner and man) creates a state of tension that starts from banal, insignificant motives; 2. This tension degenerates into a crisis, moment in which the aggressor loses his control and attacks the victim; 3. The attacker seeks apologies, minimizes his guilt and transfers it upon the victim; 4. The aggressor apologizes, promises he will not do it again, regrets, becomes attentive and affectionate. Subsequently, with a different occasion, he starts from the same reason or from another one apparently non-aggressive and this cycle of violence rebegins[37].

C. Causes of violence. According to the WHO (World Health Organization)[38], the factors favoring the emergence of violent acts may be individual, familial, communitarian or social. In the multinational study dedicated to violence against women within the couple, WHO has concluded that certain factors are systematically present in all the studies regardless of the state in which they have been applied, but the different causes depend on the cultural context[39] and national specificity[40]. Of these, WHO identified as common factors both in sexual and couple violence, which were found in all studies conducted regardless of state, the following:

a. Individual factors:

- Educational disfunctions and gaps both of the aggressor, as well as of the victim;
- The aggressors and/or the victims witnessed domestic violence during childhood;
- Poor sex education;

[36] ***, United Nations (Department for Public Information), the Fourth World Conference on Women, Beijing, China, 4-15 September 1995; Action Platform and Beijing Declaration published in 1996.
[37] ***, *Violența domestică. Manual de bune practici pentru magistrați şi lucrători de poliției*, *op. cit.*, p. 5
[38] According to the WHO – https://www.who.int/news-room/fact-sheets/detail/violence-against-women, 3 July 2019, general presentation page.
[39] Ibidem, *Comprender y abordar la violencia contra las mujeres.... – Panorama general y Violencia infligida por la pareja*, *op. cit.*, pp. 4-5 and 5.
[40] *Efficient prevention and intervention on domestic violence*, Center for Legal Resources and the Institute for Research and Prevention of Criminality, Bucharest, 2003.

- Alcohol and/or drugs used as substitute for solving personal problems and "drowning" the degree of personal dissatisfaction;
- Depression;
- Accepting the violence as means to solve conflicts;
- The incidence of mental disorders.

b. Relational factors:

- A conflictual intimate relationship, with a high degree of general dissatisfaction;
- Major differences of educational level between man and woman, in the meaning that the woman has a higher level of education than the man in that relationship;
- Economic difficulties in the relationship;
- The masculine domination within the relationship and/or the fact that the man has several sexual partners.

c. Community factors:

- Social norms de facto and/or de jure discriminatory between men and women;
- A lower social and economic position of the woman in society;
- Judicial sanctions of small importance for the cases of couple violence;
- A high degree of permissiveness of Community rules to violence against women (at school or at work).

d. Social factors:

- Poverty;
- The existence of armed conflicts and other types of conflicts generalized within that society;
- A high degree of permissiveness of the social norms towards the violence against women (it is an accepted violence or performed even by the state's authorities, such as the police or the organs who are entitled to protect the victims of any forms of aggressions);
- The existence of social attitudes that privilege men, to the detriment of girls;
- Reduced access of women to paid work.

D. The effects of domestic violence and of the violence against women. These types of violence have numerous negative and serious effects both on short-term, but especially on long-term; the effects may be noticed directly (upon the victim) or indirectly (upon the persons witnessing violent acts). In a brief enumeration and analysis, we shall introduce these effects starting from the physical level, continuing with the effects upon the emotional and mental condition, but also upon the relations and social integration of the victim(s).

Thus, regarding the **health condition**, as effect of physical violence, repeated in time or unique (though this case is rarely seen), the victim may suffer a series of injuries or bodily harm, to varying degrees of severity, with serious and long-term consequences, which can lead to infirmities, total or partial loss of work capacity or death of the victim. Among other subversive effects, usually called "*functional disorders*", which do not have a well-defined cause, we need to mention: chronic pains, especially backpains and not only; irritable bowel syndrome or other disorders of the digestive system[41], fibromyalgia and acute asthma attacks[42].

[41] Ibidem, *...Panorama general...*, *op. cit.*, p. 4.

Also, among the effects on the physical health condition, but as effects of sexual violence, the effects are specific and consider the following: an unwanted pregnancy, miscarriage, different disorders of the genital apparatus, including its physical injuries, infection with sexually infectious diseases[43].

A study of the European Institute for Gender Equality has ascertained that, although there is still a need for more data collection and feasible studies in this respect, at a first estimation, the cost of physical violence at EU level involving both medical and legal and specialist treatment is 38,9% totaling € 109 million/year, which means approximately € 42,4 million[44]. However, the estimated costs of the same survey over the physical and emotional implications of violence between partners or couples are even higher, accounting for 48,2% of the total of 109 million/year, or € 52,5 million at EU level.

As effect of verbal and psychological violence, but also of the physical ones repeated for long period of times, **the victim's physic and mental health is affected**. For instance, the legal literature states that the effects of the psychological abuse, as the psychological violence is called, is a central factor of the forms of domestic abuse and has long-term very serious consequences[45]. Specifically, the victims may suffer from a series of transitory or permanent disorders in the emotional area, such as: acute or chronic depression, anxiety, phobias, panic attacks, insomnia, nightmares or post-traumatic syndrome. Depending on the duration and nature of the abuse, personality and behavioral disorders, eating disorders and suicidal attempts may occur; addictive behaviors can also occur (victims get refuge in alcohol, drugs or tranquilizers or barbiturates). The worst effect is, however, low self-esteem, a self-assessment ability and very low self-esteem, which gives rise to and perpetuates other psycho-emotional effects and psycho-emotional states from the above[46].

Either as effect of the economic violence, but also as indirect effect of the other forms of violence (especially physical and psychological), the professional and economic life of the victim shall be affected by the absence of a workplace or by its loss, as effect of the interdictions for the partner to be employed or of his scenes of jealousy, without mentioning the absences (the consequences of physical violence requiring medical care). The insufficient incomes or their complete absence shall create a financial dependence on the aggressor, especially in the absence of alternative resources (the situation is worse if the victim has minor children in care). In economic terms, especially in relation to the lack of work and the much lower returns of victims of couples' violence, the estimated costs of the European Institute for Gender Equality survey were reported at 11,6%, i.e. € 12,6 million/year at EU level[47]. Also, the study

[42] Ibidem, *...Violencia infligida por la pareja...*, p. 6; *Expunerea la experienţe abuzive în perioada copilăriei* – results of the study conducted by WHO on Romanian students – 2012.
[43] Gabriela Dima, Iolanda Felicia Beldianu, *Violenţa domestică : intervenţia coordonată a echipei multidisciplinare. Manual pentru specialişti*, West Publ.-house, Timişoara, 2015, pp. 72-73.
[44] See the information published by the EIGE on their official website – https://eige.europa.eu/gender-based-violence/estimating-costs-in-european-union, accessed at 27 February 2019.
[45] Case analysis, CNEPSS – National Center for Evauation and Promotion of Health Conditions, http://insp.gov.ro/sites/cnepss/wp-content/uploads/2018/11/Analiza-de-situatie-Violenta-2018.pdf.
[46] ***, WHO, *Violencia infligida por la pareja...*, *op. cit.*, p. 6.
[47] *Ibidem*.

conducted in 2015 for Spain ascertained that, surprisingly, the most toxic effects on woman's health, with a percent of 16,6% was represented by the economic violence, followed by the sexual one with a percentage of 14,4%[48].

Socially, the victims are gradually isolated and eventually, completely isolated from their families, group of friends, coworkers or from social services. Social isolation of the of the victim represents one of the most severe factors of failure in the attempt of exiting from this dependence.

E. Romania and domestic/family violence. Between 12 and 21 July 2013, INSCOP Research[49] conducted a poll "Public Opinion Barometer – Truth about Romania" – *How do Romanians perceive the phenomenon of domestic violence?* The survey was conducted on a sample of 1050 people and is representative of the population of Romania for over 18 years. According to this survey, it turned out that:

- 43,5% of the Romanians have declared that "from the beginning of this year (2013) they have heard among known persons or in their area where they live about cases of domestic violence";
- 44,5% have never heard about such cases in their proximity this year, while 12% have chosen not to answer;

The question is a typical victimological indicator, and the fact that over 40% of the Romanians heard about cases of family violence within their own social networks proves a significant presence of this phenomenon.

According to statistic data from the General Inspectorate of the Romanian Police and National Agency of Civil Servants[50] from the past years, it resulted that:

- in the first five months of 2008 there were 21,3% more rape followed by the death of the victim compared to the same period of 2007, over 50% of them in rural areas, according to the Romanian Police;
- domestic violence is mainly pointed against women: in 2006 out of a total of 9372 victims, 5160 were women, and in 2007 out of a total of 8787 victims, 5794 were women, according to the National Agency of Civil Servants;
- 69 women died because of family violence only in 2006 and 69 in 2007, the trend being increased, according to the National Agency of Civil Servants;
- Only in Bucharest in the period 2006-2007 were registered 968 cases of domestic violence against women, 10 deaths as effect of violence and 47 street rapes, according to the statistics of the General Police Directorate of the Municipality of Bucharest.

The recent statistics referring to Romania, show that in our country at November 1st, 2018 the evolution of VAW registered an ascendant trend, in the first seven months of 2018 13,200 cases being registered.

One year after the entrance into force of the Law No 25/2012 which inserted in Romania for the first time the protection order, modifying the Law No 217/2003, the

[48] ***, Spanish Government, *Macroencuesta de violencia contra la mujer 2015*, Ministerio de Sanidad Servicios Sociales e Igualdad Centro de Publicaciones, Madrid, 2015, p. 145.
[49] INSCOP study/survey (– it is a private structure on social and marketing research).
[50] Statistic data registered by the National Agency of Civil Servants between January 2014 and September 2008

Transcena Association[51] launched a national survey aiming the number of the protection orders granted upon the victims' request. According to statistics, most protection orders for domestic violence were released in Bacau, Prahova, Bucharest, Vaslui, Iasi, Neamt, Constanta, Arges, Cluj, Suceava and Sibiu counties.

Also, for 2014, from the data provided by the Romanian Police, at a national level were reported 28,204 cases of violence. Among them, the total number of victims was of 28,796, of which only 4414 were men, the rest being women.

Also, according to the data from the General Inspectorate of the Romanian Police, 2017 was the year with the greatest number of cases of family and domestic violence. According to this data, in Romania 191 persons were killed, as victims of family violence. Considering that in Spain, in the same year, the number of victims of couple violence was 51, of who only 12 reported previous violence and of them – 6 already enjoyed protection measures, also that of the number of 51 – 33 were Spanish[52]; considering the fact that the Spanish population is of 2,37 higher than the population of Romania, it results that the number of victims in our country is almost 13 times higher than in the Iberic state.

As reaction to the increasing phenomenon, the Initiative Group "*Life after abuse*" released a practice guide for opinion makers in the area of family violence in order to answer the needs of the victims, survivors and of those assisting them through shelters, counseling, awareness campaigns and fund raisings.

In this meaning, Sandra Ghițescu[53], specialist in communication and initiator of the project claimed that "*Everybody speaks of family violence, but the participants in the debate have different levels of information totally different and rarely approach the subject of psychological and emotional violence preceding the physical one. In this context, the Life after abuse aims to create content in order to support all the ones involved to communicate and better understand the situation. We are living a real epidemy of domestic violence, and this guide proposes for all those communicating on this subject, formally or informally, to assume an active role in combating this phenomenon*"[54].

III. Conclusions

The definitions and statistics provided in this study, although official, reflect only part of the phenomenon of perpetrating violence within the family, both in Romania and in the world. The moment of the awareness of the situation, we appreciate, has already been overcome, especially by the decision-makers at national level in Romania,

[51] *TRANSCENA* – NGO, founded in 2001, having as main activity the education and theater training in the schools, in penitentiaries – having as motto: *Education instead of marginalization. Advocacy instead of delinquency. Theater instead of victimization. Monitoring instead of inaction. Art is part of solving complex social issues.*

[52] According to the Annual Statistic Bulletin for 2017, publication under the auspices of the Spanish Government, p. 9

[53] Sandra Ghițescu, communication specialist, initiator of the project *Life after abuse*

[54] *Life after abuse*, movement against VAW, online platform (https://www.viatadupaabuz.ro/)

but this must be followed by others involving: taking measures to protect victims by expanding the centers placement and providing full support for them, from the point of view of their personal security but also of their children where appropriate from a psychological and legal point of view; taking coordinated legislative measures by correlating the internal legislation; taking educational measures in the school and academic environment, as well as training of specialists working with such cases.

Of course, all we are proposing in this study is just a part of the measures. Many steps have already been taken: there is a specific legislation, corelated with certain European and international norms, there is a county and national structure for protection of the victims through the Directions for Social Assistance, but unlike the extremely large number of dead victims and the number of the cases of violence statistically reported, it means that there is room for many more things to be made for the prevention and combating of the phenomenon.

And first of all, we are counting on, or we appreciate that we should start in this way, from education!

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THE SHAREHOLDERS' RIGHT TO WITHDRAW FROM JOINT-STOCK COMPANIES

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Abstract: *The shareholders' right to withdraw from the company represents an exception of two fundamental principles intended to protect the shareholders' interests – the majority principle and the principle of free transfer of shares. In line with the European legislation, Law no. 31/1990 regarding trading companies sets forth in Article 134 the right to withdraw from joint-stock companies, following some important associate-related events occurred which regard: a) change of the main line of business; b) relocation of company head office abroad; c) change of company type; d) merger or company division.*

The right to withdraw from the joint-stock company finds its origins in the General Assembly resolution and may not be made conditional on the company's consent with regard to the purchase of shares. The shareholder withdrawn shall collect the equivalent value for the shares owned at a price set by an independent expert, which is an exception of the principle concerning price determination in line with the supply and demand law.

This paper will dedicate a distinct section to the analysis of the withdrawal right relating to companies traded on regulated markets under provisions of Article 134 of Law no. 31/1990, Law no. 297/2004 regarding share capital market as well as Regulation of the National Securities Commission (CNVM)/National Surveillance Authority (ASF).

Keywords: *joint-stock company, shareholder, right to withdraw.*

I. The shareholders' right of withdrawal – exception of the majority principle and the principle of free transfer of shares

1. Preliminary aspects

Law 31/1990 –Law regarding Trading Companies[1] regulates 5 types of companies. Pursuant to article 2, unless otherwise stipulated by the law, the company with legal personality is established as follows: a) general partnerships; b) limited partnerships; c) joint-stock companies; d) joint-stock partnerships and e) limited liability company. The joint-stock company is the most complex and advanced type of company in terms of business activity.[2]

The joint-stock company is the typical company intended to perform large transactions, which is set and operates in line with democratic principles. The key elements of this type of company are defined in article 3 of Law regarding Trading Companies no. 31/1990 which sets forth that the joint-stock company is the company of which liabilities are secured with the business assets and in relation to which the shareholders are liable only in respect of up to the share capital subscribed.

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[1] *Law no 31/1990, republished in the Official Gazette of Romania, Part I, no. 1066 of 17 November 2004.*

[2] Y. Guyon, *Droit des affaires,* Tome 1, 12ème, Economica Publishing House, vol. I, Paris, 2003, p. 270.

The joint-stock company is set in accordance with the Memorandum of Association and charter in compliance with provisions of Article 5 of Law no. 31/1990.

What is defining for the joint-stock companies is the fact that the associates show no interest in the personal capacities of the other associates; what matters is the participation or the contribution to the share capital and the benefits resulting from the business activity.

The doctrine has laid down certain intrinsic defining elements of the Memorandum of Association underlying all types of companies, as follows[3]:

a) Obligation to contribute to the share capital;

b) Obligation to cooperate towards reaching the business-related targets *(affectio societatis);*

c) Obligation to share both benefits and losses.

Without going into details which are not related to our theme, it is worth stating that the obligation to cooperate for business purposes should exist throughout the entire length of the company; however, in relation to companies, this obligation is diminished down to disappearance in case of companies publicly traded.[4]

In case of joint-stock companies, the share capital is represented by shares issued by the company which may only be nominative.[5]

The shares are marketable securities entitling the holder to equal rights. According to Article 8 under Law no. 31/1990, the Articles of Incorporation of the joint-stock company may include all and any restriction with regard to the transfer of shares. The law or other normative acts may set certain restrictions regarding transfer of shares: legal restrictions and conventional restrictions (agreement clauses and pre-emption clauses or inalienability clauses).[6]

The shares are freely negotiable securities. The shareholders are entitled to alienate them at any time and may grant a cause of preference to other shareholders, provided such right is stipulated in the Articles of Incorporation of the company. As for listed companies, the statutory restrictions regarding transfer of shares are not accepted.

By way of exception, the shareholders' right to withdraw from the company and the company's possibility to purchase the shares are regulated.

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[3] St. D. Cărpenaru, Gh. Piperea, S. David,*Law regarding Trading Companies. Comments by Articles,* 5th edition, C.H. Beck Publishing House, Bucharest, 2014, p. 85-87.

[4] St. D. Cărpenaru, *works quoted,* pp. 87-91.

[5]Article 91 was amended by Law no. 656 of 7 December 2002, republished, regarding prevention and sanction of money laundry, published in the Official Gazette No. 904 of 12 December 2002, which transposes the Directive (EU) 2015/849 of the European Parliament and Council of 20 May 2015 regarding prevention of using financial system with a view to laundering money or financing terrorism, amending Regulation (EU) no. 648/2012 of the European Parliament and Council and repealing Directive 2005/60/EC of the European Parliament and Council and Directive 2006/70/EC of the Commission*, normative act stating that shares may be nominative only.* Law no. 656 of 7 December 2002 was amended in 2019 and the legislative initiative was submitted for promulgation to the President of Romania on 03.07.2019.

[6]St. D. Cărpenaru, *Dissertation on Romanian Commercial Law*, 6th Edition, updated, Universul Juridic Publishing House, Bucharest, 2016, pp. 331-332, A. Țuțuianu, *Stock Market. Legal Regime applicable to Participants*, Hamangiu Publishing House, Bucharest, 2007, pp. 122 and foll.

2. *Majority principle*

The commercial law doctrine has allocated many pages to the analysis of the rights of the shareholders of joint-stock companies[7]. There are no strong connections between shareholders, which is the case of partnerships. Shareholders of joint-stock companies barely know each other and this is the reason why conflicts are inevitable[8].

Consequently, the doctrine has set two fundamental principles intended to protect the rights and interests of certain categories of majority or minority shareholders, i.e. *the majority principle* and *the investment protection principle*[9].

The majority principle[10] represents the basic rule for a joint-stock company to operate. In the doctrine, it is unanimously considered that the will of the majority equals the business will, which is different from the amount of the individual wills, as it is a new will, emerged from the unification of the individual wills[11].

Nevertheless, it should be observed that the will of the joint-stock company is based on a share-related majority and not a person-related one. This means that the will of the majority is binding to the minority.

In this respect, Article 132 (1) of Law no. 31/1990 sets forth that "The decisions made by the general assembly within the law and the articles of incorporation are binding, inclusively to the shareholders who failed to attend the general assembly meeting or voted against."

3. *The principle of free transfer of shares*

In legal literature, the authors who tackled the issues of joint-stock companies have dedicated a special chapter to the analysis of the characteristics/features of the shares[12]. As marketable securities, the shares exist in the civil circuit; they may be transferred under the principle of free circulation; diminishing the characteristic of *intuitu personae* is irrelevant with regard to change of the holder of such share. The tradability of the shares may be limited by legal or conventional provisions, agreements or agreement clauses and pre-emption clauses. Such clauses are unacceptable in case of joint-stock companies listed on regulated markets.

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[7] In respect to this, see C. Duțescu, *Shareholder Law*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2007, pp. 132 and foll.

[8] Y. Guyon, *Droit des affaires,* Tome 1, 12ème, Economica Publishing House, vol. I, Paris, 2003, p. 270.

[9] C. Duțescu, *works quoted*, p. 13

[10] See, C. Duțescu, *works quoted*, p. 15-20

[11] I. L. Georgescu, *Commercial Law*, 2nd volume, All Beck Publishing, Bucharest, 2002, p. 293; St. D. Cărpenaru, *works quoted*, p. 323; St. D. Cărpenaru, S. David, Gh. Piperea, *quoted works*, pp. 448 and foll.

[12] See M. N. Costin, *Corporate Instrument as Variety of Securities, with Special Focus on Shares*, Business Law Magazine, no. 3/1998; St. D. Cărpenaru, *Dissertation on Romanian Commercial Law*, 6th edition, updated, Universul Juridic Publishing House, Bucharest, 2016, p. 323; E. Cârcei, *Joint-Stock Companies*, All Beck Publishing House, Bucharest, 1999, C. Duțescu, *works quoted*.

II. Shareholders' right to withdraw under European Regulation. Regulating the right to withdraw in domestic law

1. Shareholders' right to withdraw under European Regulation

The European regulation seeks to protect the interests of the associates and the third parties with regard to establishing joint-stock companies, maintaining and changing their share capital and regulates aspects such as[13]:

- Purchase by the joint-stock company of their own shares, either directly or through a person acting on their own behalf and also on behalf of the company concerned.
- Derogations of the rules regarding purchase by companies of their own shares.

According to the European norm, a trading company may purchase their own shares either directly or through persons acting on their own behalf and on behalf of the company, provided that four cumulative requirements are met: approval of the extraordinary general assembly; nominal value or accounting equivalent of the shares purchased, including shares previously purchased and held by the company, shall not exceed 10% of capital subscribed; purchases do not cause reduction of net assets under a certain quantum and the transaction covers fully paid-in shares.

The European Norms also regulate situations which are derogatory of the rule regarding purchase of own shares. The cumulative requirements do not apply to shares purchased by virtue of a legal obligation or an obligation emerged as a result of a court decision seeking to protect the minority shareholders, in particular in case of a merger, alteration of the main line of business of the company or legal form, transfer of head office abroad or in case of an introduction of a restriction regarding transfer of shares.

2. Shareholders' withdrawal as regulated by Romanian Civil Code

Article 1924 of the Romanian Civil Code regulates the general cases regarding loss of the capacity of associate; the withdrawal from the company is one of them.

By virtue of Article 1926 Civil Code "*The associate of a company with indefinite length or of which Memorandum of Association states the withdrawal right, may withdraw from the company, by notifying the company thereon, within a reasonable timeframe, provided they do so in good faith and their withdrawal at that specific time causes no imminent prejudice to the company.*"

The associate of a company with indefinite length or of which line of business may be performed within a certain timeframe may withdraw from the company due to

[13]Second Directive of the Council of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies, within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC) and Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

reasonable grounds, with the consent of the majority, unless the Memorandum of Association provides otherwise.

Should the other associates fail to grant their consent, the associate concerned may address the court which shall rule on the withdrawal, appreciating the legitimacy and the merits of the case, the opportunity of the withdrawal in relation to the circumstances and the good faith of the parties. In all cases, the associate shall cover the damages which may have resulted from their withdrawal.

3. Shareholders' right to withdraw as regulated by Law no. 31/1990 regarding trading companies

We have already indicated that the shareholders' right to withdraw represents an exception of the majority principle and the principle of free transfer of shares.

In line with European regulation, Law no. 31/1990 regulates in Article 134 the shareholder's withdrawal from the joint-stock company. Therefore, Article *134 under Law no. 31/1190 lays down the following:*

"(1) Shareholders who voted against a resolution of the general assembly are entitled to withdraw from the company and request purchase of their shares by the company, provided that such resolution of the general assembly seeks to:

a) change the main line of business of the company;

b) relocate the company head office abroad;

c) change the type of company;

d) merger or company division.

(2) The right to withdraw may be exercised within 30 days of publication of the general assembly resolution in the Official Gazette of Romania, Part 4, for the cases stipulated in par (1) letters a) – c), and of adoption of such resolution, in the cases stipulated in par (1) letter d) .

(2^1) In the cases stipulated by Article 246^1 and 246^2, the shareholders who are not in favor of the merger/division may exercise their right to withdraw within 30 days of the publication date of the merger/division draft under Article 24 (2) or, where appropriate, Article 242 (2^1) .

(3) The shareholders shall submit at the company head office both the written statement regarding withdrawal and the shares held or, where appropriate, the shareholder certificate issued in accordance with Article 97.

(4) The price paid by the company for the shares held by the person who exercises the right to withdraw shall be set by an independent certified expert, as an average value resulting from application of minimum two assessment methods recognized by the legislation in force upon the date of the assessment. The expert shall be appointed by the judge delegate appointed in accordance with provisions of Article 38 and 39, upon request of the Board of Administration, respectively the Board of Directors.

(5) The assessment costs shall be borne by the company."

According to Articles 7 and 8 under Law no. 31/1990, the Articles of Incorporation of a company shall state "the line of business, domains and main activity". We support the opinion according to which the hypothesis stated in Article

134 (1) letter a) "change of the main line of business" takes into consideration a change of the main domain of activity or the main activity.[14]

The withdrawal from the company in line with the hypothesis stated at Article 134 (1) letter b) "relocation of company head office abroad" is justified by the fact that it may generate fiscal alterations, additional costs, permits, authorizations, etc.

The change of the company type, hypothesis regulated by Article 134 (1) letter c), justifies the withdrawal from the company as there may occur differences in relation to the associates' liabilities, transfer of shares/interests, functioning of the company[15].

The merger and company division[16] are technical and juridical procedures by which the companies are restructured with a view to increasing the market share and the return on investments, separating some activities or rescuing companies in difficulty. Such company-related events generate important mutations concerning the financial status of the companies involved, share capital, structure of the ownership, line of business, capital ownerships etc.

The doctrine has expressed the idea according to which the scope of the cases in which the shareholders are entitled to withdraw should be extended, for instance in case of transforming the nominative shares into bearer shares and inversely[17], or the right to withdraw should also apply when the company head office is relocated to another locality and not only when such office is relocated abroad, as provided by Article 134.[18]

4. The shareholders' right to withdraw as regulated by Law no. 297/2004 regarding the stock market

With regard to listed companies, applicable shall be the provisions of Law no. 31/1990 and Law no. 297/2004[19] which regulate the following cases of withdrawal[20]:

a) Adoption of some resolutions by the shareholders' general assembly with regard to relocation of the head office abroad, alteration of the main line of business or type of company, merger or division of the company (Article 134 (1) of Law no. 31/1990)[21].

b) Adoption of some resolutions by the shareholders' general assembly of a listed company resulting in a division or merger which entails the allocation of the shares not admitted for trading on a regulated stock market. (Article 242 of Law no. 297/2004).

c) Adoption of some resolutions by the shareholders' general assembly of a listed company will lead to removing the issuing companies from trading.

d) A public bid for voluntary or mandatory takeover shall be carried out.

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[14]M. Gherghe, R. Papadima, R. Văleanu, *Shareholders' Withdrawal. Comparative Law Study*, in Romanian Business Law Magazine no. 11/2015, p. 43.
[15]M. Gherghe, R. Papadima, R. Văleanu, *works quoted,* p. 43.
[16]With regards to merger and company division, see St. D. Cărpenaru, *works quoted.*, p.367 and foll.; St. D. Cărpenaru, S. David, Gh. Piperea, *works quoted*, p. 810-858.
[17] Ioan Schiau, Titus Prescure, *works quoted,* p.134.
[18] C. Duțescu, *works quoted,* p. 402.
[19] Law no. 297/2004 regarding the stock market, published in the Official Gazette, no. 571/2004.
[20] See C. Duțescu, *works quoted*, p 604-669.
[21] For the contrary opinion in the sense of the non-applicability of Article 134 (1) under Law no. 31/1990 to listed companies, M. Gherghe, R. Papadima, R. Văleanu, *works quoted.,* p. 37.

e) A public takeover bid shall be carried out in case the bidding majority shareholder forces the remaining minority shareholders to sell their shares and therefore initiates *the squeeze out procedure*.

f) Following a public takeover bid, in case the remaining minority shareholders force the bidding majority shareholder to purchase their shares and initiate *the sell out procedure*.

The doctrine[22] notes that, in the cases provided at letters a) – d) and f), we witness a free exercise of a genuine right to a legal price, whereas in the case provided at letter e) we witness a forced exercise of the same right.

III. Legal characteristics of the right to withdraw from the company

1. Preliminary aspects

The doctrine has found some legal characteristics of the shareholders' right to withdraw from the joint-stock companies. An author expressed a critical opinion concerning the naming of the shareholders' right, as regulated by Article 134, a withdrawal right. The motivation thereof was that, in principle, "all and any shareholder is entitled to withdraw from the company, Article 134 dedicating only a particular situation to this right. The author proposes the concept of "the right to withdraw" at a legal price, which means that the issue is a terminology-related issue rather than a content-related one[23].

2. Legal characteristics

The doctrine has consecrated the following legal characteristics to the withdrawal right:

a. The withdrawal of a shareholder from a joint-stock company is an act of will of such shareholder, a unilateral juridical act amending the articles of incorporation of the trading company[24]. This is an exceptional situation, as the articles of incorporation are multilateral, which normally prevents their unilateral amendment.[25]

b. The right to withdraw is limited. [26] Nevertheless, it is admitted that a shareholder may withdraw from the company against the will of the other shareholders and also in cases other than the ones laid down by Article 134, provided the following requirements are met cumulatively[27]:

- The Articles of Incorporation of a joint-stock company provide restrictions with regard to transfer of shares and therefore prevent their free assignment;
- The shareholder has reasonable grounds to leave the company;

[22]St. Cărpenaru, S. David, Gh. Piperea, *works quoted*, p. 448, C. Duțescu, *works quoted,* p. 309-610.
[23]St. Cărpenaru, S. David, Gh. Piperea, *works quoted*, p. 447; C. Leaua,"*Trading Companies. Special Procedures",* H. Beck Publishing House, Bucharest 2008, p. 226.
[24] C. Leaua, *quoted works,* p. 226.
[25] C. Leaua, *quoted works*, p. 226.
[26] St. D. Cărpenaru, S. David,Gh. Piperea, *works quoted*, p. 448; I. Schiau, T. Prescure, *works quoted*, p. 401.
[27] St. D. Cărpenaru, S. David, Gh. Piperea, *works quoted,* p. 448.

- The attitude of the other shareholders practically prevents the shareholder from alienating their shares.

The authors mentioned consider that the shareholder seeking to withdraw may address the court by filing a petition to have the Articles of Incorporation annulled, yet only in relation to the shares. The court shall be free to rule as to how the shareholder shall be indemnified by analogy, enforcing therefore the provisions of Article 134 or Article 224 (2)[28].

c. The right to withdraw represents an exception and a dual aspect:

- of the rule according to which the business will is the result of the majority shareholders' will. It applies to minority shareholders as well.
- of the principle of free transfer of shares which is not consecrated by an imperative norm and is not of public order either.

d. The withdrawal from the joint-stock company is also a measure intended to protect the minority shareholders in a trading company of which shares are slightly liquid or not liquid[29].

It is admitted that the extension of the withdrawal cases may generate serious financial or liquidity issues to some companies with a large number of shareholders.

e. The right to a legal price is an exception of the principle to determine the price of shares in line with the supply and demand law

The right to a legal price is a subjective, personal, asset-related, liability-related, relative right (the holder of the correlative liability is the issuing company itself), accessory to the ownership right over the shares, affected by the requirement regarding occurrence of some events, enumerated in the legal provisions in a limitative manner, which influences the status of the issuing company in a decisive manner. [30] The price of the shares is not negotiated. It is a legal price regulated by Law no. 31/1990 and Law no. 297/2004 as means to protect the minority investors.

f. The right to withdraw sees the light ope legis in the assets of the shareholders of such companies. It may be limited by no statutory provision[31].

In principle, this right is the right of the minority shareholders of issuing companies. Theoretically, it may be exercised by the majority shareholder as well. This right may not be limited by the Articles of Incorporation of the Company.

IV. Correlation between the right to withdraw from joint-stock companies and other situations derogatory of the principle of negotiability of shares

1. Correlation between the right to withdraw regulated by Article 134 and right to withdraw by alienation of shares

In principle, the ownership right of the shares is transferred against payment. The assignment shall comply with the sale-purchase rules. The ownership right over the

[28] St. D. Cărpenaru, S. David, Gh. Piperea, *works quoted*, p. 448.
[29] I. Schiau, T. Prescure, *works quoted,* p. 134.
[30] C. Duțescu, *works quoted,* p. 603.
[31] C. Duțescu, *works quoted*, p. 404.

nominative shares is transferred by a statement made in the Ledge of the Issuer's Shareholders, subscribed by the assignee and the assignor or their agents, and a mention thereon made on the share itself.

The Articles of Incorporation may also stipulate other methods for the transfer of the ownership right over the nominative shares. The ownership right over nominative shares issued in dematerialized form and on a regulated market is transferred in accordance with provisions of Law no. 297/2004[32].

One may notice that the shareholder who alienates the shares holds a claim against the purchasing entity for the payment of the value represented by the shares.

In the cases regulated by Article 134, the same shareholder holds a claim against the company for the payment of the value represented by the shares.

In case of share alienation, the price of the shares is negotiated between the seller and the buyer, whereas in the cases stipulated by Article 134 the price paid by the company for the shares of the withdrawing shareholder is set by an independent certified expert, as an average value resulting from application of minimum two assessment methods recognized by the legislation in force upon the date of the assessment.

There are also differences in terms of paying dividends. In case of share alienation, applicable shall be provisions of Article 67 (6) setting forth: "The dividends owed after transfer of shares shall be paid to the assignee, except when the parties have agreed otherwise".

In the cases of withdrawal stipulated by Article 134, the withdrawing shareholder holds a claim for the amount owed as dividend against the issuing company.

2. Correlation between Article 134 (1) and Articles. 104. 105[1] under Law no. 31/1990

Article 104 and following under Law no. 31/1990 regulate the exceptional situation derogatory of the common law.

Pursuant to Article 103[1] of Law no. 31/1990, companies may not subscribe their own shares; this interdiction is intended to protect the company creditors against the reduction of the share capital.[33]

Shares may be repurchased as follows:

a) authorization for acquisition of own shares is granted by the Extraordinary General Shareholders Assembly, which will set the conditions of such acquisition, in particular the maximum number of shares which are to be acquired, the length for which the authorization is granted and which may not exceed 18 months from the publication date in the Official Gazette of Romania, Part 4, and, in case of an acquisition against payment, the minimum and maximum equivalent value;

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[32] A.Ţuţuianu, *works quoted,* p. 121-124; Gh. Piperea,"*Trading Companies, Share Capital. Community Aquis",* C.H.Beck Publishing House, Bucharest, 2005, p. 275; Ioan Schiau, Titus Prescure,"*Transfer of Ownership over Nominative Shares"*, Business Law Magazine, no. 5/2000.

[33] St. D. Cărpenaru, *works quoted* p. 332-333; S. Bodu, *Acquisition of Own Shares by Joint-Stock Companies,* in Romanian Business Law Magazine, no. 1/2004; C. Duţescu, *Repurchase of Own Shares by a Joint-Stock Company admitted for Trading on a Regulated Market* in The Law no. 9/2010, p. 68 and foll.

b) nominal value of own shares acquired by the company, including the shares in their own portfolio, may not exceed 10% of the share capital subscribed;

c) the transaction may seek only fully-released shares;

d) the shares thus acquired shall be paid only from distributable profit or the reserves available in the company, recorded in the latest annual financial statement approved upon constituting legal reserves.

By virtue of Article 104 (2), the restrictions provided by Article 103^1, except the restriction stipulated at Article 103^1 (1) letter d), do not apply to shares acquired in accordance with Article 134.

3. Correlation between the shareholder's right to withdraw set forth by Article 134 and the associate's right to withdraw set forth by Article 226 under Law no. 31/1990

Pursuant to Article 226, the associate in a general partnership, limited partnership or limited liability company, may withdraw from the company[34]:

a) In the cases provided by the Articles of Incorporation;

a^1) In the cases provided by Article 134;

b) With the consent of all other shareholders;

c) Unless there are provisions in the Articles of Incorporation or in the absence of a unanimous consent, the associate may withdraw for reasonable grounds following a decision of the Court which was subjected to an appeal only.

The right to withdraw under provisions of Article 226 applies either with the consent of the associates previously expressed in the Articles of the Incorporation or expressly with regards to a specific demand, or without the consent, in which case the withdrawal may be declared enforceable by the court of law[35].

One may observe that in case of the associates' withdrawal from a general partnership or a limited liability company, the withdrawal reasons are practically unlimited.

In terms of the withdrawing associate's rights owed for their shares, these rights are set by agreement between associates or by an expert appointed by the latter or the Court, provided the associates fail to reach an agreement in this respect. In the absence of a deadline, the petition to have the withdrawal declared enforceable shall be filed throughout the entire duration of the capacity of associate held by the person whose withdrawal is expected to be declared enforceable by the court.

The petition to have the withdrawal declared enforceable may be filed only by the time the company is dissolved and not throughout its liquidation[36].

The petition to have the withdrawal declared enforceable is filed to determine a right; it does not constitute a right as such withdrawal takes effect as a result of the shareholder's actual representation of their will[37].

The assessment costs shall be borne by the company (Article 226 (3)).

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[34] In respect to this issue, see: St. D. Cărpenaru, *works quoted,* p. 369, St. D. Cărpenaru, S. David , Gh. Piperea, *works quoted*, p. 772-778, Gh. Piperea, *works quoted,* p. 290 and foll.

[35] C. Leaua, *works quoted,* p. 227.

[36] I. N. Stan, *Alterations in the Associative Structure of the Limited Liability Companies*, in Business Law Magazine no. 7-8/2001, p.166-179

[37] C. Leaua, *works quoted.,* p. 231-232

In case of the shareholder's withdrawal regulated by Article 134, the price paid by the company for the shares for which the withdrawal right was exercised shall be set by an independent certified expert, as an average value resulting from application of minimum two assessment methods recognized by the legislation in force upon the date of the assessment.

The expert shall be appointed by the judge delegate appointed in accordance with provisions of Article 38 and 39, upon request of the Board of Administration or the Board of Directors. The assessment costs shall be borne by the company (Article 134 (4) and (5)).

V. Conditions and procedure relating to exercising the right of withdrawal from the company. Determining the equivalent value of the shares of the shareholders who exercise their right of withdrawal

1. Preliminary aspects

Law no. 31/1990 regulates the procedure on the withdrawal from the company starting from the principle of protecting the interest of minority investors/shareholders. The withdrawal procedure regulated by Article 134 seeks that the minority investors/shareholders may exercise their actual right of withdrawal and be granted a fair price for the shares under such right.

In the absence of this regulation, the investors/shareholders may find themselves in the situation of not being allowed to alienate their shares or alienating their shares at a price which does not represent their real value.[38]

2. Conditions and procedure relating to exercising the right of withdrawal from the company

The analysis of the provisions under Article 134 reveals the following conditions relating to exercising the right of withdrawal[39]:

a. Adopting a resolution of the General Assembly regarding the relocation of the company head office abroad, change of the main line of business, change of the company type, merger or company division;

b. Casting a vote against this resolution of the General Assembly by the shareholder requesting to withdraw;

c. Submitting a written statement regarding the withdrawal at the company office.

Law no. 31/1990 does not expressly stipulate the written form of the request for withdrawal, which means that such withdrawal mat be also expressed verbally, in the General Assembly meeting, in which case it shall be recorded in the minutes of the

[38] With regard to shareholders' protection, see C. Duțescu*, works quoted,* p. 752-781, Gh. Piperea, *works quoted*, p. 459 and foll, A. Țuțuianu, *works quoted*, p. 410-435, S. David, H. Dumitru, *Fundamental Principles Governing the Regulations Applicable to the Securities Market*, RDC 7-8/1996.

[39] See C. Duțescu*, works quoted,* p. 414.

meeting[40]. In accordance with provisions of Article 134, the shareholder has a withdrawal right which does not require the consent of the other associates[41]. In the doctrine, it has been stated that the request for withdrawal stands for an offer[42].

The right to withdraw shall be exercised within 30 days from the publication date in the Official Gazette of the resolution of the Shareholders' General Assembly, regarding the relocation of the company head office abroad, change of the main line of business or change of the company form, respectively from the date of the adoption of the resolution of the Shareholders' General Assembly for merger or company division.

In the doctrine, the following aspects have been noted:

➢ *In case the company has not issued a shareholder certificate, the withdrawal procedure may not be dependent on submitting such certificate; the company shall simultaneously issue the certificates and assign them [43]; another solution would be that the company takes advantage of its own guilt in order to block the withdrawal process.*

In case of dematerialized shares, indicated by their registration in the account, the statement of account shall be submitted by the registration company[44].

➢ *The written statement regarding the withdrawal and the submission of the shares/shareholder certificate/statement of account, represent cumulative elements of the withdrawal procedure. The right to withdraw turns from a vocation right into a subjective claim. It emerges upon the shareholder's submission of the statement regarding the withdrawal at the company office, in accordance with Article 134 (3)[45].*

Classifying it as a subjective right has the following consequences[46]:

➢ Shareholders may waive their right if they understand that sale of shares at the price set in this manner is not to their best interest. They may revoke the statement regarding the withdrawal prior to appointing the expert. The company is entitled to request the shareholders to cover the assessment costs provided the latter may not prove that they have objective reasonable grounds to waive such right.

➢ *The shareholders exercising their right of withdrawal shall alienate all the shares to the issuer; they may not sell their shares in part and continue to be shareholder.*

➢ *We consider that the right of withdrawal may also be exercised prior to the publication of the resolution of the Shareholders' General Assembly in the Official Gazette of Romania, Part 4, in the cases stipulated by (1) letters a) – c); the argument is that the shareholder has taken note of the content of this resolution and the duration of their doubts with regard to the withdrawal and its consequences was therefore shortened.*

➢ *The shareholder may waive the right to collect the equivalent value of their shares; this liberality shall be exercised in an authentic form, except the cases when this is concluded in relation to a death.*

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[40] C. Leaua, *works quoted*, p. 227.
[41] C. Leaua, *works quoted*, p. 227.
[42] R.N. Catană, "*Exercising the Capacity of Withdrawal from the Trading Company*", Romanian Business Law Magazine no. 2/2002, p. 184
[43] St. D. Cărpenaru, S. David, Gh. Piperea, *works quoted*, p. 450-451.
[44] I. Schiau, T. Prescure, *works quoted,* p. 403.
[45] In this respect, C. Duțescu, *works quoted,* p. 451.
[46] St. D. Cărpenaru, S. David, Gh. Piperea, *works quoted*, p. 451.

➢ *In case of merger or company division, the right of withdrawal exists for all shareholders of the companies involved in the merging and dividing operations existing upon the adoption of the Shareholders' General Assembly resolutions*[47].

3. Deadline provided for exercising the right of withdrawal

Pursuant to Article 134 (2) under Law no. 31/1990, the right of withdrawal may be exercised within 30 days of the publication of the shareholders' general assembly resolution in the Official Gazette of Romania, Part 4, for the cases provided in (1) letters a) – c), i.e. change of the main line of business, relocation of the company head office abroad, change of the company type.

Should the shareholders' general assembly resolution regard merger or company division, the right of withdrawal may be exercised within 30 days of the adoption of the general assembly resolution.

In case of merger by absorption, respectively division, regulated by Articles 246^1 and Article 246^2, the shareholders who disagree with the merger/division may exercise their right of withdrawal within 30 days from the publication of the merger/division draft, within the meaning of Article 242 (2) or, where appropriate, Article 242 (2^1)[48].

In the doctrine, the 30-day timeframe has been classified in a different manner [49]. Some authors have considered it to be a peremptive period which may not be ceased or suspended [50]. Other authors have classified the same term as statute of limitations.

4. Determining the equivalent value of the shares of the shareholders who exercise their right of withdrawal

According to Article 134 (4)*: "The price paid by a company for the shares of the entity exercising their right of withdrawal shall be set by an independent certified expert, as an average value resulting from application of minimum two assessment methods recognised by the legislation in force upon the date of the assessment. The expert shall be appointed by the judge delegate appointed in accordance with provisions of Article 38 and 39, upon request of the Board of Administration, respectively the Board of Directors."*

By virtue of Article 134 (5): "The assessment costs shall be borne by the company".

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[47] C. Duțescu, *works quoted,* p. 613.

[48] Article 242 (2) "The merger/company division draft, endorsed by the judge delegate, shall be published in the Official Gazette, Part 4, at the parties' expense, in full or in excerpt, in compliance with the order of the judge delegate or request of the parties, minimum 30 days prior to the dates set for the extraordinary general assembly meetings on which occasion the shareholders are to decide, pursuant to Article 113 letter h), with regard to the merger/company division.

(2^1) Should the company have their own website page, publication in the Official Gazette of Romania, Part IV, provided at par (2), may be replaced by publication online, for a length of time of minimum one month prior to the shareholders' extraordinary general assembly which is to decide with regard to the merger/company division; this timeframe shall end no later than the end of the respective general assembly meeting."

[49] M. Gherghe, R. Papadima, R.Văleanu, *works quoted*, p. 37-39.

[50] In this respect, see: C. Duțescu, *works quoted,* p. 615, St. D. Cărpenaru, Gh. Piperea, S. David, *works quoted*, p. 452, I. Schiau, Titus Prescure, *works quoted*, p. 403.

Article 134 (4) and (5) is therefore reproduced as amended by Law no. 441/206. The law formerly took into consideration setting the price by minimum two assessment methods provided by the European assessment standards.

The analysis of the legal texts has shown that:

- The request for appointing the independent certified expert is remitted to the judge delegate within the Trade Register Office by the Board of Administration or Board of Directors.

In the doctrine[51], it is appreciated that the judge is free to appoint the assessor whom they consider appropriate. The judge delegate shall appoint within 5 days of the registration of the request, one or several experts from the list of certified experts. Pursuant to Article 39 of Law no. 31/1990, the following may not be appointed to act as experts:

a) relatives or in-laws to the fourth degree inclusively, or the spouses of the ones who have made contributions in kind or spouses of the founder members;

b) persons who collect, in any form, for the positions held, other than the one of expert, a salary or a remuneration from the founder members or the ones who have made contributions in kind;

c) any persons lacking, as a result of their business, work or family relations, the independence to carry out an objective assessment of the contributions in kind, according to special norms regulating such profession.

The judge delegate shall render their resolution in accordance with the rules of the non-contentious procedure.

- The price shall be set by the assessor as an average value resulting from application of minimum two assessment methods recognised by the legislation in force upon the date of the assessment. [52]

- In the doctrine[53] it has been rightly indicated that Article 134 under Law no. 31/1990 does not provide a reference date for the assessment and the date on which the payment should be settled to the shareholder withdrawn. The following solutions are therefore proposed:

- The reference date for the assessment is the date of adoption or publication of the resolution of the general assembly' which approved the company-related event set forth in Article 134 (1) letters a) – d).

- The payment becomes due on the date the assessment report is submitted by the expert. For the timeframe between the date on which the withdrawal request is filed and the date of report submission by the expert, the company shall settle a

[51]St.D.Cărpenaru, S. David, Gh. Piperea, *works quoted,* p. 450

[52] Assessment methods used: International assessment standards provide 4 main methods according to which the value of a company is set:

1. Cash flow method
2. Income capitalization method
3. Net book asset method
4. Market assessment method

For details, see C.Duțescu, *works quoted,* p. 618-620.

[53]M. Gherghe, R. Papadima, R.Văleanu, *works quoted,* p. 41.

remunerating legal interest whereas for the timeframe between the report submission and the actual payment, they shall settle a penalizing legal interest[54].

As far as we are concerned and *de lege ferenda,* we propose supplementing Article 134, in the sense of establishing as reference date for the assessment – the date of publication of the extraordinary general assembly resolution. Additionally, it is required to set a 15 to 30 day timeframe from the submission of assessment report for the company to pay the equivalent value of the shares.

- The withdrawing shareholder is not entitled to contest the appointment of the assessor or the results of the assessment report, except when the assessor is not independent from the company and/or the assessment was conducted in violation of the assessment methods recognised by the law and/or fails to set the price of the shares as an average value resulting from application of minimum two assessment methods recognised by the legislation in force upon the date of the assessment.[55]

The petition of the shareholder shall be filed against the resolution of the judge delegate or shall be a tort liability action filed against the company provided that the latter endorses the assessor's position.

- The doctrine has expressed the opinion according to which the withdrawing shareholder and the company may reach an agreement without having an expert appointed by the court. The shareholders of the company may have such convention annulled by the court provided that the price is overestimated.[56]

This opinion has been criticised by other authors[57] who argue that the norm is imperative, "the price shall be set", and regulates a mechanism used to determine such price under judicial supervision, the private law issues may not ignore such legal provision.

An agreement concluded between the company and the shareholder withdrawn may generate the risk of impairing the remaining shareholders' best interests.

As far as we are concerned, we endorse the first opinion and start form the premise that the legal representatives of the company seek the business interest, and an agreement concluded in relation to the price of the shares would be of nature to exempt the company from settling the assessment and legal costs and to accelerate the withdrawing procedure.

In addition, there is no opposition as to the company and the withdrawn shareholder to conclude a transaction by which to settle a potential claim.

- A special situation reflected both in the doctrine and the judicial practice is the one in which the company refuses to enforce provisions of Article 134, which leads to two distinct situations[58]:

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[54] D. Călin, "*Shareholders' Withdrawal from Joint-Stock Companies"*, in Romanian Business Law Magazine no. 3/2001, p. 96.
[55] St. D. Cărpenaru, S. David, Gh. Piperea, *works quoted,* p. 450; M. Gherghe, R. Papadima, R. Văleanu, *works quoted,* p. 39.
[56] I. Schiau, T. Prescure*, works quoted,* p. 404-405; M. Gherghe, R. Papadima, R.Văleanu, *works quoted,* p. 9-40.
[57] St. D. Cărpenaru, S. David, Gh. Piperea, *works quoted,* p. 450.
[58] See C. Duțescu, *works quoted,* p. 621-622

- The company makes no offer to the withdrawing shareholder. In this case, the shareholder prejudiced may address the court on the grounds of *the obligation to make,* and request forcing the company to conclude a sale-purchase contract covering the shares held by the issuing company, in which case the price is to be set by means of a court-commissioned expert report, evidence which will be submitted in relation to this litigation.
- In the absence of an assessment conducted by a certified expert, the company refuses to make a price offer. In this case, the shareholder withdrawn may file a tort liability action against the company, grounded on the illicit act of offering a price forbidden by the law.

VI. Shareholders' withdrawal from companies traded on a regulated market

1. Enforcement of Article 134 under Law no. 31/1990 in case of companies listed on the share capital market

The doctrine and the practice outline the majority opinion which we endorse according to which the shareholders' right of withdrawal provided by Article 134 also applies to companies traded on a regulated market; in support of this opinion, there are the following arguments[59]:

- As common law, Law no. 31/1990 applies to all listed or unlisted companies and does not make a distinction between these two categories of joint-stock companies;
- Law no. 297/2004 does not include derogatory provisions applicable only to tradable companies.
- The right of withdrawal provided by Article 134 is fully in line with the investment protection principle, the fundamental principle of the share capital market.

It should be observed that the case of changing the legal form of the company does not apply to tradable companies, as only joint-stock companies may be admitted for trading and the legal form of the company may not be changed prior to leaving the trading market, in which case the shareholders are entitled to withdraw from the company and collect the legal price for their shares[60].

The doctrine has also expressed the idea according to which Article 134, except the case of company relocation, is inapplicable to listed companies [61]. Other authors have considered that Article 134 under Law no. 31/1990 does not apply to listed companies, the scope of the legal right to withdraw as a result of extraordinary events is narrower in case of listed companies and the procedure to exercise such legal right is exclusively governed by Law no. 297/2004 and National Securities Commission (CNVM)/Financial Surveillance Authority (ASF) Regulations[62].

[59] St. D. Cărpenaru, S. David, Gh. Piperea, *works quoted*, p. 453-454 and C. Duțescu, *works quoted,* p. 622.
[60] C. Duțescu, *works quoted,* p. 622.
[61] Gh. Piperea, *works quoted,* p. 292.
[62] M. Gherghe, R. Papadima, R.Văleanu, *works quoted,* p. 43-45.

2. The case provided by Article 242 under Law no. 297/2004 regarding the share capital market

Pursuant to Article 242 under Law no. 297/2004, "shareholders of a company admitted for trading who do not agree with the resolutions of the Shareholders' General Assembly with regard to mergers or company divisions, which imply allocation of shares which are not admitted for trading on a regulated market, are entitled to withdraw from the company and collect from the latter the equivalent value of the shares", according to Article 134^1 of Law no. 31/1990[63].

The withdrawal procedure and implicitly the exercise of the right to collect the price for the shares owned are regulated by Regulation no. 1/2006 adopted by the National Securities Commission (CNVM) / Financial Surveillance Authority (ASF).

Derogatory issues:

- Article 132 (2) of Regulation no. 1/2006, (2) The Shareholders' Extraordinary General Assembly which approves in principle a merger according to par (1) empowers the Board of Administration to prepare a merger draft and too retain an independent assessor registered with the National Securities Commission, as to determine the value of a share which will be granted to the shareholders who disagree with such merger and request to withdraw from the company.
- The resolution of the Shareholders' Extraordinary General Assembly shall also set the registration date, i.e. the date in relation to which the shareholders who may withdraw from the company are identified.
- Pursuant to Article 132 (3) of Regulation no. 1/2006, the shares of the issuing companies shall be traded on the share capital market up to two days prior to Registration date set by the Shareholders' Extraordinary General Assembly. Subsequent to this date, they will be suspended from trading until all merger-related procedures have been carried out.
- The shareholders who do not agree with the merger are entitled to submit the company their request for withdrawal within maximum 15 work days of the publication in the Official Gazette of the merger draft (Article 132 (5) of Regulation no. 1/2006).

The request shall include the total number of the shares held and total value of the shares, as well as the payment methods applicable to settling their equivalent value (bank transfer, money order with acknowledgment of receipt).

- The shares shall be settled by the issuing company within maximum 7 days of the date of the Shareholders' Extraordinary General Assembly approving the merger.

The procedure applied to set the legal price for company divisions implying allocation of unlisted shares and the merger-related procedure are similar.

3. Case of delisting (withdrawing from trading) of issuing companies

Law no. 297/2004 sets forth in Article 234 letter d) the possibility for the securities to be withdrawn from trading. Therefore, "the National Securities Commission (CNVM) may … decide to withdraw from trading the securities admitted

[63] With regard to the correlation between Article 242 under Law 297/2004 and Article 134^1 of Law 31/1990, see M. Gherghe, R. Papadima, R. Văleanu, *works quoted*, p. 44-46.

on a regulated market, provided they consider that, due to special circumstances, a proper market for such securities may no longer be maintained."

Neither Law no. 297/2004 nor the National Securities Commission (CNVM) Regulations (Regulation no. 14/2004 and Regulation no. 2/2006) regulate the voluntary withdrawal from the share capital market of an issuing company[64].

It is considered in the doctrine that such a situation finds legal grounds in provisions of Article 87 (4), letter d) and (5) – (11) of the National Securities Commission (CNVM) Regulation no. 1/2006. [65]

3.1. Voluntary withdrawal from trading under provisions of Regulation 1/2006 regarding issuers and transactions of securities

The voluntary withdrawal from the share capital market may be exercised provided that:

- There is a resolution adopted by the Shareholders' Extraordinary General Assembly;
- The shareholders who do not agree with the resolution adopted by the Shareholders' Extraordinary General Assembly are granted the right to withdraw;
- The rules applicable to regulated markets are complied with.

The shareholders' right to withdraw has the following characteristics:

a) The assessment report with regard to the price owed to the withdrawing shareholders shall be prepared by an independent assessor registered with the National Securities Commission (CNVM). This assessor will use minimum two assessment methods recognised by the European assessment standards;

The assessment report will be submitted to and approved by the Shareholders' Extraordinary General Assembly approving the voluntary withdrawal from trading. The assessment costs will be borne by the company.

b) The shareholders who do not agree with the withdrawal from trading may request the issuing company, within 45 days of publication of the Shareholders' Extraordinary General Assembly resolution in the Official Gazette, the withdrawal from the company and the settlement of the equivalent value for their shares;

c) The issuing company shall settle the equivalent value within 15 work days of the registration of the request for withdrawal, using the means indicated by the shareholder in their request for withdrawal: bank transfer, money order with acknowledgement of receipt.

3.2. Voluntary withdrawal from trading under provisions of Order to take measures of the National Securities Commission no. 8/2016 regarding withdrawal of securities from trading

The National Securities Commission has regulated the terms regarding the withdrawal from trading upon the initiative of the issuer by Order to take actions No.

[64] With regard to the evolution of the regulation, see C. Duțescu, *works quoted*, p. 630-634.

[65] For further details, C. Duțescu, *works quoted,* p. 634 and foll; National Securities Commission (CNVM) Regulation no. 1/2006, approved by Order no. 23/09.03.2006, published in the Official Gazette no. 312/06.04.2006, repealed by Regulation no. 5/2018 of the Financial Surveillance Authority (ASF), published in the Official Gazette no. 478/2018.

8/2016[66]. The issuer may withdraw from trading provided that the following requirements are met:

a. In the first 12 months prior to the publication of the convening notice for the Shareholders' Extraordinary General Assembly;

- A number of maximum 50 transactions with shares of the respective issuer were registered, except the transactions performed between persons concerned or persons having strong connections or persons belonging to the same group[67];
- The number of shares traded represents maximum 1% of the total shares representing the share capital of the issuer.

b. The shareholders who do not agree with the resolution adopted by the Shareholders' Extraordinary General Assembly are granted the right to withdraw and to collect the equivalent value for their shares.

The right of withdrawal shall be exercised under the following conditions:

- Adoption of a resolution regarding the withdrawal from trading, upon the initiative of the issuer, by the Shareholders' Extraordinary General assembly. This resolution shall be published in accordance with provisions of Article 131 under Law no. 31/1990.
- The minimum price which is to be settled to the shareholders who do not agree with the resolution of the Shareholders' Extraordinary General Assembly shall be included in the text of this resolution. The price shall be set in a report prepared by the independent assessor registered with the National Securities Commission (CNVM), in accordance with international assessment standards.

The costs relating to the assessment report shall be borne by the company. Should the Shareholders' Extraordinary General Assembly be convened upon request of a shareholder/group of shareholders who act in concert and hold a significant position, the costs shall be borne by such shareholders[68].

- The registration date in relation to which the shareholders who may have the right of withdrawal are identified, shall be subsequent of minimum 90 days but no

[66]Order to take actions no. 8/2016 regarding withdrawal from trading of securities, available at *https://asfromania.ro/legislatie/legislatie-sectoriala/legislatie-capital/legislatie-secundara-cnvm/dispuneri-de-masuri-cnvm*; see also C. Duțescu, *works quoted*, pp. 635-689.

[67]Defined by Law no. 297/2004, Article 2 – persons concerned:

a) persons who control or are controlled by an issuer or who are under a joint control;

b) persons who directly or indirectly participate to conclusion of some agreements with a view to obtaining or exercising in concert their rights to vote, provided that the shares covered by such agreements may grant a controlling position;

c) natural persons within issuing companies who hold controlling or management positions;

d) spouses, relatives and in-laws up to second degree of the natural persons mentioned at letters a) – c);

e) persons who may appoint the majority of the members in the Board of Administration within an issuing entity.

[68]Defined by Law no. 297/2004, Article 2,"significant shareholder means a natural person, legal person or group of persons acting in concert, who directly or indirectly own minimum 10% of the total number of shares and thus exercise a significant influence in relation to making decisions in the general assembly or the board of administration, where appropriate".

Defined by Law no. 297/2004, article 2 – persons acting in concert – natural persons or legal entities who cooperate pursuant to a formal or tacit agreement, verbal or written, in order to implement a common policy in relation to an issuer;

longer than 120 days to the date of the Shareholders' Extraordinary General Assembly which approved the withdrawal from trading[69];

- The shares of the issuer shall be suspended from trading two work days prior to registration date;
- The issuer shall inform by means of a registered letter with acknowledgment of receipt all shareholders registered upon the reference date who did not attend the Shareholders' Extraordinary General Assembly meeting approving the withdrawal from trading. The notice shall also include a reference to the share price and shall be remitted to the shareholder's address available in the records of the company which is in charge of the ledger of the issuer's shareholders.
- The right to withdraw shall be exercised within 45 days of registration date.
- The right to withdraw may be exercised by the shareholders existing upon registration date provided they have owned the respective package of shares upon the reference date of the shareholders' Extraordinary General Assembly which approved the withdrawal from trading.

This provision seeks to protect the investors, to prevent certain persons from purchasing shares, only with a view to exercising the right to withdraw at a price higher than the market price, and to maintain a proper market for the respective securities[70].

3.3. Voluntary withdrawal from trading under provisions of Bucharest Stock Exchange Code[71]

Bucharest Stock Exchange Regulation regulates the possibility for a company to withdraw from trading (delisting) through the procedure which bears the technical name of *squeeze-out*. This procedure implies the following:

- Submitting a public offer to all shareholders and for all their shares;
- The bidder holding over 95% of the share capital of the issuer or has purchased through a public purchase bid over 90% of the shares concerned may request, by virtue of Article 206 (1) letters a) and b) of Law 297/2004, all shareholders to sell the respective shares at a fair price.

Pursuant to Article 206 (3), a fair price means the price made as part of a mandatory public takeover bid and a voluntary public takeover bid on which occasion the bidder subscribed and purchased shares representing over 90% of the shares taken into consideration.

The presumption concerning the fair price applies only when the bidder exercises their right to request the shareholders to sell the shares within 3 months from completion of the respective bid. Otherwise, the price shall be set by an independent expert in compliance with international assessment standards (Article 206 (4)).

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[69] This deadline is derogatory of the deadline provided by Article 238, par 1, Second Thesis of Law no. 297/2004 (10 work days subsequent to the date of the general assembly); the National Securities Commission (CNVM) supplements the law regarding the share capital market, which is unacceptable.

[70] C. Duțescu, *works quoted.,* p. 638-689

[71] Bucharest Stock Exchange Code, form updated on 18 February 2016, approved by Decision of the Financial Surveillance Authority (ASF) no. 1848/20.01.2017.

It is noted that withdrawal from the company as a consequence of delisting implies payment of the price by the majority shareholder who submitted the public takeover bid and exercised their squeeze-out right. This represents the difference between the cases regulated by Article 134 of Law no. 31/1990 when the price is settled by the issuing company.

3.4. Withdrawal from trading as a result of failure to comply with the requirements regarding staying on the market – Article 157 of National Securities Commission (CNVM) Regulation no. 1/2006

According to Article 157 of National Securities Commission *(*CNVM) Regulation no. 1/2006, "up to the date the alternative trading system is constituted, the companies of which securities are traded on the RASDAQ market or Bucharest Stock Exchange Market (BVB) and which do not comply with the requirements under Article 153, may be withdrawn from trading based on the General Extraordinary Assembly's resolution regarding withdrawing from trading."

In accordance with Article 153 of Regulation, in order for the shares of an issuer to be further admitted for trading, the following conditions are to be met:

a) In 2005 the issuer had an average capitalization of a minimum lei equivalent of 1,000,000 de euro[72].

b) The issuer complied with the requirements regarding notification, as stipulated by Law 297/2004, and regulations issued in order for the National Securities Commission (CNVM) and Bucharest Stock Exchange (BVB) to enforce it.

c) Other criteria, including liquidity-related ones, set by the market operator and previously approved by the National Securities Commission (CNVM).

As already mentioned, the withdrawal from trading will be carried out based on a resolution of the Shareholders' Extraordinary General Assembly and granting the shareholders who do not agree with such resolution the right to withdraw from the company and collect from the latter the equivalent value for their shares. The assessment report shall be prepared by an independent expert registered with the National Securities Commission (CNVM) who uses minimum 2 assessment methods recognized by international assessment standards, in compliance with provisions of Article 87(5) – (11) of Regulation 1/2006.

Law no. 151/2014 has clarified the legal status of the shares traded on the Rasdaq market and the market of the unlisted securities[73].

[72] Bucharest Stock Exchange Code has set the requirements regarding the value of equities in relation to the category to which they are traded, respectively: Category I – 8,000,000 euro; Category II – 2,000,000 euro; Category III – 1,000,000 euro; the issuer's field of activity shall include development of new technologies and implementation of such technologies in sectors such as: computer science, medicine, biotechnology and communication.

[73] Published in the Official Gazette no. 774/24.10.2014. Pursuant to Article 1, the objective of the law is to classify the status of the shares traded on the RASDAQ market or the market of unlisted securities with a view to harmonizing with provisions of Law no. 297/2004, Directive 2004/39/EC of the European Parliament and Council of 21 April 2004 regarding markets of financial instruments, amending Directives 85/611/EEC and 93/6/EEC of the Council and Directive 2000/12/EC of the European Parliament and Council and repealing Directive 93/22/EEC of the Council.

The Boards of Administration/Directors of companies of which shares are traded on the de RASDAQ market or the market of the unlisted shares, shall convene and make all arrangements required to conduct shareholders' extraordinary general meetings within 120 days of the date this law comes into force, under conditions set by Law no. 31/1990 regarding trading companies, with a view to debating by the shareholders on the situation created by the lack of the legal framework of the RASDAQ and making a decision regarding all legal arrangements that the company should make towards having the shares issued by the company admitted for trading on a regulated market or trading them within al alternative trading system.

Should the shareholders' general assembly decide that the company should make all legal arrangements towards having the shares issued by the company admitted for trading on a regulated market or trading them within al alternative trading system, the shareholders are entitled to withdraw from the company under provisions of Article 134 of Law no. 31/1990. The timeframe set for the shareholders to exercise their right to withdraw is 90 days of publication of the shareholders' general assembly resolution on the webpage of the Financial Surveillance Authority (A.S.F.), the webpage of Bucharest Stock Exchange (B.V.B.), and also in a newspaper with major readership nationwide. Should the company have their own webpage, the resolution will also be published on this page.

The shareholders are also entitled to withdraw from the company in case the general assembly convened in compliance with provisions of Article 2: a) may not be conducted due to lack of quorum; b) fails to adopt a resolution due to non-compliance with requirements on majority rules; c) fails to convene within 120 days set in Article 2 (1).

The timeframe to exercise the right to withdraw starts on the date of the general assemblies in the cases stated at (1) letters a) and b), respectively from expiry of the term stated at Article 2, in the case stated at (1) letter c).

In the event that the shareholders' general assembly approves initiation of the arrangements to have the shares admitted for trading on a market regulated by the Financial Surveillance Authority (A.S.F.), the company regulated by Law no. 31/1990 shall file with ASF, within maximum 90 days of adoption of the shareholders' resolution, the leaflet on admission to trading, prepared in compliance with the legal provisions in force upon its approval.

ASF shall issue a decision on admission to trading on a regulated market or denial of the request in compliance with provisions of Law no. 297/2004.

In the event that ASF does not admit shares for trading on a regulated market, the shareholders are entitled to withdraw from the company in accordance with provisions set in Article 3. The term set in article 3 starts from the publication of the ASF decision.

With a view to protecting the shareholders, Regulation no. 17/2014[74] has set forth the following[75]:

[74]Regulation no. 17/2014 regarding the legal status of shares traded on the RASDAQ market or a market of unlisted securities, published in the Official Gazette no. 87/28 November 2014.

[75]With regards to the criticisms on regulation and its consequences in connection with the stock market, see M. Gherghe, R. Papadima, R.Văleanu, *works quoted.,* p. 47-48.

- The Board of Administration and the Board of Directors shall request the Trade Register Office to appoint the expert within 5 days from receipt of the first request for withdrawal;
- The expert shall complete the report within 30 days from appointment;
- The shareholders may renounce the requests for withdrawal within 30 days of the expert's report;
- The company shall settle the price to the shareholders within 30 days of the expert's report.

4. The right to withdraw in case of public purchase bid

The public purchase bid represents the offer of a person to buy securities made to all holders of such securities, conveyed through mass media or communicated in other manners, provided the holders of such securities are legally provided the possibility to receive such information, as per Article 193 (1) of Law 297/2004.

Without going into any further details on its regulation, as they would exceed the theme of our paper, we will refer only to aspects pertaining to the right of withdrawal, in compliance with provisions of Article 193-195 of Law 297/2004 and Article 57 of Regulation no. 1/2006[76].

a) The public purchase bid shall be made through an agent authorized to provide financial investments services.

b) The bidder shall draw up a draft which shall include the minimum content of information set forth by the Regulation of the National Securities Commission (CNVM) no. 1/2006. The public purchase bid shall be made in conditions which shall guarantee equal treatment for all investors.

c) The National Securities Commission (CNVM) shall rule with regard to approval of the bidding documentation within 10 work days from registration of request; this term will be interrupted by all and any request for further information or amendment of the aspects initially presented initially in the bidding documentation, initiated by the National Securities Commission (CNVM) or the bidder.

d) The price shall be set as follows:

- As a value at least equal to the highest price paid by the bidder and the persons with whom the former acts in concert over the past 12 months prior to submission of the bidding documentation to the National Securities Commission (CNVM).
- Average trading price for the shares of the issuer over the past 12 months prior to submission of the bidding documentation to the National Securities Commission (CNVM).
- The price resulted from dividing the net book value of the company assets to the number of outstanding shares as per the latest financial statement prepared by the issuer, in case the two criteria enunciated above may not be applied.

5. Right to withdraw in relation to public takeover bid

Law no. 297/2004 regulates the voluntary public takeover bid and the mandatory public takeover bid.

[76]For details: C. Duțescu, *works quoted,* p. 647-648, T. Prescure, D. Călin, *Share Capital Law. Comments and Explanations*, C.H. Beck Publishing House, Bucharest, 2008, pp. 305-307.

5.1. Voluntary public takeover bid

The voluntary public takeover bid is defined by Article 196 (1) of Law no. 297/2004 as a public purchase bid made to all shareholders for all their shares launched by a person who is not legally forced to do so in order to acquire more than 33% of the voting rights.

The voluntary public takeover bid may be promoted by all and any natural or legal person who is not legally forced to do so or hold the capacity of shareholder subject to this action[77].

The procedure of voluntary public takeover bid is largely regulated by provisions of Articles 196-200 under Law 297/2004; their presentation is not the subject matter of our paper.

The price offered on such occasions is the one regulated by Article 59 in the National Securities Commission (CNVM) no. 1/2006:

- As a value at least equal to the highest price paid by the bidder and the persons with whom the former acts in concert over the past 12 months prior to submission of the bidding documentation to the National Securities Commission (CNVM)
- Average trading price for the shares of the issuer over the past 12 months prior to submission of the bidding documentation to the National Securities Commission (CNVM).
- The price resulted from dividing the net book value of the company assets to the number of outstanding shares as per the latest financial statement prepared by the issuer, in case the two criteria enunciated above may not be applied.

The stock market also regulates the competing public bids in accordance with Article 201 (1) of Law 297/2004: *All and any person may launch a counterbid under the following conditions:*

a) The person aims to purchase at least the same quantity of securities or to reach at least the same participations to the share capital;

b) The person offers a price that is minimum 5% higher than the price offered in the first bid.

The counterbid shall be filed with the National Securities Commission (CNVM) for authorization. In the event of a counterbid, the minority shareholders shall be granted the price set in the auction by National Securities Commission (CNVM), in several rounds, the bid increment being 5% of the one offered in the previous round.

The price resulted following the bid shall be offered to all the shareholders of the issuing company and for all the shares under the public takeover bid. This price shall be paid by the bidder.

5.2. Mandatory public takeover bid

The mandatory public takeover bid is initiated in compliance with Article 203 (1) by a person who, following their acquisitions or the acquisitions of the persons with whom they act in concert, own more than 33% of the voting rights of a joint-stock company. The bidder has to make a public bid to all the holders of securities, for all

[77]A. Țuțuianu, *works quoted,* p. 662-669; Gh. Piperea, *works quoted,* p. 670-672.

securities owned, as early as possible, but no later than 2 months from reaching the target in relation to the securities owned[78].

The mandatory public takeover bid shall be accompanied by suspension of the voting rights for the securities exceeding 33% and the interdiction to purchase shares of the same issuer, by the bidding shareholder and the persons with whom they act in concert.

The bidder or the persons with whom they act in concert shall pay the price set in accordance with Article 204 of Law, in line with the following criteria:

a) The price shall be at least equal or higher to the one paid by the bidder or the persons with whom they act in concert over 12 months prior to the bid.

b) In the event the abovementioned provision may not be applied, the price offered shall be set in accordance with Article 204 (1) "The price in the mandatory public takeover bid shall be at least equal to the highest price paid by the bidder or the persons with whom they act in concert over 12 months prior to the date the bidding documentation has been filed with the National Securities Commission (CNVM)."

6. The right to withdraw stipulated by Article 206 of Law no. 297/2004 (squeeze-out procedure)

Pursuant to Article 206 (1) of Law no. 297/2004, a shareholder who made a public takeover bid to all shareholders and for all their shares (majority shareholder), is entitled to request the shareholders who did not subscribe in relation to the bid to sell them the respective shares, at a fair price, provided the former:

a) ../../../../../../../Users/daniela.stefan/sintact 3.0/cache/Legislatie/temp/00075084.html – #holds shares representing more than 95% of the share capital;

b) ../../../../../../../Users/daniela.stefan/sintact 3.0/cache/Legislatie/temp/00075084.html – #has purchased in relation to the public takeover bid made to all shareholders and for all their shares, shares representing at least 90% of the ones under the respective bid.

In the event the company has issued several classes of shares, the provisions of (1) shall apply separately to each class.

In terms of the right to withdraw, we note the following main aspects[79]:

- To exercise the squeeze-out right provided at Article 206, there is no legal requirement for a resolution of the Shareholders' General Assembly. The majority shareholder exercises this right *ope legis* provided the conditions mentioned are observed;
- The fair price which the majority shareholder shall pay the minority shareholders is the price offered in relation to a mandatory public takeover bid and a voluntary public takeover bid, in which the bidder has purchased by bid-related subscriptions shares representing more than 90% of the shares concerned (Article 206 (3)).

[78] For further details, see: C. Dutescu, *works quoted*, p. 652-657, T. Prescure, D. Călin, N. Călin, *works quoted,* p. 312-319, A. Țuțuianu, *works quoted.,* p. 669-667, Gh. Piperea, *works quoted,* p. 670-684.

[79] For further details, see: C. Duțescu, *works quoted.*, pp. 658-663, T. Prescure, D. Călin, N. Călin, *works quoted*, p. 319-322, A Tutuianu, *works quoted.,* pp. 670-672, Gh. Piperea, *works quoted*, p. 670-684.

- The presumption on the fair price applies only when the bidder exercises their right stated in Article 206 (1) within 3 months from the completion of such bid. Otherwise, the price shall be determined by an independent expert in line with the international assessment standards.

In the doctrine[80] it has been rightly shown that the provisions of Article 206 supplemented by regulations adopted by the National Securities Commission (CNVM) by Regulation no. 1/2006 are contrary to provisions of Article 44 in the Constitution of Romania concerning the right to private property, as they lay down forced transfer of some shares from the patrimony of a natural person to the patrimony of another, at a price set in accordance with the criteria enunciated. Additionally, the regulation is considered to bring about abuses of the majority shareholders in relation to minority ones.

7. The right to withdraw stipulated by Article 207 of Law no. 297/2004 (sell-out right)

The procedure regulated by Article 207 under Law no. 297/2004, the sell-out right is favorable to the minority shareholders of the company who maintained their status after the public takeover bid has been conducted. Article 207 (1) and (2) sets forth: "Following a public takeover bid made to all shareholders for all their shares, a minority shareholder is entitled to request the bidder holding more than 95% of the share capital to purchase their shares at a fair price.

In the event the company has issued several classes of shares, the provisions of (1) shall apply separately to each class."

In light of our theme, the following aspects should be noted:

- A resolution of the shareholders' general assembly is not required, the minority shareholders exercise this right *ope legis*;
- The price used to make the public takeover bid shall be paid by the majority shareholder who holds more than 95% of the share capital;
- The fair price to be offered to the minority shareholders shall be determined in accordance with provisions of Article 206 (3) Law no. 297/2004.[81]

VII. Conclusions

The shareholders' right to withdraw from a joint-stock company is largely regulated in the Romanian legislation. The scope of the withdrawal rights is wide even though Romania has one of the lowest share capitalizations in the European Union. The company-related litigations and the shareholders' activism are also low[82]. The right to withdraw has been frequently used in the context of the liquidation of the RASDAQ market as a consequence of enforcing Law no. 151/2014 and ASF

[80] For further details, see: C. Dutescu, *works quoted*, pp. 660-664.

[81] See above Section VI, 3, 3.3. "*Voluntary withdrawal from trading under provisions of Bucharest Stock Exchange Code"*

[82] With regard to these aspects, see M. Gherghe, R. Papadima, R. Văleanu, *works quoted.,* p. 35-36. The authors approach in detail the legal rights of withdrawal in Romania, France and the United States of America.

Regulation no. 17/2014. However, we consider that, *de lege ferenda*, some supplements of Article 134 of Law 31/1990 are necessary, respectively:

- Forcing the Board of Administration/Board of Directors to request the Trade Register Office to appoint an expert within 5 days from receipt of the request for withdrawal; including the obligation for the expert appointed to draw up the assessment report within maximum 30 days;
- Providing the reference date for the assessment as the date of the publication of the resolution of the extraordinary general assembly which approved the company-related event at Article 134 (1) letters a) – d);
- Setting a 15 to 30 day timeframe from the date the assessment report has been filed for the joint-stock company to be forced to settle the equivalent value of the shares for which the withdrawal right is exercised;
- In addition, we consider that Article 134 should set forth the possibility for the rights of the shareholder withdrawn to be set by agreement between the parties.

With regard to Law no. 297/2004 and CNVM Regulations, we consider that they should be amended so that the regulations should be unitary in relation to the following aspects:

- Registration date – date according to which the shareholders who may withdraw from the company may be identified[83];
- The term by which the shareholders of the listed companies are entitled to submit the company their request for withdrawal and the exact time when such term shall begin[84];
- The term by which the issuing company shall settle the shares and the exact time when such term shall begin[85].

Our proposals are in line with the fundamental principle of investment protection and are of nature to consolidate actual exercise of such right.

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[83] According to Article 242, this is set by the extraordinary general assembly of the shareholders; Order to take measures 8/2006 sets forth that the registration date shall be at least 9 days subsequent to, but no longer than 120 days of the extraordinary general assembly of the shareholders when the withdrawal from trading was decided.

[84] According to Article 242, the term is maximum 15 work days of publication in the Official Gazette of the merger draft; in the case provided by Article 234 letter d) the term set is 45 days of publication in the Official Gazette, whereas Law no. 151/2014 sets a 90-day term.

[85] According to Article 242, the term is 7 days of the extraordinary general assembly of the shareholders which approved the merger; in the case provided by Article 234 letter a) and Regulation 1/2006, the term is 15 work days of publication of the request for withdrawal; Regulation no. 17/2014 sets forth a 20-day term of the expert's report.

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ENFORCEMENT STARTED AGAINST DEBTORS IN INSOLVENCY PROCEEDINGS

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Abstract*: In this article, we shall analyse the applicability of the provisions of GEO 88/2018 on the enforcement of debts that companies in insolvency proceedings have not paid in due term.*

The article is structured in three parts. The first part concerns the effects of opening insolvency proceedings governed by Law 85/2006 and Law 85/2014.

The second part examines the changes made by GEO 88/2018 on Law 85/2014 and Law 85/2006.

The third part concerns the criticism that we are bringing to the current changes to the Insolvency Act.

Keywords: *insolvency, enforcement in insolvency, suspension of enforcement in insolvency, cancellation of enforcement acts in insolvency.*

1. The insolvency procedure governed by Law 85/2014[1] applies in particular to the category of professionals governed by Law 31/1990 on commercial companies. In the doctrine[2] it is said that "subject to insolvency proceedings, irrespective of the legal form of the company: in collective name, are limited partnership companies, joint stock companies, partnerships limited by shares and limited liability companies. Also, subjects of this procedure could be represented by the companies that have been established in the reorganization of the state economic units, under art. 1, in correlation with art. 16 of Law 15/1990. "

After the entry into force of the new Civil code, the companies established under Law 31/1990 have acquired legal personality ever since their registration, but, in correlation with the provisions of art. 3 of the Civil code, they are deemed professionals.

The insolvency, as it has been defined, shows that it is the state of the debtor's patrimony, which is characterized by insufficiency of funds for the payment of definite, liquid and chargeable debts[3]. The provisions of art. 5 item 29 a) and b) of Law 85/2014[4] distinguish between imminent insolvency and presumed insolvency. However, regardless of the state of insolvency of the debtor, be it imminent or

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[1] Law 85/2014 on insolvency and insolvency prevention procedures published in Official Journal no. 466 of June 25th, 2014.

[2] R. Bufan, A. D. Diaconescu, F. Moțiu, *Practical Insolvency Treaty,* Hamangiu Publishing House, 2014, p. 197.

[3] In the doctrine it was shown that this definition was given by the Romanian legislature, in view of the potential economic and legal reality of the estate of its debtor, in other terms, the current insolvency – M.N. Costin, C.M. Costin, *The conditions laid down by the law for the opening of commercial insolvency proceedings, at the request of the entitled creditor*, in "Journal of Commercial Law" No. 9/2006, p. 9.

[4] Law 85/2014 *On insolvency and insolvency prevention procedures* published in Official Journal no. 466 of June 25th, 2014.

presumed, we can speak of a commercial company in insolvency only if, following the analysis made by the syndic judge, invested with such an application, it is established that all legal requirements are fulfilled and a sentence or closure related to the opening of the procedure is issued.

Under article 4 of Law 85/2014[5] on insolvency prevention procedures, we find the principles underlying this regulatory enactment. Of these, the most important one is the principle of maximising the wealth of the debtor, which is closely connected with the principle of efficiency of the procedure. By virtue of the principle of maximising the debtor's wealth, insolvency proceedings have been conceived as an enforcement procedure, to which all creditors of the debtor company may participate, even if they do not possess an enforceable title. By virtue of the Insolvency Act, any creditor may apply for entry to the debtor's statement of affairs, even if it does not possess an enforceable title, on the basis of the documents substantiating the debtor's debt. Thus, in order to participate in insolvency proceedings, any creditor of the debtor may request entry in the stamen of affairs with a pure and simple claim or conditionally.

Insolvency proceedings are a collective procedure aimed at covering the debtor's liabilities and providing a chance for economic recovery of the company in financial distress. The collective procedure was defined by Law 85/2014 on insolvency prevention procedures under art. 5 item 44 as ”the procedure in which creditors participate together in the pursuit and recovery of their claims, in the manner provided for by this law”.

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[5] Article. 4 of Law 85/2014 *On insolvency and insolvency prevention procedures* published in Official Journal no. 466 of June 25th, 2014 shows that “the provisions of this law are based on the following principles:

1. Maximizing asset valorization and debt recovery;
2. Granting a chance for debtors to efficiently and effectively recover the business, either through insolvency prevention procedures or through judicial reorganization procedure;
3. Ensuring an effective procedure, including by means of appropriate mechanisms for communicating and proceeding within a timely and reasonable deadline, in an objective and impartial manner, with a minimum of costs;
4. Ensuring equal treatment of creditors of the same rank;
5. Ensuring a high degree of transparency and predictability in the procedure;
6. Recognition of existing creditors ' rights and compliance with the order of priority of claims, based on a set of clearly determined and uniformly applicable rules;
7. Limiting the credit risk and systemic risk associated with derivatives transactions by recognizing the compensation with immediate chargeability in the event of insolvency or a procedure to prevent insolvency of a co-contractor, having the effect of reducing credit risk to a net amount, due between the parties, or even zero, where financial guarantees have been transferred to cover net exposure;
8. Ensuring access to sources of funding in insolvency prevention procedures, in the observation and reorganization period, with the establishment of an appropriate regime for the protection of such claims;
9. Substantiating the vote for the approval of the reorganization plan on clear grounds, ensuring equal treatment between creditors of the same rank, recognition of comparative priorities, and acceptance of a majority decision, with the objective of providing Payment of other creditors equal to or higher than what they would receive in bankruptcy;
10. Favouring, in insolvency prevention procedures, the amicable negotiation/renegotiation of claims and the conclusion of a preventive arrangement;
11. Timely and effective recovery of assets;
12. In the case of a group of companies, the coordination of insolvency proceedings for the purpose of their integrated approach;
13. The management of insolvency and insolvency proceedings by insolvency practitioners and their conduct under the control of the court of law.

In the doctrine[6], it is stated that this collective character "consists of the fact that, following the opening of the proceedings, either at the debtor's initiative or at the request of the creditors, or at the request of any other person or institution expressly provided for by the law, any individual enforcement pursuit ceases, and cannot continue. In other words, the insolvency procedure is collective, as it obliges all creditors of the debtor against whom the opening of this procedure has been ordered, to gather within one common procedure."

Following the opening of insolvency proceedings, all creditors may apply for entry in the statement of affairs of the debtor, with their unpaid claims, and the application for entry in the statement of affairs must be submitted within the established time limit, by means of the ruling to open proceedings under the sanction of the revocation of the right to be able to redeem claims based on insolvency proceedings.

One of the most important effects of opening insolvency proceedings is the rightful suspension of all judicial, extra-judicial or enforcement measures for carrying out claims on the debtor's estate, and the capitalisation on these rights is to be achieved in the insolvency proceedings, in accordance with art. 75 para 1 of Law 85/2014 on Insolvency prevention procedures. Based on said provision, all actions submitted by creditors of the debtor company prior to the opening of insolvency proceedings, which have as objective the achievement of claims by enforcement, shall be suspended by law, from the date of the opening of the procedure. The suspension of enforcements against the debtor company does not represent the cancellation of enforcement acts carried out prior to the opening of insolvency proceedings, but aims to stop them in their respective stage at that time.

The suspensive effect of enforcements initiated before the opening of insolvency proceedings is intended to protect creditors, under the competition principle of insolvency proceedings.

2. By means of Emergency Ordinance no. 88/2018, amending and supplementing normative acts in the field of insolvency and other normative acts, important amendments to Law 85/2014 on Insolvency prevention procedures have been made. The major changes made by GEO 88/2018[7] are mainly related to art. 143 and 75 of the Insolvency Act.[8]

[6] R. Bufan, A. D. Diaconescu, F. Moțiu, o*p. cit.*, p. 87.

[7] GEO 88/2018 published in Official Journal 840 of October 2nd, 2018.

[8] Law 85/2014-143 (1) If the debtor fails to comply with the plan or accumulates new debts to creditors within the insolvency proceedings, any of the creditors or the judicial administrator may request the syndic judge at any time to order the bankruptcy of the debtor. The application shall be judged urgently and in particular within 30 days of its registration within the case file. The application will be rejected by the syndic judge in the event that the claim is not due, is paid or the debtor concludes a payment convention with said creditor. For debts accrued during the insolvency proceedings which are older than 60 days old, enforcement may commence.

Law 85/2014 art. 75 (4) the holder of a current, definite, liquid and chargeable claim, which has been recognised by the judicial administrator or in relation to which the former has failed to rule within 10 days of the lodging of the application for payment, or recognized by the syndic judge according to para. (3) where the amount of the claim exceeds the threshold value, it may request, during the period of observation, the opening of the debtor's insolvency proceedings, if such claims are not paid within 60 days from the date of the measure of the judicial administrator for admission or omission of the decision on the request for payment or the judgment of the court of law. The provisions of art. 143 para. (2) and (3) shall apply accordingly.

Amendment brought to article 143 para. 1 of Law no. 85/2014 (following the adoption of GEO no. 88/2018), namely establishing the possibility of a parallel procedure for individual enforcement, has a significant impact on the economy and the physiognomy of Law no. 85/2014 in its entirety, in such a way as to distort its initial purpose (being even in contradiction with it), namely ”the establishment of a collective procedure for the covering of the debtor's liabilities, with the granting, where possible, of the chance to remediate its activity”. Thus, a major breach is created in relation to the competition nature of the procedure, by acknowledging the possibility of empting the assets of the insolvent debtor, by means of individual enforcement procedures, and without the chance of recovery.

3. We find that the precision necessary for the actual application of the provision in question is lacking, even creating the premises of incompatibilities between the same-ranking general rules, *inter alia*, based on the non-indication of the scope of the goods in relation to which the individual enforcement procedure could be initiated, namely the actual conditions for the exercise of individual execution, since:

a) the insolvency debtor's account is unattachable. Article 163 para. (3) of Law no. 85/2014 provides that the insolvency account cannot be frozen: ”by any criminal, civil or administrative measure ordered by the criminal investigation bodies, administrative bodies or courts of law”. We remind the fact that art. 39 of Law no. 85/2014 provides that payments shall be made from an account opened at a bank branch, on the basis of provisions issued by the debtor or, where applicable, the judicial administrator, and in the course of bankruptcy, by the judicial liquidator, and the costs of the related procedure shall be paid with priority, at the time of availability in the debtor's account.

b) a potential interpretation in the sense that the goods affected by the rights of preference constituted in favour of creditors before the opening of the proceedings could be pursued as well, beyond the fact that it would breach the rights of the holders of those guarantees – a right of ownership guaranteed by the Constitution, would raise the question of the application of provisions of the common law relating to an individual enforcement, which does not reconcile with the competition character of the procedure, namely: civil/fiscal enforcement, which acknowledges the intervention of other creditors (e.g. art. 690 and the following ones from the Civil Procedure Code), the distribution in accordance with the order of preference, with the possibility of declaring state claims and observing the rank of guaranteed claims (865, 866, 867 Civil Procedure Code), at the risk of a conflict with the distribution order provided for under Law no. 85/2014.

c) the potential rejection of the right of intervention of the guaranteed creditor could raise the question of breaching the right of ownership (art. 87 para. 3 of Law no 85/2014 on providing for appropriate protection, whilst an individual enforcement, which would not allow for intervention, could thus call into question the breaching of its rights). In fact, it would allow an unsecured creditor to enforce the property mortgaged in favour of another creditor.

d) even if it were accepted that said provision concerned only unencumbered goods, the parallel initiation of an individual enforcement has the potential to enter into conflict with other provisions of Law no. 85/2014, which provide that, following

confirmation of a plan, the activity is conducted in accordance with the confirmed plan (art. 141 of Law no. 85/2014) – if the pursued asset is necessary to achieve the plan and is included in the plan.

e) on the other hand, the admission of the right of intervention creates a major problem in the application of the penalty of forfeiture of a creditor, holder of a previous claim, sanctioned by Law no. 85/2014, based on the reason that said creditor did not lodge its claim statement within the established period. Thus, Law no. 85/2014 forfeits the creditor in what concerns the right to recover claims, whilst the Civil Procedure/Tax Code allow the latter to intervene in enforcement.

f) moreover, the institution of the list of creditors, namely the hierarchy of payment of claims, governed by art. 159, art. 161 and art. 102 para. (6) of Law no. 85/2014, is escalated in enforcement. As there are no express provisions to show the rules based on which distributions in enforcement within the insolvency proceedings are carried out, one can even interpret that any or all lists of creditors will be disregarded, and enforcement is strictly performed in accordance with the existing rules within the Civil Procedure/Tax Code.

Both creditors and debtors must be able to have a clear representation of the consequences of non-payment of a current claim, without affecting the substance of the rights of other creditors – which also puts the breach of the principle of legal certainty into question. Therefore, starting from these premises, the provision referred to in our opinion is clearly lacking in coherence, as it conflicts with the other provisions of Law no. 85/2014, and creates the premises of violation of the rights of other creditors (especially privileged ones), but also of the debtor (who is granted, by means of Law no. 85/2014 the opportunity to reorganise its activity, while an individual enforcement does not provide for such an approach). The aforementioned provisions are liable to create confusion in the application process, and are also lacking in predictability, since they end up applying to ongoing procedures, as well.

We note that if enforcement is allowed for current claims, they benefit from a net advantage over previous claims, which are required to wait for payment, by means of a reorganization plan. **Art. 16 para. (1)** of the Constitution[9] governs the principle of equality according to which "citizens are equal before the law and public authorities, without privileges and without discrimination".

The previous claim is blocked by the effect of art. 75 para. (1) of Law no. 85/2014, the active state of affairs being protected and affected during the procedure, but the current claim can be removed precisely from the recovery of these assets. **Article 44** of the Constitution guarantees the right of property, stating under para. (1) that "the ownership right, as well as claims on the state, are guaranteed. The content and limitations of these rights are determined by the law." and under para. (2), "private property is guaranteed and protected equally by the law, irrespective of the holder (...)". Referring to protocol 1 of the European Convention on Human Rights, we find that "any natural or legal person has the right of respect in what concerns his property. No one can be deprived of his property, except for a cause of public utility and under the conditions laid down by the law and the general principles of international law."

[9] Romanian Constitution published in Official Journal no. 767 of October 31st, 2003.

We just need to ask whether the property rights over the intangible asset, the monetary claim, entered in the table of claims, is still protected and benefits from equal treatment, if, while forced to wait, the active statement of affairs is diminished by the enforcements of current claims.

Moreover, equal treatment is once again disregarded even between current claims, as long as the budgetary creditor can directly issue an enforceable title and proceed to enforcement, whereas the non-budgetary creditor must first lodge a request to the judicial administrator, and if he has the misfortune of receiving a positive answer, namely the creditor will have the liquid and the chargeable nature of the claim recognised, the request of the practitioner in insolvency shall not be deemed an enforceable title.

Thus, even if we are talking about 2 current claims constituted on the same date, for the same amount, the budgetary claim is net advantageous to the non-budgetary claim, which must be rejected by the judicial administrator, so that it can be subsequently challenged at the syndic judge, in order to obtain a judicial ruling, deemed as an enforceable title. During this time, the budgetary creditor can settle his claim by calling for enforcement.

With regard to economic freedom, fair competition and ownership, in accordance with the provisions of art. 135 para. 1 of the Constitution, Romania's economy is a market economy, and the state, according to art. 135 para. 2 a) of the Constitution must ensure the protection of fair competition. Economic freedom also appears as a corollary of ownership[10], which cannot be arbitrarily restricted.

The protection of economic freedom and fair competition means *avoiding discriminatory conditions for different professionals*, which also derive from the constitutional principle of equality before the law (art. 16 of the Constitution). We mention that, as it has been stated in the law: ”*a difference in treatment is discriminatory, if it does not have an ”objective and reasonable substantiation”, i.e. if it does not pursue a ”legitimate aim” or if there is no ”reasonable ratio of proportionality between the means used and purpose envisaged*”.[11]

On the basis of those premises, we deem the criticised text to be unconstitutional, firstly because it creates the premises of additional/parallel procedures for the recovery of claims for creditors of the same debtor only in relation to the origination date of the claim (i.e. claims appeared after the opening of insolvency proceedings).

The regulation creates in an objective and rational manner an unjustifiable differentiated treatment between creditors with claims emerged after the opening of the procedure and creditors with previous claims, creating, in favour of the first category, the premise of starting an individual enforcement (which, in addition, depending on the interpretation of the text, may also affect potential preference rights of previous creditors, and thus their proprietary right, guaranteed by the Constitution, including in respect of a ”claim”). Also, the current creditors are differentiated, and the budgetary claim may unilaterally issue an enforceable title and proceed to enforcement, whilst

[10] I. Muraru, S. Tănăsescu, *Constitutional law and political institutions*, edition 14, vol. I, C. H. Beck Publishing house, 2011, p. 178.

[11] Decision from May 28th, 1985, series A no. 94, paragraph 72; Decision Marckx v. Belgium of June 13th, 1979, Series A no. 31, p. 16, paragraph 33.

non-budgetary claims must wait for an unfavourable solution from the judicial administrator, in order to be able to appeal to the syndic judge. The text clearly affects the ownership of privileged creditors with previous claims, in so far as the regulation is interpreted in the sense that enforcement could also cover the goods affected by guaranteeing those claims – thus breaching, in an unsubstantiated manner, the very substance of the guarantee.

Similarly, the criticised text directly affects the right of ownership and economic freedom of debtors concerned by the hypothesis of the content of the law by means of the negative effects it produces, limiting the actual chances of a recovery (the premise of Law no. 85/2014 resulting from art. 2, further contradicted by art. 143, the final thesis of the same normative act) by allowing individual enforcements without distinction; the insolvency debtor will assist in the individual enforcement of his property, perhaps even of that which would represent the main source of recovery to the detriment of a competitive enforcement and in compliance with the rules intended to ensure recovery.

We mention that art. 6 para. 1 of Law no. 24/2000[12] on the legislative technique provides the following: "(1) The draft normative act shall set out necessary, sufficient and possible rules leading to the highest *legislative stability and efficiency*. The solutions it contains must be *thoroughly substantiated*, taking into account the *social interest*, legislative policy of the Romanian state *and the requirements of correlation with all regulations and harmonisation of national legislation with Community legislation and international treaties, in which Romania is included, as well as with the case-law of the European Court of Human Rights*." – our highlight.

Although that provision has no constitutional rank, it provides important milestones in the assessment of the text, whose constitutionality control is at issue. In this respect: "Although the rules of legislative technique do not have constitutional value, the court finds that by regulating them, the legislature has imposed a number of binding criteria for the adoption of any normative act, the observance of which is necessary as to ensure the systematization, unification and coordination of legislation, as well as the appropriate content and legal form for each normative act. Thus, compliance with these rules aims at ensuring a legislation, which complies with the principle of security of legal relations, possessing the necessary clarity and predictability (Decision no. 681 of June 27th, 2012, published in the Official Journal of Romania, Part I, no. 477 of July12th, 2012)".[13]

In this regard, we mention the European Commission recommendation on restructuring and second chances, as well as the Directive Proposal of the European Parliament and of the Council on preventive restructuring frameworks, second chances and measures to enhance efficiency of restructuring and insolvency procedures and remission of debt, amending Directive 2012/30/EU.

In that recommendation, Member States were asked to introduce (i) effective pre-insolvency procedures, whereby viable debtors would be helped to restructure and thus

[12] Law 24/2000 on Legislative technique published in Official Journal no. 139 of March31st, 2000

[13] DECISION no. 447 of October 29th, 2013 on the exception of unconstitutionality of the provisions of the Government Emergency Ordinance no. 91/2013 on insolvency and insolvency proceedings.

avoid insolvency, and (ii) provisions on *second chances for entrepreneurs*, enabling them to obtain the remission of debt within maximum three years as of their insolvency.

The substantial amendment of the insolvency regime cannot be the subject of an emergency ordinance since art. 115 (6) of the Romanian Constitution dictates that: "emergency ordinances cannot be adopted in the field of constitutional laws, may not affect the regime of the fundamental institutions of the state, the rights, freedoms and duties laid down by the Constitution, electoral rights and may not concern measures for the enforcement of public property assets."

From the substantiation note of GEO no. 88/2018, the rationale of the establishment of the parallel procedure for the enforcement of current claims is not clearly outlined (irrespective of the holder, so not only the budgetary creditor), thus creating a differentiated framework for the recovery of claims, as it refers to a claim prior to the opening of the proceedings or a claim accrued after the opening of the proceedings, in disagreement with the competitive and unitary nature of the insolvency proceedings.

Thus, we note that, among the reasons proposed for issuing the normative act, the following is included: "it is necessary to streamline insolvency proceedings and to improve the protection of creditors' rights, substantially contributing to improving the business climate, thus creating the prerequisites for the recovery of viable businesses and faster recovery of claims, including budgetary ones."

On the basis of the matters referred to in the preceding paragraph, the effects which could be generated by the amendment in question, in conjunction with the lack of clarity of the text, are contrary to the intended purpose, leading, rather, to individual enforcements (even in relation to assets necessary for reorganisation) initiated including by private creditors, to the detriment of creditors from before the opening of the proceedings and without giving the debtor the actual chance of recovery, rather speeding the entry into bankruptcy (by means of the hypothetical possibility of enforcing the goods necessary for the implementation of the plan).

Basically, we are talking about an interference in the configuration of the substance of creditors' rights in insolvency proceedings (to the detriment of previous creditors), about the very change in the competition regime of insolvency proceedings and its rationale, so that such a conduct of the delegated legislature no longer appears as a proportionate one and exceeds the normal conditions for the exercise of activity, as set out in the provisions of art. 115 para. 6 of the Constitution.

The insolvency proceedings were conceived as a collective executive procedure in which the recovery of creditors' claims is carried out in compliance with the principle of ensuring fair treatment of creditors of the same rank (art. 4, item 4 of Law no.85/2014) and compliance with the order of priority of claims (art. 4, item 6). [14] Likewise, the insolvency proceedings are regarded as an enforcement procedure for the recovery by force of the claim against the debtor, as is the enforcement procedure

[14] Gh. Piperea, *Insolvency code*, C. H. Beck Publishing house, Bucharest, 2017, p. 5.

governed by the Civil Procedure Code[15]. The emphasis is on the collective nature of this procedure, which differentiates it from the enforcement of common law and, which also ensures safeguarding from individual enforcement of creditors.

What is the purpose of the procedure? What are the principles governing the procedure? The Purpose of the procedure, as defined by article 2 of Law no. 85/2014, is to establish a collective procedure, whereby creditors can satisfy their claims and the debtor is granted the opportunity to recover its activity. The establishment of this collective and competitive procedure seeks to avoid situations in which some creditors will no longer be able to recover their claims, as a result of the commencement of individual enforcements. The same line of thought if followed by the principles governed by art. 4 items 2, 4 and 6, which establish that the debtor must be granted the opportunity for efficient and effective recovery and creditors of the same rank must benefit from equal treatment, in compliance with the order of priority of claims.

What is the rule established by the Law on enforcements? Is 143 an exception? The relationship between art. 75 and art. 143. One of the main effects of opening insolvency proceedings is the lawful suspension of enforcements against the debtor's estate. Thus, according to the rule established by art. 75 para. (1) of Law no. 85/2014, the enforcement body will no longer be able to issue any acts of enforcement such as minutes, notices, calls, to organise tenders or to make distributions of the amounts obtained from the enforcements. As a rule, considering the purpose of the procedure, from the date of initiation, no individual pursuits are possible, as they may prejudice the interests of creditors. The recovery of their rights may be made only within the insolvency proceedings, by submitting claims admission requests[16]. This provision offered efficiency to the concept of *automatic stay* known in European insolvency law.

Thus, in this context, a question arises in what concerns the determination of the relationship between the rules of suspending the enforcements set out in art. 75 of Law no. 85/2014 and the amendment to art. 143 brought forth by GEO no. 88/2018, which confers current creditors with claims older than 60 days the possibility of initiating enforcement.

The interpretation of the latter text as an exception to the effect of suspending enforcements would be equivalent to denying the purpose and principles of the procedure, as set out above. The very collective and competitive nature of the procedure prohibits the existence of parallel enforcement procedures that gravitate around the main proceedings with the conclusion of diminishing the debtor's assets and jeopardising the fair treatment of creditors, in terms of debt collection.

Including the recommendations of the World Bank in what concerns the regulation of insolvency proceedings in national law have emphasised the rethinking of exceptions from the suspension of enforcement, in particular with regard to creditors appeared after the opening of the procedure. Thus, the recommendation was to prevent

[15] Ion Turcu, *Insolvency Proceedings Act. Comment on articles.,* C.H. Beck Publishing house, Bucharest, 2012, p 12.

[16] John Adam, Anca Roxana Adam, *Insolvency Code. Comments and explanations,* C.H. Beck Publishing house, Bucharest, 2016, p. 397.

erosion of the fundamental principle of insolvency, namely, its competitive nature, by discouraging creditors from resorting to enforcement.[17]

If art. 143 establishes an exception to the rule of suspension of enforcements, which is the procedure to be followed, which law applies and which bodies apply the procedure?

Moreover, if we were to admit that the text of art. 143 para. (1), as amended by GEO 88/2018, indeed allows for the commencement of enforcement, we are faced with a legislative conflict with regard to the rules applicable to enforcement. Specifically, will enforcement be done following the rules laid down by Law no. 85/2014, or those of the Civil procedure or Tax procedure, depending on the quality of the creditor, namely if it is a private creditor or a budgetary creditor? It is also unclear what bodies are applying this procedure and how the duties of the enforcer can reconcile with those of the judicial administrator, on the same assets of the debtor. Consequently, in order to interpret the text in such a manner so that it is enforced, it should be interpreted in the sense that the enforcement to which it refers is a means of recovering the claim within the insolvency proceedings, and not by triggering a procedure parallel to it.

Conflict/incompatibility between the rules of civil procedure and those of insolvency-art. 342 of Law 85/2014? According to art. 342 para. (1) of Law no. 85/2014, the provisions of the insolvency law shall be completed, in so far as they do not contradict, with those of the Civil Procedure Code and Civil Code. In the event that we consider that enforcement to which the text of art. 143 para. (1) refers follow the rules laid down in the Civil Procedure Code, we would be in a situation where we should apply two sets of incompatible rules, governing two procedures, which, by definition, cannot coexist, namely individual enforcement procedure and the collective procedure for the recovery of claims.

The purpose of insolvency proceedings is incompatible with the individual attempts by creditors to obtain the settlement of their claims on procedural paths outside the insolvency proceedings. Therefore, the interpretation *per a contrario* of art. 342 para. (1) leads to the conclusion that, given the incompatibility between the provisions of the insolvency law and the rules of enforcement under common law, in the given situation, art. 143 para. (1) of Law no. 85/2014 cannot be completed with art. 622 and the following ones of the Civil Procedure Code.

Summarizing, we see that trying to enforce the provisions of art. 143 para. (1) final thesis, as amended by GEO no. 88/2018, leads to a legislative and procedural deadlock by incompatibility of said provision with the insolvency proceedings itself.

The uncertainty also relates to the applicable rules of law, the manners of enforcement, the competent bodies to apply the procedure and even the purpose of this proceeding. The application of the rules of civil procedure or tax procedure relating to enforcement, depending on the status of the creditor, i.e. private or budgetary, would lead to the blocking of insolvency proceedings due to the impossibility to coordinate and reconcile the main proceedings with the numerous individual procedures that could

[17] The World Bank, *Report on compliance with standards and codes. Legal regime of insolvency and rights of creditors/debtors, Romania, 2014*, http://www.worldbank.org/content/dam/Worldbank/Document/ECA/Romania/ROSC/Romania%20ICR% 20ROSC% 20Final-April% 202014% 20COMPLET_clean_ro. pdf Viewed on 04.04.2019

be initiated in parallel. At the same time, it would infringe both the principle of uniqueness of the procedure and its purpose regarding the chance to recover the debtor's activity. Allowing change in the distribution order and favouring certain categories of claims by recourse to a procedure exceeding the insolvency framework creates unfair treatment and represents derogation from the very essence of the insolvency proceedings. Therefore, the only way to apply this text is to interpret it in the sense that enforcement is carried out within the insolvency proceedings, by the judicial administrator, the only one who has duties regarding asset management and distribution of insolvency payments.

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PARTICULARITIES OF CRIMES AGAINST THE REGIME OF NUCLEAR MATERIALS IN ROMANIAN LEGISLATION

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Abstract: *Protection of public safety and of the environment against the non-compliant use of nuclear materials and of nuclear facilities is an essential concern for most contemporary legal systems.*

Current constitutional landmarks led to a reconfiguration of guarantee systems designed over two decades ago and also to a new standard applicable to incriminations depending on administrative and technical requirements.

In this paper, the author analyzes the particularities of two crimes relevant for the protection of nuclear materials in domestic law by identifying the vulnerabilities resulting from the analysis of the material element of the objective side, for each crime separately.

Keywords: *regime of nuclear materials, criminal protection, environmental crimes, ineffective incrimination, incomplete criminal regulations.*

1. Regulating human activities involving nuclear materials, both in the use of raw materials and of processing facilities requires a high degree of correlation between legal requirements and purely technical provisions, given that the specificity of this field determines scientific-technical delimitations, that generate effects on a legal scale.

The importance of obtaining a hermetic regulations is determined primarily by the impact that an accident occurred during the handling of nuclear material has on public health and safety, and secondly by its effects on the environment in all its components.

Considering the risk level of this activity, naturally, the Romanian legislator, by criminal law, provided protection to social relations regarding "the safety of nuclear activities for exclusively peaceful purposes, so as to meet the conditions of nuclear security, protection of occupationally exposed workers, population, environment and property"[1], this phrase covering the special legal object, common to both offenses subjected to analysis.

In this paper we will point out, in relation to the material element of the constitutive content, the particularities of the regulation found in art.345 of the Romanian Criminal Code[2], with the marginal name: "Failure to comply with the regime of nuclear materials or other radioactive materials" and of the provision found

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[1] N. Conea, E. Tanislav, C. Gheorghe, M. Conea, *Offenses under special laws*, Semne Publishing House, Bucharest, 2000, p. 244.

[2] Law no.286/2009 regarding the Criminal Code, published in the Official Gazette, Part I, nr.510/24.07.2009.

in special legislation, namely Article 44 of Law no.111/1996 regarding the safe deployment, regulation, authorization and control of nuclear activities[3].

2. The crime regulated by art.345 of the Criminal Code contains two basic forms, in paragraphs 1 and 2, two aggravated forms in paragraph 3 and 4, an attenuated form in paragraph 5 and the last paragraph contains a special provision on the amount of a day fine for legal entities[4], as a criminal law penalty. The conduct regulated by the first basic form, is represented by the conduct of a person or entity that receives, holds, uses, leases, changes, disposes, dispersed, exposing, producing, processing, handling, intermediate or final storing, or exports, imports, transports, or hijacks the carrying of nuclear or other radioactive materials, or performs other operations with them in an unlawful manner.

Art. 345, paragraph 2 of the Criminal Code, regulates an autonomous basis or distinct version[5] from the crime provided by the preceding paragraph, namely the action of a person who steals nuclear material or other radioactive materials. As can be seen, the second basic variant of the offense is a special form of theft regulated by art.228 of the Criminal Code.

Paragraphs 3 and 4 of the same article provide aggravated variants of the basic forms of paragraphs 1 and 2, including the situation in which by the conducts earlier mentioned other substances or goods have been endangered or the injury or death of one or more people occurred, and paragraph 5 criminalizes an attenuated version specific when the offense is committed by fault.

In what regards the constitutive content of the offense, in both basic forms found in art.345, paragraph 1 and paragraph 2 of the Criminal Code, the premise implies the pre-existence and availability, for the author, of nuclear or other radioactive materials.

As regards the first form referred to in paragraph 1, the alternative material element is stipulated in the incrimination norm as actions of *receiving, detaining, using, leasing, modifying, transferring, dispersion, exposure, production, processing, handling, intermediate storing, importing, exporting or final storing, transporting or hijacking the carrying of nuclear material or other radioactive materials, or any operation on their movement*.

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[3] Republished in the Official Gazette, Part I, no.552/27.06.2006.

[4] Art.345 of the Criminal Code. states: "(1) receive, detaining, use, lease, modification, transfer, dispersion, exposure, production, processing, handling, intermediate storage, importing, exporting or final storage, transport or hijacking the carrying of nuclear material or other radioactive materials, or any operation on their movement, in an unlawful manner is punishable by imprisonment from 3 to 10 years and deprivation of certain rights. (2) The theft of nuclear materials or other radioactive materials is punishable by imprisonment from 5 to 12 years and deprivation of rights. (3) If the acts provided in paragraphs (1) and (2) endangered other people or property, caused injury to one or more persons, the penalty is imprisonment from 7-15 years and the deprivation of rights. (4) If the acts in paragraphs (1) and (2) resulted in the death of one or more persons, the penalty is imprisonment from 10-20 years and deprivation of certain rights. (5) If the acts provided in paragraphs (1), (3) and (4) were carried with fault, the special limits of the sentence are reduced to half. (6) Notwithstanding the provisions of art. 137, paragraph (2) of the Criminal Code, for the offense under this Article, the amount corresponding to a day-fine for legal entities is between 500 lei and 25,000 lei".

[5] E. Neață, M. Ş. Petrescu, *Crimes against the regime of arms, munitions, nuclear and explosive materials*, Hamangiu Publishing House, Bucharest, 2014, p. 118.

The proper understanding of the incriminated conducts implies explaining them, fact already done undeniably by criminal law literature[6], but we consider that further clarification to the ordinary meaning of the *verbum regens* are imposed only in regard to three actions: production, processing and modification. Thus, the action of "production" involves the construction of materials in question. We appreciate that the rule is complemented by Appendix no.2 of Law no.111/1996, as amended and supplemented, which stipulated that the production of nuclear materials, specifically involves the production of nuclear raw material (uranium containing the mixture of isotopes occurring in nature, uranium depleted in the isotope 235, thorium, and any form of their metal, alloy, chemical composition or concentration). We believe that the manufacturing otherwise than by extraction or by depletion of uranium extracted in 235 isotope, or by including it in an alloy represents a modification of the material in a technological process that should be circumscribed to the alternative manner of "processing". In our opinion, we are facing a double incrimination between the alternative manner of "modification" and that of "processing", because a single modification is sufficient to constitute the alternative material element of the offense in question, thus it is not necessary to include the manner of processing, which, by definition involves a repeated number of modifications.

As a general observation we notice that a large number of normative manners overlap, namely exports and imports are premises for the transport of goods, which is not possible without a prior handling, the storage is subsequent to handling, and none of these actions are possible without the detention of goods. Most probably, the legislator created this list of actions that constitute the material element as examples, to cover as many practical situations as possible, but the overall effect generates confusion when a particular conduct is subjected to legal framing in this provision.

Starting from the incrimination text it is clear that the material element of the crime must have an essential requirement attached, that the conduct prohibited is committed "unlawfully" namely in violation of the provisions stipulated by law for the production, modification, holding and movement of nuclear material or other radioactive substances.

The relevant provisions of national law can be found in Law no.111/1996 on safe deployment, regulation, authorization and control of nuclear activities, republished, in Government Ordinance no.7/2003 on the promotion, development and monitoring of nuclear activities, republished[7] which are complemented by a considerable number of normative acts of lower legal force, such as government

[6] I. Rusu, Ş. Daneş in G. Antoniu, T. Toader (eds.), *Explanation of the new Criminal Code*, vol. IV, Universul Juridic Publishing House, Bucharest, 2016, p. 737 and I. Pascu in V. Dobrinoiu (eds.), *The new Criminal Code commented*, volume II, Special Part, Universul Juridic Publishing House, Bucharest, 2012, p. 829.

[7] Published in the Official Gazette, Part I, no.388/09.05.2005.

decisions, ministerial orders or orders of the President of the National Commission for Nuclear Activities Control[8].

Practical shortcomings resulting from the application of art.345, paragraph 1 of the Criminal Code, consist in the difficulty of effectively establishing the incriminated conduct. The essential requirement of committing the offending conduct "unlawfully" requires a violation of legal provisions enacted for the valid carrying out of activities with nuclear materials.

Given the large number of regulations with eminently technical content, adopted by ministerial orders or orders of the President of the National Commission for Nuclear Activities Control, the fulfillment of the essential requirement is possible when the activity concerning nuclear material or radioactive material is carried out in violation of administrative and technical requirements established by the President of the National Commission for Nuclear Activities control, or by order of the Minister of Health, therefore, the criminal nature of the act will be determined by the content of technical and administrative requirements adopted by the executive.

We appreciate that a problem of constitutionality can arise, because Article 73, paragraph 3, letter h of the Romanian Constitution expressly states that criminal offenses, penalties and their executional regime can only be regulated by organic law.

In the present case, the essential requirement attached to the material element is determined by provisions from secondary, even tertiary legislation, of technical nature whose prescriptions complement the criminal regulation in order to determine whether a specific conduct is prohibited or not by criminal law.

In order to justify the assessment earlier made, we believe that we must relate to the Romanian Constitutional Court's practice, namely Decision no.405/15.06.2016[9]. Although the decision concerns a different legal provision, we appreciate it is relevant for the reasoning used by the constitutional judges that, for the same reasons, must apply to other offenses regulated in a similar manner, by incomplete criminal provisions, as in this case.

Starting from the reasoning of the decision, we observe that the incomplete incrimination rule must be complemented by an act of primary regulation otherwise that would lead to establishing the incriminated conduct by another type of normative

[8] By way of example, Government Decision no.1437/18.11.2009 approving the Regulation of organization and functioning and organizational structure of the Agency for Nuclear and Radioactive Waste, as amended by Government Decision no.579/30.07.2013, amending Government Decision no.1437/2009 on approval of the organization and functioning and organizational structure of the Agency for Nuclear and Radioactive Waste, published in the Official Gazette, Part I, no.506/12.08.2013; Order of the Ministry of Administration and Interior no.279/22.12.2010 regarding the approval of methodological norms for planning prevention and intervention in case of nuclear or radiological emergency, published in the Official Gazette, Part I, No.29/12.01.2011; Order of the President of the National Commission for Nuclear Activities Control, no.3/16.01.2014 for approval of the nuclear safety on preparing transients, accidents and emergencies at nuclear power plants, published in the Official Gazette, Part I, No. 65/27.01.2014; Order of the Ministry of Health, no.381/05.04.2004, regarding the approval of basic sanitary norms for the safety of nuclear activities, published in the Official Gazette, Part I, no.527/11.06.2004.

[9] Regarding the exception of unconstitutionality of the provisions of art.246 of the Criminal Code from 1969, the 297, paragraph 1 of the current Criminal Code and art.13² of Law no.78/2000 on preventing, detecting and sanctioning corruption published in the Official Gazette of Romania, Part I, nr.517/08.07.2016.

act than that required by the constitutional text. Given the wide reception of the Constitutional Court Decision nr.405/15.06.2016 in national judicial practice, we appreciate that the reasoning of constitutional judges should not be generalized, meaning that Article 73, paragraph 3, letter h of the Constitution does not require absolutely all components of the constitutive content of a crime to be regulated by organic law. This way, we find it constitutionally appropriate to establish the constitutive content by a Government Emergency Ordinance issued by legislative delegation under Article 115 of the Constitution, or by a normative act of lower legal force, as long as it is determined[10] or determinable[11] starting from the content of the norm of primary regulation, considered by the Court in accordance with the constitutional provisions mentioned above.

As concerns the basic form of the offense regulated by art.345, paragraph 2 of the Criminal Code, note that the material element consists of an action of removal of nuclear material or other radioactive materials, thus it is a particular form of taking a movable asset from the possession or detention of another, in order to acquire it unjustly, being, therefore a special provision in relation to the offense of theft, regulated by art.228 of the Criminal Code.

For the regulations found in art.345, paragraph 3, 4 and 5 of the Criminal Code, we observe that no clarifications are necessary in relation to the material element, because the provisions are aggravated or attenuated versions of the incriminations previously discussed.

3. Analyzing the crime provided by Article 44 of Law no.111/1996, we observe that the physiognomy of the incrimination is based on a criminal legal frame that will be supplemented by provisions of the same law[12].

For an accurate determination of the punishable criminal conduct, it is necessary to reproduce the texts to which reference is made by the legislator. In this regard, we note that

[10] By directly pointing to the enactment, as in Annex 1 of the Law no.101/2011 on preventing and sanctioning acts on environmental degradation, republished in the Official Gazette, Part I, nr.223/28.03.2014.

[11] Stating the type of law, without stipulating its number and year, as in Article 116 of the Forest Code, which provides that the average price of a cubic meter of standing timber shall be established annually by Government decision, at the proposal of central public forestry authority.

[12] According to Article 44 of Law no.111/1996 " "(1) Carrying out an activity among those referred to art.2, art.24, par.1, art.28, par.2 and art.38, par.1 without proper authorization required by law alongside the breach of art.38 par.2^1 and 2^2 constitutes an offense and shall be punished as follows: a) with imprisonment from six months to two years or a fine, the activities referred to in: art.2 letter a, on the research, development, ownership, location, construction or assembly, conservation of nuclear installations; art.2, letter b; art.2, letter d, regarding means of packaging or transport of radioactive materials, specially arranged for this purpose; art.2, letter g; art.24, par.1, and art.38, par.1; b) imprisonment from 2 to 7 years and deprivation of certain rights, the breach of art. 38 par.2^1 and 2^2, and performing unauthorized activities under: art.2 letter a, relating to the commissioning, trail-run, operation, modification, removal, import and export of nuclear installations; art.2 letter c, if radiological facilities, nuclear or radioactive materials, radioactive radiation generating waste presents a special risk; art.2, letters e and f and art.28 par.2, if nuclear or radioactive materials, radioactive waste and radiation generators present a special nuclear or radiological risk. (2) Attempt to offenses under par.1, letter b is punished".

Article 2 of Law no.111/1996[13] provides the regulatory field, Article 24, paragraph 1 of the same law[14] implies that the management systems in the nuclear field must hold mandatory authorization, Article 28, paragraph 2 of the Law[15] refers to the authorization of detention,

[13]Article 2 of Law no. 111/1996 provides: "The provisions of this law shall apply to the following activities and sources of radiation: a) research, design, possession, siting, construction, installation, commissioning, trial run, operation, modification, conservation, decommissioning or closure import, export and intra-Community transfer of nuclear installations, including the management of spent nuclear fuel; b) the design, ownership, location, construction and assembly, commissioning, operation, conservation and decommissioning of mining and preparation of uranium and thorium and facilities of waste from the mining and preparation of uranium and thorium; c) the production, location, construction, supply, hire, transfer, handling, holding, use, storage, removal, transportation, transit, import, export and transfer of intra radiological facilities, including radioactive waste management facilities; c1) producing, manufacturing, supply, hire, transfer, handling, storing, processing, utilization, recycling, storage, transport, transit, import, export and transfer of intra-radioactive material and radioactive sources, as appropriate; c2) producing, manufacturing, supply, transfer, handling, storing, processing, utilization, storage, transport, transit, import, export and transfer of intra-nuclear materials, including fresh and spent nuclear fuel; c3) the transfer, handling, holding, intermediate storage, final storage, transport, transit, import, export and transfer of intra-radioactive waste; d) the production, the provision and use of dosimetric and systems for detection of ionizing radiation, materials, and devices for the protection against ionizing radiation, and means for packaging or transport of radioactive materials, specially designed for this purpose; e) the production, manufacture, lease, transfer, possession, import, export and intra-Community transfer of materials, devices and equipment referred to in Annex provision and use of dosimetric and ionizing radiation detection systems, materials and devices for the protection against ionizing radiation, and means for packaging or transport of radioactive materials, specially designed for this purpose; e) the production, manufacture, lease, transfer, possession, import, export and intra-Community transfer of materials, devices and equipment referred to in Annex provision and use of dosimetric and ionizing radiation detection systems, materials and devices for the protection against ionizing radiation, and means for packaging or transport of radioactive materials, specially designed for this purpose; e) the production, manufacture, lease, transfer, possession, import, export and intra-Community transfer of materials, devices and equipment referred to in Annex no. 1; f) holding, transfer, import, export and intra-Community transfer of unpublished information relating to materials, devices and equipment pertinent to the proliferation of nuclear weapons and other nuclear explosive devices, in Annex no. 1; g) providing products and services for nuclear facilities; h) providing products and services for radiation sources, dosimetric control instruments, ionizing radiation detection systems, materials and devices used for protection against ionizing radiation; h^1) design and execution of nuclear constructions; i) orphan sources, for their detection as to the disposal of radioactive waste; j) manufacture, import, export and transit of products for consumption which have been irradiated, containing or contaminated with radioactive material; k) activities leading to exposure of workers or the population to radon and thoron or their offspring inside, the external exposure caused by building materials, and prolonged exposure situations caused by long-term effects of an emergency or a past human activities; l) associated with sites contaminated with mineral substances in the ore or uranium or thorium residual radioactive contamination resulting from a radiological or nuclear accident, after the emergency was closed; m) of human activities that involve the presence of natural sources of radiation which leads to a significant increase in the exposure of workers or other people, including the operation of aircraft in terms of exposure crew during the flight, the extraction and processing of minerals associated to the reservoir uranium or thorium, and other raw materials in the process of extracting and processing the technological process, lead to an increase in the concentration of natural radionuclides in the intermediate products and waste, and the processing of materials containing naturally occurring radionuclides; n) preparation, planning and response for all cases of exposure to ionizing radiation in order to protect health workers and workers in emergency situations."

[14]According to Article 24, paragraph 1 of Law no.111/1996 "The authorization of management systems in the nuclear activities of design, location, supply, manufacturing, service delivery, construction, installation, commissioning, operation, decommissioning or conservation of nuclear installations and products, services and systems classified as important for nuclear safety is mandatory".

[15]Article 28, paragraph 2 of Law no.111/1996 provides: " Upon closure or decommissioning of nuclear or radiological facilities, and in case of partial or complete transfer of nuclear and radiological installations, radioactive products or nuclear materials, the authorization holder must, in advance, request and obtain, as provided by law, the authorization for possession, storage, decommissioning or transfer, as appropriate".

conservation, decommissioning or transfer, and Article 38, paragraph 1 of Law no.111/1996, lists two categories of licenses that are to be issued by the Ministry of Health[16].

The plurality of incriminated conducts resulting from reporting Article 44, paragraph 1 of Law no. 111/1996 with subsequent amendments to the provisions of Article 2 of the same law, determines a poor legislative technique and generates confusion on how to identify the actual content of the criminal provision.

To determine expressly prohibited behaviors, using both the completing norms referred to and analyzing the penalties provided by law, we consider that the offense in question can be committed, under Article 2 combined with Article 44 paragraph 1 of Law no. 111/1996, only by the following actions or omissions: a) research, design, possession, siting, construction, installation, commissioning, trial run, operation, modification, conservation, decommissioning or closure import, export and intra-Community transfer of nuclear installations, including the management of spent nuclear fuel; b) the design, ownership, location, construction and assembly, commissioning, operation, conservation and decommissioning of mining and preparation of uranium and thorium and facilities of waste from the mining and preparation of uranium and thorium; c) the production, location, construction, supply, hire, transfer, handling, holding, use, storage, removal, transportation, transit, import, export and transfer of intra radiological facilities, including radioactive waste management facilities; c1) producing, manufacturing, supply, hire, transfer, handling, storing, processing, utilization, recycling, storage, transport, transit, import, export and transfer of intra-radioactive material and radioactive sources, as appropriate; c2) producing, manufacturing, supply, transfer, handling, storing, processing, utilization, storage, transport, transit, import, export and transfer of intra-nuclear materials, including fresh and spent nuclear fuel; c3) the transfer, handling, holding, intermediate storage, final storage, transport, transit, import, export and transfer of intra-radioactive waste; d) the production, the provision and use of dosimetric and systems for detection of ionizing radiation, materials, and devices for the protection against ionizing radiation, and means for packaging or transport of radioactive materials, specially designed for this purpose; e) the production, manufacture, lease, transfer, possession, import, export and intra-Community transfer of materials, devices and equipment referred to in Annex provision and use of dosimetric and ionizing radiation detection systems, materials and devices for the protection against ionizing radiation, and means for packaging or transport of radioactive materials, specially designed for this purpose; e) the production, manufacture, lease, transfer, possession, import, export and intra-Community transfer of materials, devices and equipment referred to in Annex provision and use of dosimetric and ionizing radiation detection systems, materials and devices for the protection against ionizing radiation, and means for packaging or transport of radioactive materials, specially designed for this purpose; e) the production, manufacture, lease, transfer, possession, import, export and intra-Community transfer of materials, devices and equipment referred to in Annex no. 1; f) holding, transfer, import, export and intra-Community transfer of unpublished information

[16]Article 38, paragraph 1 of Law no.111/1996 provides: "The Ministry of Public Health shall authorize: a) the introduction into the economic and social circuit, for use or consumption by the population, of products which have undergone irradiation or containing radioactive materials; b) the introducing into the field of medical diagnosis and medical treatment, radiation sources closed, open, ionizing radiation generating devices and pharmaceutical products containing radioactive materials".

relating to materials, devices and equipment pertinent to the proliferation of nuclear weapons and other nuclear explosive devices, in Annex no. 1; g) providing products and services for nuclear facilities, *all without proper authorization required by law, as stipulated by the incrimination text itself.*

The exhaustive list of alternative manners is sometimes redundant and it is determined, in our opinion, by the normative technique used by the legislator in 1996, when the law was adopted, a time when the use of extremely vast reference norms was preferred especially in highly technical fields.

Despite the resulting volume of the incriminating text from the actions found in article 2, which is the regulatory field of the law, only the conducts set out in paragraphs a, b, c, d, e, f, g are sanctioned by indicating a criminal punishment. Therefore, although the activities prohibited under art. 2 lit.c¹, c², c³, h, h¹, i, j, k, l, m, n are found within the regulatory field of the law, they cannot be subjected to criminal liability of the perpetrator. In literature[17], these provisions were described as imperfect forms of crime. While acknowledging the terminology, we believe that it may not be relevant in the field of criminal law, as long as the criminal sanction is essential for defining criminal acts as opposed to other prohibited acts.

This imprecision in the incrimination text was caused by repeated changes of Law no.111/1996, but only on certain articles, regardless of other provisions which refer explicitly to the articles changed. As an argument, we observe that in the original form of the law[18], Article 2 contained only the letters from "a" to "g", the rest being an effect of changes in subsequent legal points.

We notice that the offense is typical when the activities regulated under Art.24 par.1, Art.28 par.2 or Art.38 par.1 are done without proper authorization required by law. In this situation, according to the legal texts indicated, the prohibited conduct is the activity of design, location, supply, manufacturing, service delivery, construction, installation, commissioning, operation, decommissioning or conservation, of nuclear installations and product services and systems classified as important for nuclear safety or the closure or decommissioning of nuclear or radiological, alongside the transfer in whole or in part of the nuclear and radiological installations, radioactive products or nuclear materials; or introduction into the economic and social circuit, for use or consumption by the population of products that were subjected to radiation or contain radioactive materials, placing in the medical field, for diagnosis and treatment, of closed or open radiation sources, ionizing radiation generating devices and pharmaceutical products containing radioactive materials.

All regulatory arrangements set out above have the essential requirement attached to the material element that the acts are made without proper authorization provided by law.

As we mentioned during the analysis of the crime provided by art.345 of the Criminal Code, imposing an authorization for the activities to be carried out must be made by an act of primary normative regulation or by an act of lower legal force determined or determinable based on the act of incrimination, so as to ensure the compliance of the criminal prescription with the provisions of Article 73, paragraph 3, letter h of the Constitution.

[17] E..Neață, M..Ş. Petrescu, *op. cit.,* p. 134.
[18] Version published in the Official Gazette, Part I, no.267/29.10.1996.

The latter normative manner for the crime in question is the noncompliance with art.38 par.2¹ and 2² of Law no.111/1996[19]. These provisions prohibit the deliberate addition of radioactive substances in the production of food, cosmetics, toys, personal ornaments and import and export of such products.

We note that this normative version no longer has an essential requirement attached to its material element and the incriminated conduct prohibits the manufacturer, importer or exporter of food, cosmetics, toys and personal ornaments to deliberately add radioactive substances in them.

4. As a *conclusion*, we observe that the protection provided by the Romanian criminal legislator to the regime of nuclear materials is accomplished primarily by two incriminations, susceptible to criticism, considering the quality standards of criminal law imposed by the current jurisprudence of the Constitutional Court of Romania.

For the crime of noncompliance to the regime of nuclear material or other radioactive materials provided by art.345 Criminal Code, the effectiveness of the incrimination is directly dependent on a substantial number of regulatory acts, namely secondary or tertiary legislation, as government decisions, ministerial orders or orders of the President of the National Commission for Nuclear Activities Control, which limits its compatibility with the provisions of Article 73, paragraph 3, letter h of the Constitution, using the reasoning of the Constitutional Court Decision no.405/2016.

With regard to the crime regulated under article 44 of Law no.111/1996 we see that we are in the presence of a legal text that could not keep up with legislative changes that underwent since its original enactment, and currently it generates real problems of application in the practice of judicial authorities. In addition, about half of the objects that make up the regulatory field of the law, although protected by the reference made by Article 44, paragraph 1 to Article 2 in its entirety, are not relevant under the criminal aspect, being prohibited, but not sanctioned by a penalty.

Taking into account the contemporary standards of clarity and precision of the law, the incriminating texts analyzed have deficiencies that make them difficult to reconcile with the guarantees of a fair trial in criminal matters, however, given that there is no case law on this issues, so far, the indicated drawbacks have been hidden and no need for legislative changes emerged.

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[19]According to art. 38 par.2¹ and 2² of Law no.111/1996" (2¹) It is prohibited to deliberate add radioactive substances in the production of food, feed and cosmetic products, as well as the import or export of such products". (2²) "It is prohibited to deliberate addition of radioactive substances in toys and personal ornaments, and the import or export of such products".

UNION REGULATIONS REGARDING THE MANAGEMENT OF THE EXTERNAL BORDERS OF THE EUROPEAN UNION

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Abstract: *Chapter 2 of the TFEU, entitled 'Policies on border control, asylum right and immigration', states in Article 77 (ex Article 62 TEC) (1) (b) and (c) that the European Union is developing a policy which aims to ensure effective control of persons and oversight at the crossing of external borders and to gradually introduce an integrated system of external border management and the development of a European strategy in this respect. Thus, within the meaning of the above provisions, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, adopted Union-wide secondary legislation, namely Regulation (EU) 1052/2013 establishing the European Border Surveillance System (EUROSUR) and Regulation (EU) 2016/1624 on the European Border Police and Coast Guard Agency. The normative texts under discussion in the present paper contribute to the completion of the appropriate legislative framework, while supporting the continuous and uniform implementation of Union law, including the acquis communautaire[1] in areas such as securing the Union's external borders, strengthening a common return policy for Union nationals.*

Keywords: *security policy, member states, cooperation, agency, union system, external borders.*

I. Introduction

The EU's *foreign and security policy* allows Member States to express and act together on a global basis. The role of the foreign and security policy developed at the Union level is to maintain peace and to strengthen international security, to promote, develop and strengthen international cooperation.

The European Union, a security co-ordinator based on its *Common Security and Defense Policy* (CSDP), relies on the peacekeeping forces contributed by the Member States for joint disarmament, humanitarian and rescue missions, military advice and assistance, conflict prevention, and peacekeeping, crisis management, for instance, peace re-establishment and post-conflict stabilization.

The Union Neighborhood Policy (ENP) governs relations with a series of extra-Union countries, namely Algeria, Egypt, Jordan, Israel, Lebanon, Libya, Morocco, Palestine, Syria and Tunisia, Moldova, Ukraine, Armenia, Azerbaijan, Georgia.

This last component of foreign policy based on neighbourhood relations implies issues with the *control of external borders*. This control of the Union's external borders is an indispensable corollary of the free movement of persons in the Union and a fundamental component of an area of freedom, security and justice, while contributing

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[1] I.Boghirnea, *Teoria generala a dreptului*, Editia a III-a, revizuita si actualizata, Editura Sitech, 2013, p. 29.

to combating crime with a cross-border dimension and ensuring a high level of internal security in the Union. At the same time, it is necessary to act in full respect of the fundamental rights of Union and non-national citizens living in the territories of the 27 Member States[2]. European Integrated Border Management, based on the four-level access control model, includes measures in third countries such as the Common Visa Policy, measures with neighbouring third countries, external border control measures, risk, as well as measures in the Schengen area and in the field of return.

II. Implications of the European Border Surveillance System in developing a common policy for the management of the Union's external borders

Regulation (EU) No. 1052/2013 establishing a European Border Surveillance System (EUROSUR[3]) provides a common framework for the exchange of information and cooperation between the border surveillance authorities of the Member States and the European Border Police and Coast Guard Agency (Frontex), hereinafter referred to as "the Agency".

Eurosur includes a governance framework as well as a system for exchanging information through States' "components", as well as cooperation with neighbouring third countries, on issues such as the exchange of personal data.

Thus, the main components mentioned in the consolidated supervision of the Member States are:

a) *National coordination centers*[4] operate at the level of each Member State. Depending on the geographical situation of the Member State, the national coordination center is used either for command and control of border guards or as a "center" for coordinating border surveillance activities. All national coordination centers cooperate and exchange information with centers in other Member States and with the Agency as well as with other national authorities belonging to the same Member State. Each national coordination center operates on a permanent basis, twenty-four hours a day, seven days a week.

b) The communications network[5] manages, stores and supports the exchange of information within EUROSUR, including sensitive non classified information, classified in a secure and near real environment with and between national coordination centers.

c) *Fusion surveillance services* are provided by the Agency to the Member States and consist of satellite images, ship reporting services and weather and environmental services. Their role is to detect and analyze cross-border criminal activities, such as illegal immigration, arms, drugs, etc.

[2] C. Mătuşescu, *The scope of application of fundamental rights guaranteed by European Union law on member states' action. Some jurisprudential landmarks*, Law Review, Volume VII, special issue 2, December 2017, pp. 91-101.

[3] 30 Member States apply the EUROSUR Regulation, ie 26 EU Member States (excluding the United Kingdom and Ireland) and the four Schengen associated countries (Iceland, Norway, Liechtenstein and Switzerland).

[4] Article 5 of Regulation (EU) No. 1052/2013.

[5] Article 7 of Regulation (EU) No. 1052/2013.

d) *Situational paintings*[6] *are identified at the Union as well as national levels.* They contain information on border incidents (event layer) and analytical reports (analysis layer). Each Member State manages its own national situational picture while the Agency handles the European situational picture covering the territory of the Member States as well as the common information sheet on the pre-frontier area covering the region located outside the external borders.

The European situational picture is comprised of information collected from the following sources:

(i) national situation maps,

(ii) the European Commission for Border Police and Coast Guard, the Commission, which provides strategic border control information, including deficiencies in external border control;

(iii)relevant delegations and offices of the European Union.

At the level of the operational operational chart, information is stored on: incidents and other events included in the event layer of the national situation table; incidents and other events included in the prefrontal area information pool; incidents in the area of a joint operation, a pilot project or a rapid intervention coordinated by the Agency[7].

III. Competences of the European Border Police and Coast Guard Agency[8] on European Integrated Border Management in accordance with the provisions of Regulation (EU) 2016/1624[9]

What is the European Border Police and Coast Guard Agency and what are its competencies?

The Agency is a European Union body with legal personality, being independent in the implementation of its technical and operational mandate[10].

The Agency consists of: *a) the Administrative Board responsible for strategic decision-making of the Agency; b) an Executive Director; (c) an advisory forum assisting the Executive Director and the Management Board on fundamental rights with independent opinions, d) a Fundamental Rights Officer*[11].

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[6] "Situational table" means a graphical interface designed to present in real time the data and information received from different authorities, sensors, platforms and other sources that are distributed to other authorities through communication and information channels in order to be aware of the situation; and supporting capacity to respond along external and pre-frontier borders; see Article 1 of Regulation (EU) No. 1052/2013".

[7] Article 10 (1) (3) of Regulation (EU) No. 1052/2013.

[8]The European Agency for Border Police and Coast Guard is the new name of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Regulation (EC) 2007/2004. Its activities are provided for in this Regulation.

[9]Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on Border Police and Coast Guard amended Regulation (EU) 2016/399 of the European Parliament and of the Council and repealed Regulation (EC) No . 863/2007 and Regulation (EC) No. 2007/2004 and Decision 2005/267 / EC.

[10]The Agency's headquarters are in Warsaw, Poland; see also Article 56 of Regulation (EU) 2016/1624.

[11]It has the task of contributing to the Agency's Fundamental Rights Strategy, to monitor and promote respect for Fundamental Rights by the Agency. The Fundamental Rights Officer regularly reports to

According to Article 4 of this Union provision, the European Integrated Management of the External Borders of the Member States of the European Union provides aim the following components:

a) border control, including measures to facilitate the legal crossing of borders and, where appropriate, measures to prevent and detect cross-border crime such as the illegal introduction of migrants, trafficking in human beings and terrorism, and measures to guide persons who need or want to apply for international protection;

b) search and rescue operations at sea, launched and carried out in accordance with Regulation (EU) No. 656/2014 of the European Parliament and of the Council[12] and international law in situations which may arise during border surveillance operations at sea;

c) cooperation between Member States, supported and coordinated by the Agency;

d) inter-institutional cooperation between the national authorities of each Member State responsible for border control or other border tasks and among the relevant Union institutions, bodies, offices and agencies, including regular exchanges of information through existing exchange such as the European Border Surveillance System ("EUROSUR") established by Regulation (EU) No. 1052/2013 of the European Parliament and of the Council[13];

e) return of third-country nationals subject to return decisions issued by a Member State, etc.

In order to implement the effective and uniform control policy at the external borders, the Agency shall carry out the following tasks:

i) *Monitor migratory flows and carry out risk analyzes on all aspects of integrated border management.*

To that end, the Agency, by means of a decision of the Management Board based on a proposal by the Executive Director, establishes an integrated common risk analysis model to be applied by both the Agency and the Member States and a common evaluation methodology of vulnerability. The monitoring and evaluation of the availability of technical equipment, systems, capacities, resources, infrastructure, and qualified personnel of the Member States necessary for border control shall be monitored and evaluated. Monitoring and evaluation shall be carried out at least once a year, the Executive Director decides otherwise on the basis of risk assessments or a previous vulnerability assessment.

The results of the vulnerability assessment shall be transmitted to the Member States concerned. The Member States concerned may comment on that assessment.

Where necessary, the Executive Director shall, in consultation with the Member State concerned, issue a recommendation setting out the necessary measures to be taken by the Member State concerned and the time limit within which those measures

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the Management Board, thus contributing to the fundamental rights monitoring mechanism; see in this respect Article 71 of Regulation (EU) 2016/1624.

[12] Regulation (EU) No. 656/2014 of the European Parliament and of the Council of 15 May 2014 laying down detailed rules for the surveillance of the external maritime border in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

[13] Regulation (EU) No. No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing a European Border Surveillance System (EUROSUR).

are to be implemented. The Executive Director shall invite the Member States concerned to take the necessary measures.

Where a Member State does not implement the necessary measures in the recommendation, the Executive Director shall refer the matter to the Management Board and inform the Commission thereof.

On a proposal from the Executive Director, the Administrative Board shall adopt a decision setting out the necessary measures to be taken by the Member State concerned and the period within which those measures are to be implemented. The decision of the anagement Board shall be binding on the Member State.

If the Member State does not implement the measures within the time limit laid down in that decision, the Administrative Board shall notify the Council and the Commission thereof and further action may be taken.

The Council, on the basis of a proposal put forward by the Commission, may, without delay, adopt a decision by means of an implementing act identifying the measures to mitigate those risks that need to be implemented by the Agency and by which it it shall request the Member State concerned to cooperate with the Agency.

The results of the vulnerability assessment[14] shall be transmitted periodically and at least once a year to the European Parliament, the Council and the Commission.

ii) monitor the management of external borders through the liaison officers of the Agency in the Member States.

Liaison officers act on behalf of the Agency, their role being to promote cooperation and dialogue between the Agency and the national authorities responsible for border management and the return of illegal immigrants.

Regarding the designation of liaison officers, we note that the Agency's chief executive is the one who appoints staff experts. On the basis of the risk analysis and following consultation with the Member States concerned, the Executive Director shall make a proposal on the nature and conditions of the referral of the liaison officers concerned, the Member State or region to which they may be sent and any tasks.

The Agency may decide that a liaison officer will cover up to four Member States in the geographical proximity.

The liaison officers have, in particular, the following tasks[15]: a) act as an interface between the Agency and the responsible national authorities; (b) support the collection of the information the Agency needs to monitor illegal immigration and risk analysis and to conduct vulnerability assessments; c) contribute to promoting the implementation of the Union acquis on the management of the external borders, including respect for fundamental rights; (d) communicate to the Member State the relevant information received from the Agency, including information on ongoing operations, etc.

The Agency may send experts from its own staff in third countries to serve as liaison officers who should enjoy the highest degree of protection in the performance of their tasks. They are part of the local or regional cooperation networks of immigration liaison officers and security experts in the Union and the Member States,

[14]Article 50 of Regulation (EU) 2016/1624.
[15] Article 12 of the Regulation (EU) 2016/1624.

including the network established under Regulation (EC) No. 377/2004 of the Council[16]: Liaison officers are only sent to third countries where border management practices respect minimum standards of human rights protection.

Sending liaison officers is approved by the Board of Directors. The decision to send liaison officers to third countries must receive the Commission's opinion in advance and the European Parliament shall be fully informed without delay of those activities.

iii) With regard to *interinstitutional cooperation on the joint application of surveillance instruments*, the Agency shall provide national coordination centers and themselves with information on the surveillance of the external borders and the pre-frontier area.

In particular, the Agency shall provide a requesting national coordination center with information on the external borders of that Member State and the pre-frontier area, obtained in the following ways:

1. tracking in the high seas vessels or other vessels identified as being or suspected of illegal immigration or cross-border crime;

2. selective monitoring of ports and coastal zones of third countries which, following risk analysis and information, have been designated as embarkation or transit points for ships or other vessels used for illegal immigration or for cross-border crime and so on.

The Agency provides the aforementioned information obtained by various means: satellite images; sensors installed on any ship or craft or using ship reporting systems.

(iv) *give Member States, where necessary, increased technical and operational assistance at the external borders by coordinating and organizing joint operations, taking into account the fact that some situations may involve humanitarian emergencies and rescue operations at sea in accordance with the law Union and international law.*

iv) *empowers the Member States where necessary, increased technical and operational assistance at the external borders by coordinating and organizing joint operations, taking into account the fact that some situations may involve humanitarian emergencies and rescue operations at sea in accordance with Union law and with international law*.

v*) provides technical and operative assistance to Member States and third countries in accordance with Regulation (EU) No. 656/2014 and international law* in search and rescue operations for persons at risk in the sea that may be triggered during border surveillance operations at sea. In particular, the Agency has the possibility to carry out actions at the external borders involving one or more Member States and a third country bordering at least one of these Member States, subject to the agreement of the third country concerned, including on its territory. Operations shall be carried out on the basis of an operational plan agreed by the Member State (s) adjacent to the operational area. In cases where teams are foreseen to be sent to a third country, the Union shall conclude an agreement on the status with the third country concerned. The status agreement covers all aspects necessary for the conduct of actions, setting out in concrete terms the scope of the operation, the civil and criminal liability, the tasks and duties of the members of the teams.

[16]Council Regulation (EC) No 377/2004 of 19 February 2004 on the establishment of a network of immigration liaison officers.

vi) *The Agency shall cooperate with the European Commission, the European External Action Service, Europol, the EASO, the European Union Agency for Fundamental Rights, Eurojust, the European Union Satellite Center, the European Maritime Safety Agency and the European Fisheries Control Agency*, offices and agencies of the Union, with the objective of combating and resolving migration issues, preventing and detecting cross-border crime, such as the illegal introduction of migrants, trafficking in human beings and terrorism[17].

IV. Conclusions

We believe that through the presence of the European Border Surveillance System, the European Border Police and Coast Guard Agency, a European Union mechanism has been set up to enable different national border surveillance authorities to share information and cooperate at the level of tactical, operational and strategic role to prevent and combat illegal immigration and cross-border crime, while at the same time making an important part of the freedom of movement of extra-Union nationals in the European Union space under conditions of legality and security[18].

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1. Report from the Commission to the European Parliament and the Council on the evaluation of the European Border Surveillance System (EUROSUR) – Brussels, 12.9.2018 COM (2018) 632;
2. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on Border Police and Coast Guard at European level;
3. Regulation (EU) No. 656/2014 of the European Parliament and of the Council of 15 May 2014 laying down detailed rules for the surveillance and surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union;
4. Regulation (EU) No. No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing a European Border Surveillance System (EUROSUR);
5. Council Regulation (EC) No 377/2004 of 19 February 2004 on the establishment of a network of immigration liaison officers;
6. I. Boghirnea, *Teoria generala a dreptului*, Editia a III-a, revizuita si actualizata, Editura Sitech,2013;
7. C. Mătuşescu, *EU Migration Policy and Ethical Values. Short Critical Considerations*, in The European Proceedings of Social & Behavioral Sciences (EpSBS), Volume XXVII, 2017, pp. 392-403;
8. C. Mătuşescu, *The scope of application of fundamental rights guaranteed by European Union law on member states' action. Some jurisprudential landmarks*, Law Review, Volume VII, special issue 2, December 2017, pp. 91-101.

[17]See in this respect Article 51 of Regulation (EU) 2016/1624A.

[18] In the literature, critical views are also expressed on the multiplication and modernization of human rights monitoring systems, which emphasize the negative approach of immigration and contribute to transforming Europe into a "fortress", thus contradicting the humanitarian waves underlying the construction European Union – see C. Mătuşescu*, EU Migration Policy and Ethical Values. Short Critical Considerations*, in The European Proceedings of Social & Behavioral Sciences (EpSBS), Volume XXVII, 2017, pp. 392-403.

THE COSTS AND THE IMPLICATIONS OF DOMESTIC VIOLENCE. A MATHEMATICAL APPROACH

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Abstract*: Domestic violence, with its different forms, is an omnipresent phenomenon which influences individual personal and professional life, organizational performance and societal development. Its costs are very important from an economical, juridical and social point of view.*

The purpose of this article is to analyze and describe the impact that domestic violence could have in generally and the factors which influence this behavior.

The objectives are to observe the influence could have some factors, named the variables, from a social, economical and juridical perspective on domestic violence cases along years. To make such an analyze, we choose to realized a mathematical model, as regression function, and an informatical program, as Eviews, in which we have introduce eight independent variables – the factors who are influencing the domestic violence, and one dependent variable, which is the domestic violence itself. Afterworlds, we were developed some proposal and made some conclusions, from an economical and juridical experience, with intention to draw attention to the costs implied in this toxic phenomenon: costs of life, of family balance and happiness, organizational performance and societal development.

Keywords: *domestic violence, the costs of domestic violence, the causes of domestic violence, a mathematical model.*

I. Introduction. Context and definition

Violence in general and domestic violence (DV), in particular, has multiple psychological and social significations and therefore has many ramifications, influences and consequences in all areas, starting from a personal plan, where the consequences are the most acute and intensive lived, and extending at family, social, economic, health and legal.

World Health Organization defines violence, in general, as an intentional use of physical force, threats against oneself, another person, a group or a community, that has as a consequence or is very likely to result a trauma, a psychological damage, developmental problems or death[1]. Also, in its Resolution no. WHA 49.25/1996, the World Health Assembly (WHA)considers violence as a major problem of public health in the entire world.

Among all forms of violence, DV has serious implications, not just personally, but also at the family, organizational (professional), economic and social level. This is why, our current study is mainly focused on the DV effects and its costs in different

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[1] WHO – https://www.who.int/topics/violence/es/ (04.07.2019).

areas, as well as in building a mathematic pattern emphasizing the factors which influence the most this phenomenon and how they influence each other.

Domestic violence is an old phenomenon, presented publically in USA and Western Europe; in Romania has been recognized as a public phenomenon since 2000 when aggression towards a family member has been introduced in the Criminal Code (the anterior Criminal Code – 1969) as aggravating forms of offenses of harassment and other violence and injuries[2].

In order to underline the amplitude of this phenomenon in Romania, a case analysis of 2015 conducted by the Government has ascertained that 77% of women think that VD is between present and very present[3].

In this meaning, General Inspectorate of Romanian Police (IGPR) communicated that from the first six months of 2016 were registered 8926 family victims, from which the major part were women – 79% and 92,3% from aggressors were men[4]. This states that in reality, the DV is mainly pointed against women, this being the most perpetuated form of violence throughout history, but also the least recognized publicly, thus requiring a specific way of punishment.

Table. Indicators regarding the domestic violence and other acts[5]:

	Indicators	
Year	**Violent offenses**	**Serious crimes committed with violence**
2015	63.375	5582
2016	70.284	5142
2017	69.648	5031

Starting from this aspect, we must note that the definition of DV given by the Convention of European Council – from Istanbul (2011), directly refers to the relation between the spouses or partners. According to this European legal document the DV represents: *all acts of physical, sexual, psychological or economic, which occur in the family or domestic environment or between former or current spouses or partners, regardless of whether the aggressor divides or a shared the same residence with the victim*[6].

In this moment, in Romania, the legal framework uses two terms, which are nothing but partially synonymous. These are: family violence and domestic violence, each of them having its own legal regulation. Thus, the Criminal Code (Title 1, Chapter 3, Art 199-200), states the family violence, while the Law No 217/2003 modified and republished in 2018, states the domestic violence, both of them trying to prevent such a phenomenon, being the result of a broader process[7].

[2]Vlădilă, L.M., *The development of the regulations on gender-based violence in Romania and Spain,* CKS, Bucharest, 2012, pp. 159-160.
[3]http://insp.gov.ro/sites/cnepss/wp-content/uploads/2016/01/Analiza-de-situatie-2015-7.pdf.
[4]https://violentaimpotrivafemeilor.ro/statistici-privind-violenta-in-familie-aproape-noua-mii-de-cazuri-de-lovire-si-alte-violente-si-80-de-violuri-in-familie-in-primele-6-luni-ale-anului//.
[5]Source: https://www.politiaromana.ro/ro/utile/statistici-evaluari/statistici, Ministry of Internal Affairs, General Inspectorate of the Romanian Police, Criminal Records, Statistics and Operative Evidences Department.
[6] Conforming with the art. 3 letr. b) from Istanbul Convention.
[7]Vlădilă L.M., *European and international marks on the family violence*, in Jurnalul de Ştiințe Juridice, vol.1 (4), 2012, p. 227.

According to Art 3 Para 1 of the Law No 2172003 modified, DV represents any action or inaction of physical, sexual, psychological, economic, social or spiritual violence committed with intention within the familiar or domestic environment or between spouses or ex-spouses, as well as between current or former partners, regardless if the aggressor lives or has lived together with the victim.

European Commission dedicated 2017 as the year of eliminate violence against women[8], nevertheless in Romania was the year with the greatest number of cases of family violence resulting in the victim's death[9]. Starting with 1981 the activists for women rights have celebrated the November 25th as being the day against violence.

Into the fifth World Women Conference celebrated in Beijing in 1995, UNO has recognized that violence against women is an obstacle in achieving equality, development, peace, and affecting human rights and liberties. Also, the Beijing Platform of 1995 recognized that the violence against women is the fundamental mechanism (we could say the main one) by which the woman is subordinated to the man, being the result of a historical manifestation of inequality between the two sexes[10].

From the perspective of a few American specialists, the DV can be defined in multiple forms. These definitions, synthetizing and underlining different aspects of the DV, which will help us to better understand this toxic phenomenon.

Thus, **violence is**:

– a symptom of deeper and more extensive problems in the individual, family, and society[11];

- a pervasive and acceptable means of behavior in some countries[12];
- a complex and disturbing act which is stemming from a psychological feeling of powerlessness[13];
- in all its forms, a serious social problem, a multidisciplinary subject, and also an all too common problem[14].

Violence is not:

– a new phenomenon, but only in modern times has society begun to recognize violence against family members as a social problem[15].

Violence represents:

– physical acts that results from injuries to the victims and can have long-term consequences[16], but not only because most of the national and international regulations

[8]http://ec.europa.eu/romania/news/20162511_declaratie_comuna_eliminarea_violentei_impotriva_femeilor_ro.

[9]As resulted from an unpublished official statistic of the Public Ministry.

[10]Points 117-118 of the Beijing Platform; document available at http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20S.pdf .

[11]Ammerman, R.T.; Hersen M., *Case studies in family violence,* Springer, 2012.

[12] Malley-Morrison, K.; Hines, D., *Family violence in a cultural perspective: defining, understanding, and combating abuse,* SAGE, 2004, p. 30.

[13]Leske, D.R. et al., *Current controversies on family violence,* SAGE, 2005, p. 6.

[14]Cahn, D.D., *Family violence: communication processes,* SUNY Press, 2008, pp. 1-2.

[15]Barnett, P.W. et al, *Family violence across the lifespan: an introduction,* SAGE, 2010.

[16] Wallace, P.H.; Robertson, C., *Family violence: legal, medical, and social perspectives,* Routledge, 2016, p. 5.

mention other forms of violence such as verbal, psychological (also called psychological, emotional or emotional abuse), social, economic, spiritual and sexual[17].

Violent and aggressive personsare the ones most in need of specialized assistance[18].

In this article the authors want to establish, using a simulation and a modellingapproach, that is a dependency between domestic violence and a few factors called independent variables. Also, the authors propose some measures to diminish the impact of these analyzed factors on individual and organizational performance and to offer some measures necessary for a society based on equality and freedom.

II. Factors that influences domestic violence

According to some studies of OMS, DV is influenced by a few factors presented in many studies such as:

- cultural, as:assigning specific roles to women and men, considering that men are superiors, considering family a private sphere, the control of women by men[19];
- economical, as: financial women dependency by men, limited access of women to money, to education, development and training[20];
- legal, as:the lack of an adequate punish for the aggressor, the diminish of the discrimination of women in the society[21], heavy procedures after the divorce, the little implication of the police and the society into these cases;
- political, as: the reduced number of women implicated in the national Parliaments and Government, consideration of family violence as little interest and importance for politics, limitation of state intervention in family life, the low involvement of women in political life.

III. Effects and costs of domestic violence

a. Domestic violence has many influences such as[22]:

- Physical health- the victim may suffer injuries, medical care or even losing the ability to work[23];

[17]According to Art 4 of the Law No 217/2003 modified and republished in 2018.

[18] Hines, D.A. et al., *Family violence in the US: defining, understanding, and combining abuse,* SAGE, 2012, p. XV.

[19]Dumitrescu, A.-M., *Aggressiveness and violence in the life of romanian women,* in Alternativas. Cuadernos de Trabajo Social, no. 21/2014, pp. 30-32.

[20] ***, OMS, *Informe mundial sobre la violencia y la salud*, Ed. Publicación Científica y Técnica No. 588, Washinton DC, 2003, pp. 105 şi 107, pe site-ul oficial, https://www.who.int/topics/violence/es/ (04.07.2019). Dumitrescu A.-M., *op. cit.*, p. 37.

[21] ***, OMS, *Comprender y abordar la violencia contra las mujeres – Violencia infligida por la pareja*, en su sitio web https://www.who.int/reproductivehealth/topics/violence/vaw_series/es/ (12.07.2019), p. 5.

[22] ***, OMS, *Informe mundial...*, *op. cit.*, pp. 109-112. Gabriela Dima, Iolanda Felicia Beldianu, *Violența domestică: intervenția coordonată a echipei multidisciplinare. Manual pentru specialişti*, West Publ.-house, Timişoara, 2015, pp. 72-74. ***, OMS – Department of Reproductive Health and Research, *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence*, printed in Italy drafted at Geneva, Switzerland, 2013, pp. 21-22.

[23] ***, OMS, *Comprender y abordar la violencia contra las mujeres – Consecuencia para la salud*, en su sitio web https://www.who.int/reproductivehealth/topics/violence/vaw_series/es/ (12.07.2019), pp. 2 and 5.

- Mental health- the victims may suffer emotionally (anxiety, fears, panic, insomnia, nightmares, post-traumatic syndromes[24];
- Professional and economic- the victim may lose her job, having interdiction from her partner, or may have absenteeism from her job due to the physical injuries. A study made in Canada showed that 30 percent of victims had to give up to their normal activities, and 50 percent to obtain medical leave due to injuries;
- Social- the victims are slowly isolated form social life, family, friends, or colleagues.

b. As a social phenomenon, domestic violence has some costs:

- Direct costs – the value of services destinated for treating the victim (hospitalization, counseling or juridical services),
- Social costs – increasing the mortality, decreasing the level of health and of quality of life,
- Economical costs – decreasing the level of productivity, the number of active labor, increasing of absenteeism and its costs, decreasing of implication, affecting of relationships with colleagues and managers, the collaboration and communication process

In USA, the domestic violence costs 12.6 bill. $ per year. A study made in India showed that women lose 7 days per year due to domestic violence[25]. Also, according to studies conducted by US specialists, women who are the victims of domestic violence have much more health care needs and more frequent than the rest of the population[26].

According to EIGE estimations[27], in Great Britain only the costs of the violence against women, in which the aggressor is her life partner were estimated to €13,5 billion/year, for the total estimated value for the gender-based violence committed against women, as well as against men be of € 32,5 billions/year (also in UK)[28].By expanding these data at the level of all EU Member States, only the gender-based violence against women costed the Union € 226 billion/year which represents 87% of the total costs on gender-based violence manifested in this geographic area[29].

IV. Mathematical analysis of the domestic violence phenomenon.

Of all the factors involved, we have selected only 8. In fact, as the mathematic analysis will prove, the ones we have selectd for the current study are just a part of the ones which could be added and which have a direct influence upon the level of domestic violence. Also, we need to mention that the study aimed to emphasize the situation of this phenomenon in Romania, based on a series of data and inputs, as following:

– relevant data have been taken from the EUROSTAT recent statistics;

[24] Ibidem.
[25] http://insp.gov.ro/sites/cnepss/wp-content/uploads/2018/11/Analiza-de-situatie-Violenta-2018.pdf.
[26] ***, OMS, *Comprender y abordar la violencia... – Consecuencia para la salud, op. cit.*, p. 6.
[27] European Institute for Gender Equality (EIGE)
[28] Also, see the information drafted by the EIGE – available on their official website– https://eige.europa.eu/gender-based-violence/eiges-studies-gender-based-violence/estimating-costs-gender-based-violence-european-union– accessed on 27.02.2019.
[29] Ibidem. See also ***, EIGE, *Estimating the costs of gender-based violence in the European Union – Report*, EIGE Press, Luxemburg, 2014, p. 142.

– there are conditions who favors violence: lack of education, sexual education, lack of adequate economic and social conditions, increased level of social permissiveness, existence of psychiatric disorders[30];

- violence against woman has large costs (productivity, educational, justice, medical);
- the number of domestic violence in Romania has been increasing from 9536 cases in in 2005 to 20.531 in 2017[31];
- number of death due to domestic violencewere, also, increasing from 149 in 2012 to 191 in 2017.

Leaving form this point and observing thatdomestic violence has many influences, we developed a mathematical model, who will reveal the relationship and the influence of these factors ondomestic violence, and between themselfs.

Thus, we implemented a function of regression having two variables: a dependent variable, noted with "**Y**"- domestic violence and eight independent variables – noted with X1 to X8 – the different factors mentioned below.

a. Research objective: to observe the relationship between the domestic violence and other factors considered important by the author.

b. Tools used: simulation program: E-views7, mathematical models- OLS (regression function), Spearman coefficient (R-squared), ANOVA, statistical indicators and correlation matrix.

c. Research Hypothesis:

H1- There is a direct and positive relationship between domestic violence and the other important factors which having an influence on it,

H2- There is a normal distribution among the analyzed variables.

H3- There is a correlation between the analyzed variables.

The data are collected from EU28 between 2009 and 2017 and is used regression functioning order to analyze the impact could have some independent variables established above (Table) on domestic violence**.**

The regression function is using the following formula[32]:

$$y = C_0 + C_1 \times X_1 + C_2 \times X_2 + C_3 \times X_3 + \varepsilon_t$$

Was denoted as:

- C0- the intercept and C1-C8- the slope of the straight line[33],
- ε_t is having the form $\varepsilon_t = (\varepsilon_1 + ... + \varepsilon_T)'$ being a vector of the observed values and the estimated error terms respectively[34].
- **"Y"**- the dependent variable (domestic violence) and X1-X8 – the independent variables[35], which influence de dependent variable.

[30] http://insp.gov.ro/sites/cnepss/wp-content/uploads/2018/11/Analiza-de-situatie-Violenta-2018.pdf .

[31] Beside these data, we can add that: in 2009 were 12461 cases; in 2016 were 18.531 and in 2017 were 20.531 of such cases, from which 18.835 were men perpertrators- http://www.mmuncii.ro/pub/imagemanager/images/file/Statistica/Buletin%20statistic/2009/familie1_65.pdf

[32] Florea, N.V., Mihai D.C., *Improving organization performance through human capital development using a regression function and MATLAB***,** no. 3 (32), JOSA, 2015, p. 229.

[33] Agung, N.G., *Time series data analysis using Eviews*, John Wiley&Sons, 2011, p. 2-2.

[34] Duica, M.C. et al., *The role of mathematical modeling in analyzing the impact of the Internet on commercial activities*, JOSA, nr.3(40), 2017, p. 513.

Table 1. Analysed data[36]

Year	(Y) Nb of cases of domestic violence	(x1) Recorded alcool per capita consump-tion	(x2) Mean and median income (men)	(x3) Resident population in Romania (men)	(x4) Life expenc-tancy (men)	(x5) Participa-tion rate in education and training (males)	(x6) Employ-ment rates (males)	(x7) In work at-risk-of-poverty rate	(x8) Average household size
2009	11.534	11,77	2172	10.049	69,8	1,6	85,1	15,5	2,8
2010	12.461	9	2036	9.900	70	1,3	89,5	16,6	2,7
2011	11.592	12	2091	9.800	70,8	1,7	87,8	17,4	2,7
2012	12.205	12	2049	9.777	70,9	1,5	87,6	17,8	2,7
2013	14.376	12	2016	9.746	71,6	2,2	87,5	17,3	2,7
2014	15.358	14,4	2155	9.707	71,3	1,7	88,2	18,7	2,7
2015	11.598	14,4	2315	9.652	71,4	1,3	88,6	17,9	2,7
2016	12.273	14,4	2448	9.603	71,7	1,2	88,1	17,9	2,7
2017	13.019	14,4	2742	9.550	71,7	1,1	90,3	16,1	2,6

Using OLS (regression function) and Eviews program we obtained:

Table 2.

Dependent Variable: _Y__NB_OF_CASES_OF_FAMIL
Method: Least Squares
Date: 06/01/19 Time: 19:20
Sample: 1 9
Included observations: 9

Variable	Coefficient	Std. Error	t-Statistic	Prob.
_X1__RECORDED_ALCOHOL_PE	0.018378	NA	NA	NA
_X2__MEAN_AND_MEDIAN_INC	0.018308	NA	NA	NA
_X3__RESIDENT_POPULATION	171.7017	NA	NA	NA
_X4__LIFE_EXPENC_TANCY__	23.24084	NA	NA	NA
_X5__PARTICIPA__TION_RAT	-8.055252	NA	NA	NA
_X6__EMPLOY_MENT_RATES__	2.248750	NA	NA	NA
_X7__IN_WORK_AT_RISK_OF_	4.614238	NA	NA	NA
_X8__AVERAGE_HOUSEHOLD_S	-70.16457	NA	NA	NA
C	-3429.629	NA	NA	NA

R-squared	1.000000	Mean dependent var	12.71289
S.D. dependent var	1.335117	Akaike info criterion	-33.12373
Sum squared resid	2.94E-16	Schwarz criterion	-32.92650
Log likelihood	158.0568	Hannan-Quinn criter.	-33.54934
Durbin-Watson stat	2.604854		

Thus, making least squares estimation method we obtained that R-squared[37] has been taking values between 0 and 1. In our case, R squared is 1 (case rarely

[35] Dixon, K.R., *Modelling and simulation in Ecotoxicology with applications in MATLAB and Simulink*, CRC Press, 2011, p. 125; Darbyshire, P., Hampton D., *Hedge fund modelling and analysis using MATLAB*, John Wiley&Sons, 2014; Walish, P. et al., *MATLAB for neuroscientists: an introduction to scientific computing in MATLAB*, Academic Press, 2014, p. 97; Florea, N.V., *Simulare si modelare in afaceri*, Mustang Publ.-house, Bucharest, 2017.

[36] Souce: violentaimpotrivafemeilor.ro, www.instat.gov.al, www.insse.ro, appsso.erurostat.ec.europa.eu.

[37] Florea, N.V., *Using simulation and modeling to improve career management processes in organizations,* Theoretical and Applied Economics, Volume XXIII (2016), No. 3(608), 2016, p. 274.

encountered), showing that there is **a perfect and direct correlation** between the analyzed dependent variable and the independent variables.

R-squared is 100%, thus results that x1-x8 are very important factors in the evolution of "Y". Being such a large value, we may conclude that the model is a very good fit for estimating "**Y**" through the chosen independent variables.

From this table we observe that:

$$\mathbf{Y} = 0.018*X1 + 0.0183*X2 + 71.7*X3 + 23.24*X4 - 8.05*X5 + \\ +2.24*X6 + 4.61*X7 - 70.16*X8 - 3429.6 \quad (1)$$

Thus, to increase with a monetary unit, the x1 will get an increase of 0.018 monetary units of "**Y**", x2 will get an increase of 0.0183,x3 will get an increase with 71.7, x4 will get an increase of 23.24, x5 a decrease of 8.05, x6 an increase of 2.24., x7 an increase of 4.61, and x8 a decrease of 70.16. We note that the value of free term (-3429.6) is negative and very high, which allows us to conclude that other factors could be taken into account and have an important impact on the evolution of "**Y**". Thus, the hypothesis **H1 – There is a positive and strong relationship between variables** is accepted, because it is indeed positive and very strong having a value of 100%.

Eviews7 helped to develop a summary of the descriptive statistics. All the analyzed variables present a positive mean value. The mean for x2 is higher than the others, but is normal, being the salary values (X2 has the largest standard deviation among all the other analyzed variables). The range of variation between maximum and minimum is quite logical. We observe that the mean and median have very similar value, the ratio between them being approximately 1.

Also, the standard deviation (Std. Dev.) of data series has small values for all the variables; therefore, it can be considered that the series is relatively homogeneous (exception making x2, being logical). The results for "**Y**" and x1, x4, x6, x7, x8 are negatively skewed (showing a left-skewed distribution) while for x2, x3, x5 is a positive skewness. The value of kurtosis is between 2.1 and 3.4 being close to the benchmark for a normal distribution of 3, which is positioned near normality; only for x4 is bigger (4.5).

Table 3.

	_Y__NB_OF...	_X1__RECO...	_X2__MEAN...	_X3__RESI...	_X4__LIFE_...	_X5__PARTI...	_X6__EMPL...	_X7__IN_W...	_X8__AVER...
Mean	12.71289	12.70778	2224.889	9.753778	71.02222	1.511111	88.07778	17.24444	2.700000
Median	12.27300	12.00000	2155.000	9.746000	71.30000	1.500000	88.10000	17.40000	2.700000
Maximum	15.35800	14.40000	2742.000	10.04900	71.70000	2.200000	90.30000	18.70000	2.800000
Minimum	11.53400	9.000000	2016.000	9.550000	69.80000	1.100000	85.10000	15.50000	2.600000
Std. Dev.	1.335117	1.856891	240.0940	0.153330	0.713754	0.337062	1.447220	1.005126	0.050000
Skewness	1.029007	-0.693245	1.206349	0.585579	-0.735003	0.771007	-0.556941	-0.424651	-1.13E-14
Kurtosis	2.733985	2.641514	3.323572	2.648938	2.105528	2.938657	3.441288	2.218532	4.500000
Jarque-Bera	1.614821	0.769074	2.222179	0.560572	1.110374	0.893089	0.538300	0.499502	0.843750
Probability	0.446012	0.680766	0.329200	0.755568	0.573965	0.639835	0.764029	0.778995	0.655816
Sum	114.4160	114.3700	20024.00	87.78400	639.2000	13.60000	792.7000	155.2000	24.30000
Sum Sq. Dev.	14.26030	27.58436	461160.9	0.188080	4.075556	0.908889	16.75556	8.082222	0.020000
Observations	9	9	9	9	9	9	9	9	9

For almost all the values of kurtosis which are around 3, are making the distribution Leptokurtic and the values concentrated around the central tendency. Thus, the analyzed variables are characterized by a normal distribution. The values obtained for Jarque Bera test are between 0.49 and 2.22 (indicating that all the variables are approximately normally distributed). So, the hypothesis **H2 – There is a normal distribution among the analyzed variables**, is accepted.

Using EViews it also can determine the relationship between the analyzed variables.

Table 4.

Correlation

	_Y__NB_OF...	_X1__RECO...	_X2__MEAN...	_X3__RESI...	_X4__LIFE_...	_X5__PARTI...	_X6__EMPL...	_X7__IN_W...	_X8__AVER...
_Y__NB_OF...	1.000000	0.220753	-0.087056	-0.285595	0.418875	0.453874	0.204227	0.403816	-0.278065
_X1__RECO...	0.220753	1.000000	0.673998	-0.752519	0.770963	-0.234422	0.155896	0.417104	-0.354086
_X2__MEAN...	-0.087056	0.673998	1.000000	-0.668234	0.513969	-0.689342	0.476078	-0.209446	-0.593518
_X3__RESI...	-0.285595	-0.752519	-0.668234	1.000000	-0.936197	0.343019	-0.679155	-0.478546	0.813607
_X4__LIFE_...	0.418875	0.770963	0.513969	-0.936197	1.000000	-0.027134	0.450701	0.529875	-0.665496
_X5__PARTI...	0.453874	-0.234422	-0.689342	0.343019	-0.027134	1.000000	-0.517057	0.164392	0.370851
_X6__EMPL...	0.204227	0.155896	0.476078	-0.679155	0.450701	-0.517057	1.000000	0.165753	-0.898274
_X7__IN_W...	0.403816	0.417104	-0.209446	-0.478546	0.529875	0.164392	0.165753	1.000000	-0.149235
_X8__AVER...	-0.278065	-0.354086	-0.593518	0.813607	-0.665496	0.370851	-0.898274	-0.149235	1.000000

The value obtained in the figure above shows us the strength of the relationship between the variables:

- If the value is zero, then the variables are not related to each other at all; in this case is no such a relation,
- If the value is between zero to one, it means that the relationship becomes stronger and stronger, and if it is closer to one, means that the variables are very strongly related to each other; in this case there is a very strong relation between x8 and x3 (0.81), x4 and x1 (0.77), x2 and x1 (0,67), x7 and x4 (0.52), x4 and x2 (0,51), medium relationships between x6 and x2 (0,47), x6 and x4 (0,45), x8 and x5 (0.37), x5 and x3 (0.34) and week but positive relationships between x6 and "**Y**" (0.20), x7 and x5 (0.16), x7 and x6 (0.16), x6 and x1 (0.15),
- If the value is between zero and minus one, it means that we have a low correlation and the two variables are a little bit related to each other, or not at all; for example, between x2 and "**Y**" (-0.08) there is a negative and low correlation and between x4 and x3 there is a negative and very high noncorrelation (-0.93).

Translated under a different form, when analyzing the relation between each independent variable – "X" and the dependent variable – "Y", namely between how and how much each of the factor influences (X1-X8) the domestic violence (Y), in relation to the results mentioned by Table No. 4, the following conclusions are to be mentioned:

The domestic violence is positively influenced by the following factors, sometimes directly, other times indirectly proportional, thus:

- **Alcohol consumption (X1)** – having a rate of influence of 0,22. Therefore, in Romania, the increase of alcohol consumption generates an increase of the DV, aspect noted also by other specialized studies or regulations[38]; we need to notice that this influence is a medium and not a very large one (the index is only 0,22 compared to 1 where it would have been maximum), which expresses the idea that alcohol is not the factor determining the DV, but it is a disinhibitory element in certain cases;
- **Prolonging the life expectancy of men in Romania (X4)** – having an index of influence of 0,41. If the life expectancy for men will continue to increase, it shall imply the incrementation of the cycle of violence, which is a paradox, because the incrementation of the life expectancy refers, first of all, to better living conditions. Though, in this case we consider that this direct influence is related to the fact that the life expectancy also involves a larger number of years of life, which means even more years of DV;
- **Level of education and professional training (X5)**–having an index of influence of 0,45. It is the highest of all the variables we have chosen for this study. It confirms, once again, the fact that the education is priority to other factors and that it may determine a necessary and wanted change of mentality in this area; also, the DV shall diminish when men shall have a higher level of education[39]and when the family shall have a domicile with more possibilities for living and using. Regarding the correlation between the level of education and the DV, again we notice that, unfortunately, Romania, together with Spain and Malta are among the first three EU states where youth aged 18 to 25 drop off their education and where the number of men with superior studies is lower than of women[40]; also, according to the European statistics, Romania is the country with the lowest percentage of youth aged 30-34 who are enlisted at an university (24,6% unlike the European medium rate of 40,7% and unlike other countries such as Lithuania, Cyprus, Ireland or Luxembourg, where the percentage of persons with superior education is above 55%)[41];

[38]According to the Resolution of the UN General Assembly 40/36/29.11.1985, for more than 30 years, the alcohol has been considered as a favorizing factor for the DV; See the UN official website, http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/485/23/. García Más, M.P., *Alcohol y violencia familiar*, in ADICCIONES Magazine, 2002, vol.14, no. 1, pp. 3-8 – the author of the study, a sociologist, recognizes that alcohol and drugs are factors favorizing the domestic violence, a factor whose social and economic effects have not yet been sufficiently analyzed and taken into consideration by the authorities.

[39]This fact was also revealed by certain statistics, thus:

[40] Eurostat – the rate of drop outs in the education system for the population aged 18-24 ranks Romania on the third place between the EU countries, along with Spain and Malta, with 16.4% – https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Educational_attainment_statistics (08.07.2019).

[41] Eurostat – percentages, indicating the age and level of education in the EU in 2017; https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Educational_attainment_statistics (08.07.2019).

- **The rate of employment(X6)** – having a rate of influence of 0,20. In other words, the DV shall diminish when men shall have higher incomes and more of them will be employed[42];
- **A high level of poverty (X7)**–with an index of 0,40. Influencing VD by economic aspects is another aspect that has been found in other statistics; thus, the lower the incomes[43] of men and the higher the poverty rate, the higher the risk of DV.

The domestic violence is little or almost influenced by the following factors:

- **The level of incomes (X2)** –having a rate of influenceof -0,08. It is interesting that in our study, according to the drafted mathematic model, the level of poverty is not at all influenced by the incomes obtained, probably depending on other factors, which are not part of our current study. According to the 2017 EUROSTAT statistics, we have noted that, in states like Romania, Spain and Italy, where there are major differences between the rate of employment of men and women (between 15-20% in favor or men)[44], there are states in which the rate of DV is also very high. It refers to the fact that though the number of employed men is higher than the one of women, the fact that women cannot afford to leave the mutual residence due to the lack of incomes, contributes to the incrementation of the cases of DV. Therefore, we consider that one of the variables which needed to be inserted was the level of incomes for women-victims, in order to analyze the way in which they influence the DV;
- **The number of men residing in Romania (X3)**–having a negative influence index of minus 0,28;
- **The existence of a more spacious, multi-room and detached home (X8)** – having a negative influence index of minus 0,28;

The fact that the number of men in Romania would increase and even if they would have dwellings will not influence the VD phenomenon, it will neither increase nor decrease. Though, if women would have other possibilities for living than with the aggressor it is possible that the offences of DV to diminish. In a previous study, we have revealed that, in more than half of the situations,the victims prefer to share the same domicile with their aggressors, either because they do not other alternatives, or because they want to[45].

Also, by drafting the analysis of the influence of the X variables between them, according to the identified mathematic model, it has been discovered that they influence each other mutually:

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[42] Ibidem. The connection between the low level of studies both of the aggressors, as well as of the victims was emphasized by the above-mentioned study underlining that 57% of the aggressors either had occasional incomes, low or very low incomes or not at all.

[43] The connection between the low level of studies both of the aggressors, as well as of the victims was emphasized by the study conducted by Marin, M., *Cauzele şi consecinţele violenţei în familie*¸ în lucrarea-studiu coordonată de Stancu, T.; Odorica, C., *Violenţa în familie – prevenire şi combatere*, Sitech Publ.-house, Craiova, 2007, p. 38, from where it results that 81% of the aggressors had maximum medium education or professional training.

[44]https://ec.europa.eu/eurostat/cache/infographs/womenmen/bloc-2b.html?lang=en (08.07.2019).

[45]The data have been taken from the study *Cercetarea Naţională privind violenţa în familie şi la locul de muncă*, presented on the official website of the Partnership for Equality Center at http://www.cpe.ro/romana/index.php?option=com_content&task=view&id=27&Itemid=48 (08.07.2019), pp. 64-65.

a. There is a close correlation between the following factors influencing DV, this being a direct and positive one:

– the existence of a spacious dwellinginfluencesthe number of men residing in Romania. Thus, if the dwelling they own would be more spacious, when the number of men residing in the country would increase (the coefficient of influence between x8 and x3 is of 0,81); but, because the two factors have a different influence upon the DV results that this incrementation of the number of men shall not automatically refer to the incrementation of the cases of DV;

– the incrementation of life expectancy refers to the diminish of alcohol consumption (the coefficient of influence between x4 and x1 is of 0,77); because the two factors have a different influence upon the DV, in this case, the incrementation of the life expectancy, corelated with the diminish of the alcohol consumption shall determine a new diminish of the number of cases of DV;

– increasing average incomes may lead to an increase in alcohol consumption, which will also lead to an increase in VD (the influence factor between x2 and x1 is 0,67);

– if the risk of poverty decreases, the life expectancy of the men's population in Romania will increase (the coefficient of influence between x7 and x4 is 0,52); in this case, by lowering the risk of poverty, DV should also decrease;

– if life expectancy increases, this is also influenced by the increase in average income of men in the geographical area under our analysis (the influence factor between x4 and x2 is 0,51); in this case, we appreciate that the VD risk should decrease.

b. There is an average correlation between the following factors influencing DV, which means that they influence each other directly and positively but less than in the first case:

– if the male employment rate increases, it is possible to increase their average income to 47% (the influence coefficient between x6 and x2 is 0,47), but it will not automatically generate a decrease in DV;

– also, if the number of male employees increases, it is possible that 45% of their life expectancy will increase (the coefficient of influence between x6 and x4 is 0,45);

– at the same time, it is possible that in the proportion of 37%, to the extent that the man will have a higher education level, he would like to have a more spacious dwelling (the coefficient of influence between x5 and x8 is 0,37);

– and it is possible in a 35% proportion that if the number of men to study will increase, this is due to the increase in the number of men in our country (the influence coefficient between x5 and x3 is 0,34);

c. **There is a minimal, direct and positive correlation between the following factors that influence DV:**

– although the rate of employment is a factor that positively influences VD, it is observed that it only occurs in a percentage of 20%; this factor should be correlated, as we have analyzed above with average revenue growth, so that together they will cause a fall in DV; therefore, just the simple employment of men is not sufficient to significantly reduce the VD rate, but it must be correlated, from our perspective and with the increase in the salary level (the coefficient of influence between x6 and "**Y**" is 0,20);

– on the other hand, it is interesting that the lack of education is not necessarily determined by the lack of income, i.e.a higher degree of poverty, although it influences it positively (the coefficient of influence between x7 and x5 is 0,16);

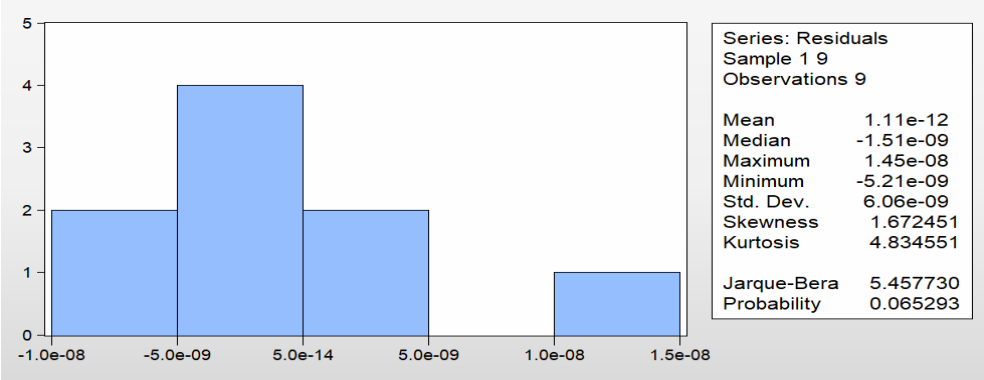
– it also follows that simple employment is not sufficient to reduce the risk of poverty and, we appreciate it, it is necessary that income from employment is high enough to reduce the risk of poverty (the coefficient of influence between x7 and x6 is 0,16);

– In the same sense, it is noticed that the employment rate does not influence the decrease in alcohol consumption, but insufficient to determine a decrease in DV (the influence factor between x6 and x1 is 0,15).

From these calculations results that the hypothesis **H3–There is a correlation between the analyzed variables,** was partially accepted, because between the analyzed variables do exist direct and positive correlations but also negative values.

For further analysis, Figure 8 presents the residual histogram and the calculations for residuals.

T able 5.



Analyzing this histogram, we can add that:

- The Jarque-Berra test (JB) is based on the hypothesis that the normal distribution has the skewness, $S = 0$, and the kurtosis, $K = 3$. If the probability – p – of JB is enough low, then the normality hypothesis of residuals is rejected, and if the probability is high, the normality of residuals distribution is accepted. In our case the value of JB test is 0.06.
- It is observed that skewness = 1.67; the positive skewness indicates that the residual is skewed to the left, which can be easily be identified on the histogram.
- The kurtosis = 4.832.35, the probability of the test is = 0.06. We have a positive kurtosis (leptokurtic) which is associated with return distribution that are more peaked in the centre but that have fatter tails[46]. From these reasons we accept the hypothesis that the distribution of residuals follows almost a normal distribution.

Thus, the hypothesis **H4- There is a normal distribution for residuals** is partially accepted.

[46] Ridley, M., *How to invest in hedge funds: an investment professional's guide*, Kogan Page Pub., 2004, p. 126.

V. Conclusions and proposals.

As a final conclusion we may say that domestic violence has multiple implications: emotional, social, financial, juridical, and economical.

There are multiple factors which lead to this toxic behaviour, and in our research we took only 8 factors with great importance and influence on domestic violence and implicitly on individual and organizational performance[47], due to the value obtained for Spearman coefficient (R=1). There are determined strong and medium relationships between analysed variables but also some of them weak, showing, that the chosen factors are well fitted. Some statistical indicators are used in this case and are explained in the research methodology.

Certainly, from the studies we analyzed to prepare this theme, there have been many other factors influencing the DV; some of them have already mentioned, without being influenced by them; it would have been intriguing to see how it would have influenced DV's level of income and education and whether our mathematical model would have been consistent with some statistics and studies that revealed that in over three quarters of cases (3/4) DV victims are those with low incomes and medium education.

Also, observing the mathematical model found by us, we concluded that the main variable that most influences DV is male education (x5), closely followed by life expectancy (X4) and poverty risk (X7). Thus, the higher the education and training of men, the lower the poverty index and the life expectancy, and the risk of DV in our country.

To limit its implications, or to overcome them, the authors proposed some measures in order to reduce the impact on victims personal and professional lives, and improve the legislative framework in order to limit or even eliminate such nocive behaviour for individuals and also for organizations:

– the implementation of educational measures from the primary school and its support in the other learning cycles

– improve the present legislation in the field to limit the nocive behavior of aggressors;

– develop adequate measures for support and protections of victims;

– develop the skills and competencies of the specialists who analyses the violence cases and situations;

– develop relationships with different stakeholders in order to prevent these situations from the start;

– develop strong and long-term relationships with the Romanian and international organismsin order to manage and reduce these acts of violence;

– develop PR campaigns in order to make known the consequences among women and men.

[47]Florea, N.V.; Mihai, D.C., *op. cit.*, p. 81.

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