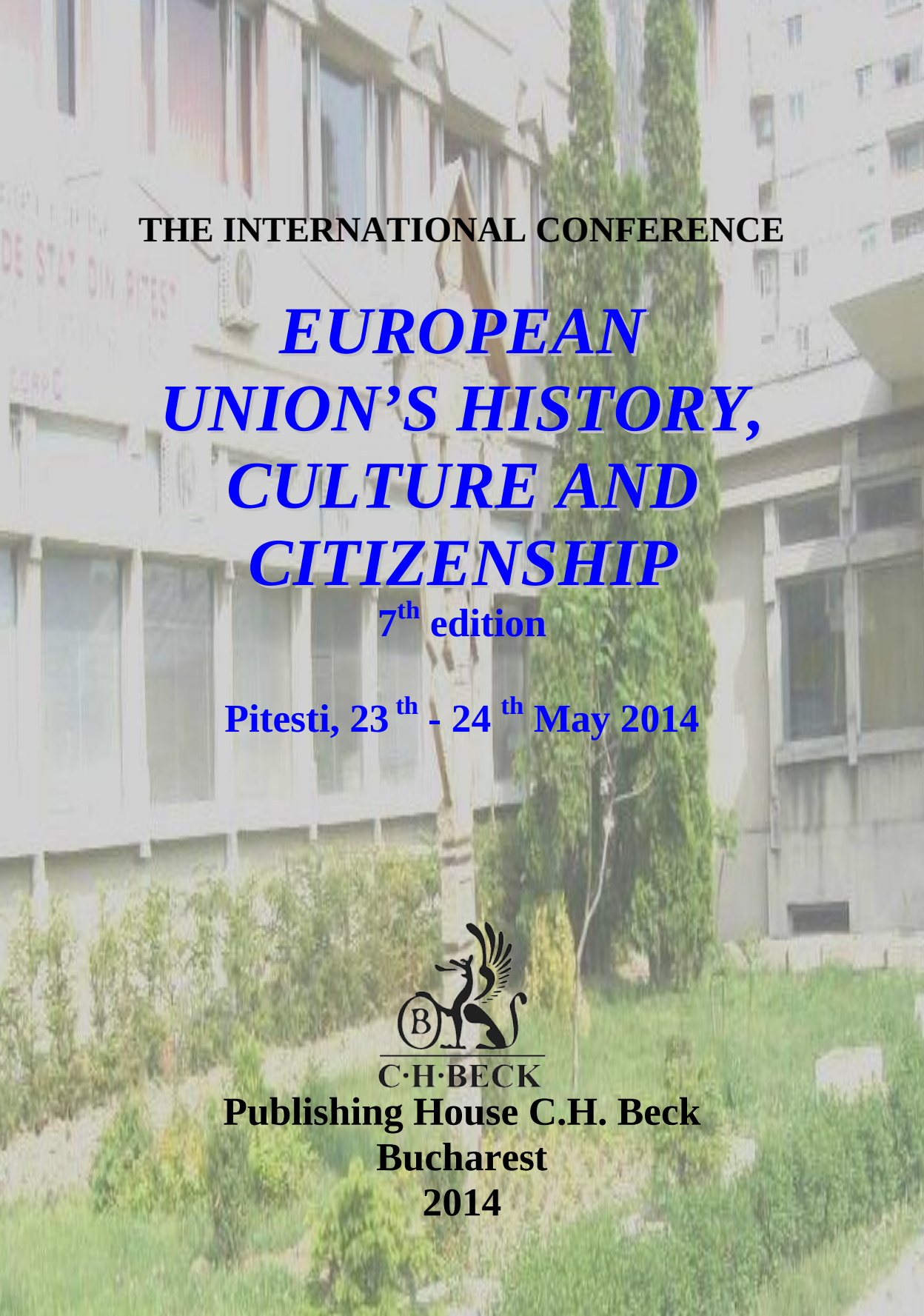

THE INTERNATIONAL CONFERENCE

EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP

7th edition

Pitesti, 23 th - 24 th May 2014

C·H·BECK
Publishing House C.H. Beck
Bucharest
2014

Proceedings of the International Conference *EUROPEAN UNION'S HYSTORY, CULTURE AND CITIZENSHIP* 7th edition

Resource continues with editions on two different media:
ISSN-L 2360 – 1841
Online – ISSN 2360- 395X
CD-ROM – ISSN 2360 – 1841

The Name of Issuing Institution
University of Piteşti
E-mail: iccu2008@yahoo.com
Web site: www.iccu.upit.ro

Publishing House C.H. Beck SRL
Str. Serg. Nutu, no. 2, Sector 5, Bucharest

Frequency - *annual*
Edition - *300 copies*
Language - *English*

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Pitesti, 23 - 24 May 2014

THE INCORPORATION OF EU LAW INTO STATE LAW - A CONSIDERATION FROM AN AUSTRIAN PERSPECTIVE AFTER THE ADOPTION OF THE TREATY OF LISBON

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Abstract

Even after the adoption of the Lisbon Treaty, the issue of incorporation of EU law into the law of the Member States remains an important issue. Adequate incorporation and application of EU law by the respective legislative, administrative and judicial organs are a precondition for the good functioning of the EU legal system. In this context, various principles of EU law converge, especially the principle of the rule of law and the principle of subsidiarity. To live up to these principles is a challenge for EU institutions as well as for Member States.

I. The new order of integrated Europe[1] requires, on the one hand, mutual understanding between the EU countries and, on the other hand, harmonization of the rights of the EU[2] in relation to the Member countries. Accordingly, a contribution can be made in each EU country, especially by the Parliaments.

[1] GERHARD BRUNN, European Unification (Die europäische Einigung), in: Universal Library No. 17038, Reclam, Stuttgart, 2002; RUDOLF STREINZ, CHRISTOPH OHLER, CHRISTOPH HERMANN, The New Order for Europe (Die neue Ordnung für Europa), introduction with synopsis, Munich 2005 and MICHAEL GEHLER, European Ideas, Institutions, Association Additions (Europäische ldeen, lnstitutionen, Vereingungen), Munich 2005.

[2] Detailed in PETER FISCHER, HERIBERT FRANZ KOCK, MARGIT KAROLLUS, European Law (Europarecht), 4th Edition, Vienna 2002, HERiBERT FRANZ KOCK, EU Law and National Constitutions - The Austrian Case, FIDE Report 2004, and RUDOLF STREINZ, European Law (Europarecht), 7th edition, Heidelberg 2005.

The importance of national parliaments in the EU legislative system has increased steadily in recent years. In particular, the Amsterdam Treaty and its Protocols regarding the role of national parliaments in the EU (Amsterdam Protocol No. 9), application of the principles of subsidiarity and proportionality (Amsterdam Protocol No. 30) and the Reform Treaty of Lisbon have enabled national parliaments comprehensive integration into the European decision-making process. The Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) has emphasized the advancement of the subsidiarity examination procedure and the corresponding strengthening of the role of national parliaments in recent years.

Under the Austrian Presidency (especially in the Subsidiarity Conference in St. Pollen on 18 and 19 April 2006[1], at the COSAC conference in Vienna on 22 and 23 May 2006[2], and at the European Conference in Linz on 23 October 2006)[3], the participation of national parliaments in EU legislation and the cooperation of the national parliaments in monitoring compliance regarding the principle of subsidiarity was highlighted. It issued an appeal to the EU institutions to examine their acts from the perspective of subsidiarity[4] and proportionality. In addition, there was a request to the Commission to convey their legislation proposals to the European institutions and at the same time to the national parliaments and a request to the Member States to develop further the cooperation within the framework of COSAC.

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[1] Europe begins at home (Europa fängt zu Hause an), Subsidiarity Conference, Subsidiarity, St. Pölten April 18-19 2006, Vienna 2006.

[2] The final documents focused on the themes of subsidiarity and transparency. See OTS0256/23.05.2006.

[3] Parliamentary Europe Conference "Austria and Europe - We build together," Linz on 23. 10. 2006, Vienna 2006; the contribution of the Austrian presidency to continue the EU Constitution re. the Reform Treaty, see generally HERIBERT FRANZ KOECK, Restoring dynamics to the European integration process – Perspectives after the Austrian EU presidency during the first semester of 2006, in: Eugeniusz Piontak, Katarzyna Karasiewicz (ed.): "Quo vadis Europo?", Warszawa 2007, pp. 68 *et seqs.*

[4] HERBERT SCHAMBECK, Subsidiarity and European Integration, in: State in the word (Subsidiaritat und europaische lntegraton, in: Staal im Wort), anniversary publication for Josef lsensee, editing Otto Depenheuer, Markus Heintzen, Matthias Jestaedt, Peter Axer, Heidelberg 2007, pp. 707 et seqs.

Since the beginning of 2007, the Austrian Parliament has had an internal preliminary subsidiarity assessment based on the Commission's regulations and directives; this was after the Commission began direct transmission to national parliaments in 2006. By the summer of 2010, the EU Committees of the National Council and the Federal Council submitted a total of 31 opinions on various legislative projects regarding the Union. With regard to the participation rights of national parliaments in the Treaty of Lisbon and in particular the 2004 intergovernmental conference (which led to the draft of the Constitution treaty) it was agreed that "Protocol on the role of national parliaments in the EU" and "Protocol on the application and principles of subsidiarity and proportionality" were attached to existing contracts. Thus, Protocols No. 9 and No. 30 of the Amsterdam Treaty were further developed. This is done by an early-warning mechanism allowing national parliaments, within eight weeks after receipt of a legislative proposal, to provide a reasoned opinion, relating to subsidiarity to the affected EU institution, explaining why a draft is not compatible with the subsidiarity principle.

Each opinion is taken into account by the originating institution. Upon reaching one third (or one quarter in the fields of Justice and Interior Affairs) of the votes of national parliaments, there arises the obligation to review, but not necessarily to change, the original proposal. Under the examination procedure, each parliament is entitled to two votes. Regarding bicameral parliaments, such as in Austria, each chamber receives one vote. In addition, the Treaty of Lisbon provides the reinforced control mechanism of subsidiarity, whereby in the event that a majority of the parliamentary chambers disputes a draft legislative act, a procedure is set in motion in which a majority of the votes cast by the Members of the European Parliament and 55 per cednt of the Members of the Council can stop the legislative procedure after considering the reasons given by the national parliaments. In a letter (dated 1 December 2009) to the parliaments of the Member States, President Barroso already presented proposals regarding the modalities of the subsidiarity test procedure. Thus, any acts proposed from 1 December are subjected to the subsidiarity test. The period of parliamentary recess, specifically the month of August, is not included in the eight-week period.

In addition, the subsidiarity Protocol grants national parliaments the possibility of an action for annulment in relation to Art. 263 TFEU with the ECJ due to breach of the subsidiarity principle. Such a complaint can be raised within two months of publication of an act and in the manner of the respective government.

In addition, other provisions of the Treaty of Lisbon[1] concern possible changes in the distribution of rights and duties between the Union and Member States by decisions of the Union institutions. In particular, these include the so-called passerelle regulations ('bridge clauses')[2] Accordingly, in relation to certain primary policy areas, the Council or the European Council can unanimously decide in the future to change from a special legislative procedure to an ordinary legislative procedure or decide on current material concluded in the Council with a qualified majority.

This applies to individual issues concerning its shared foreign affairs and security policy (Art. 31 TFEU), certain cross-border aspects of family policy (Art. 81 TFEU), individual workers' rights (Article 153 TFEU), important annexed subjects regarding environmental policy in relation to Art. 192 TFEU (tax, water, regional planning, land use, energy source), the multiannual financial framework (Article 312 TFEU) and an extension of policy areas in the framework of enhanced cooperation (Article 333 TFEU). Against such a resolution, each national parliament can exert an absolute veto within six months in relation to Article 48, paragraph 7 of the TEU.

In Art. 352 TFEU, a needs competence ("flexibility clause") is advanced of the earlier Art. 308 according to which the Council can make unanimous decisions on legislative acts beyond the legislation competence of the Union, except in the area of CFSP, if required to achieve measures provided for in the goals of the Treaties. This area will require special attention to the subsidiarity test.

Finally, in certain policy areas, provisions of the Union or provisions regarding tasks or responsibilities of the institutions of the Union proposed in the Treaties can be extended beyond, for example, additional rights of EU citizens (Art. 25 TFEU), uniform electoral rules

[1] KLEMENS H. FISCHER, The Treaty of Lisbon. Text and commentary on the European Reform Treaty (Der Vertrag von Lissabon. Text und Kommentar zum Europaischen Reformvertrag), Baden-Baden 2008.
[2] Art. 48, paragraph 7 of the TEU.

regarding the European Parliament (Art. 223 TFEU), the creation an EU legal title for property (Art. 262 TFEU) and in the field of police and judicial cooperation (Art. 82-87 TFEU).

II. Since November 3 1995, Austria has stored documents transmitted from the ministries without any additional remarks in an internal Parliament EU database. So far, more than 250,000 documents are in that database. Since September 2006, the European Commission has submitted proposals for Acts directly to the EU database. An overview of these documents is in a weekly informational mail called "News from the European Commission" which is transmitted to the deputies of the National and Federal Councils as well as to the state parliaments every Monday. These informational mails make it possible for the state parliaments to directly access the Commission's documents. The directly-transmitted Commission documents are also available on the internet under the path "Parliament and the European Union - Documents of the European Union - Direct Entry" and thus accessible for all citizens.

As soon as the Commission's templates are available in the EU database, the EU and International Service conduct an internal preliminary subsidiarity and proportionality test of all of the legislative proposals through which potentially problematic documents are identified. This internal preliminary test is carried out in three steps:

1. Test step: Legal basis - Can the EU take action?
- Does a legal basis exist for the measure in the Community Law?
- Is the measure covered by this legal basis?
- If the competence exclusive or divided between the Member States and the Union?

2. Test step: Subsidiarity - May the EU become active in this concrete case?

- Can the objectives of the action not be sufficiently achieved by the Member States at the national, regional or local level?
- Can the objectives of the measure be better reached at EU level?

Test step: Proportionality - How should the EU use its competence?
Is the planned measure necessary with regard to reaching the goals?
– Does sufficient space remain for national decisions and are the legal form, amount of regulation, administration and financial expenditure appropriate?

Only with fulfillment of all three test steps can a measure be seen as in accordance with the subsidiarity and proportionality principles and viewed as permissible. After the failure of the "Constitution for Europe" project, it could be managed to save essential content of the rejected draft contract[1] with a new contract - which in the course of its development was also named Reform Treaty due to its general purpose and EU Basic Treaty due to its character, but Treaty of Lisbon[2] came out on top named after its place of conclusion

– and to transfer this contract into the primary legislation of the European Union. Similar to previous primary treaties, it is an international-law treaty which was signed by the 27 Member States on 13 December 2007, namely because of the former Portuguese Council Presidency in Lisbon. As in the proposed Constitution, it replaces the agreement, but not by a single treaty, as was planned in the Constitution, but rather by three instruments, namely the Treaty on European Union, the Treaty on the Functioning of the European Union and the EU Charter of Fundamental Rights, which all have the same rank. Thereby, the Treaty on European Union stands in the tradition of its predecessor from 1992, while the Treaty on the Functioning of the European.

– Union is in the tradition of the EC Treaty, which goes back to the Treaty of 1951. Through the new treaty system, the European Union received a uniform structure and juridical personality.

III. The most important innovations from the Treaty of Lisbon concern the uniform structure of the European Union - the three-pillar model with its own European Community within the scope of the Union was removed - the relief of the Union legal settlement by further reducing the unanimity requirement in the Council[3] , the strengthening of the democratic element by expanding the participation of the European

[1] Compare with this HERIBERT FRANZ KOECK/TANJA Marktler, The Constitutional Treaty Overview and Analysis (Der Verfassungsvertrag - Überblick und Analyse) in: Klaus Beckmann, Jurgen Dieringer and Ulrich Huffeld (ed.): A Constitution for Europe, 2nd edition (Eine Verfassung für Europa, 2. Aufl), Tübingen 2005, pp. 328 et seqs.

[2] See KLEMENS H. FISCHER, The Treaty of Lisbon. Text and Commentary on the European Reform Treaty (Der Vertrag von Lissabon. Text und Kommentar zum Europäischen Reformvertrag), Baden-Baden 2008.

[3] Article 12 TEU.

Parliament[1] whereby the co-decision procedure became the ordinary legislative procedure of the Union, the emphasis on the subsidiarity principle by relevant involvement of national parliaments[2] together with the corresponding right of action before the European Court of Justice[3] and the empowerment of citizens, whether through enhanced consultation opportunity in the form of the European Citizens' Initiative[4] or in the field of fundamental rights by the now also formal legal status of the EU Charter of Fundamental Rights. An expressly anchored withdrawal right[5] ensures the right of self- determination of each Member State regarding integration-oriented political matters. Finally, it carries the dual function of High Representative for Foreign Affairs and Security Policy, which connects the Presidency of the Council of Foreign Ministers with the Vice-Presidency of the Commission for the effectiveness of the Union externally[6].

The entry into force of the Treaty of Lisbon was originally scheduled for 1 January 2009. This date could not be met due to the negative outcome of the first Irish referendum in June 2008.

Only the second Irish referendum, which took place in October 2009 and resulted in significant approval of the Treaty, removed the biggest obstacle[7]. On 13 November 2009, with the Czech instrument of ratification, the last of the 27 documents was deposited with the Italian government in Rome. The Treaty came into force as planned "on the first day of the year following the

[1] Article 12b TEU.
[2] Article 11(4) TEU.
[3] Article 6 TEU.
[4] Article 50 TEU.
[5] Article 18 TEU
[6] Compare MARKUS C. KERBER (Ed.), The fight for the Lisbon Treaty (Der Kampf um den Lissabon- Vertrag), Stuttgart, 2010.
[7] HERBERT SCHAMBECK, Possibilities and Limits of the Constitution in National and European Perspective (Moglichkeiten und Grenzen der Verfassung in staatlicher und europaischer Sicht), Revista De Stiinte Juridice, Universitatea din Craiova, Facultatea de drept si stiinte administrative 1(42) 2008, pp. 7 *et seqs*. and On the development of increasingly integrated Europe to the EU Constitutional Treaty and the Reform Treaty of Lisbon (Über die Entwicklung des sich integrierenden Europa zum EU-Verfassungsvertrag und zum Reformvertrag von Lissabon), in: ,,Jean Monnet" European Module ,,History of the European idea, civilization and construction", Publishing house of the University of Pitesti, Pitesti 2009, pp. 13 *et seqs*.

deposit of the last instrument of ratification of the month" (Art. 6 paragraph 2 of the Treaty of Lisbon); thus, on 1 December 2009.

IV. When discussing the implementation of EU law into national law, it should finally be emphasized that, precisely in relation to the new order of the integrated Europe, it is essential that interlocking European law with the respective constitutional law[1] achieve not only a standardization but also a motivation aligned with the knowledge of necessity to comply with a standard as well as conviction regarding the connection. This requires a suitable European- responsibility thinking which, along with the economic and monetary community as well as a legal community and community of values[2], can be experienced in a harmonization of homeland, state and European consciousness.

[1] HERBERT SCHAMBECK, Possibilities and Limits of the Constitution in National and European Perspective (Moglichkeiten und Grenzen der Verfassung in staatlicher und europaischer Sicht), Revista De Stiinte Juridice, Universitatea din Craiova, Facultatea de drept si stiinte administrative 1(42) 2008, pp. 7 *et seqs*. and On the development of increasingly integrated Europe to the EU Constitutional Treaty and the Reform Treaty of Lisbon (Über die Entwicklung des sich integrierenden Europa zum EU-Verfassungsvertrag und zum Reformvertrag von Lissabon), in: „Jean Monnet" European Module „History of the European idea, civilization and construction", Publishing house of the University of Pitesti, Pitesti 2009, pp. 13 *et seqs*.

[2] See HERBERT SCHAMBECK, The integrated Europe as a community of values (Das integrierte Europa auch als Wertegemeinschaft), in: "Jean Monnet" European modules, the international conference. The history of the European Union Culture and Citizenship („Jean Monnet" European Module, die internationale Konferenz. Die Geschichte der Europäischen Union, Kultur und Bürgerschaft), University of Pitesti, Faculty of Law and Administrative Studies, Pitesti, 2008, pp. 9 *et seqs.*

THE EUROPEAN MODEL OF MIGRATION AND INTEGRATION IN A GLOBALIZED WORLD

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Abstract

The Issues of Migration and Integration in Europe has to be considered in a global perspective. The interests of migrants and of the host countries must be mutually balanced. So far, no over-all solution has been found, lacking a functioning international economic order that primarily serves people and considers capital as a means and not as an end, on the one hand, and a common approach to human rights that is based on the unreserved recognition of human dignity for all public and private action.

I. THE NEED FOR AN INTEGRAL APPROACH

The issue of migration and integration can be viewed from different perspectives. It is an issue that concerns the individual, groups of individuals and society at large, and it concerns their political form of organization – the local unit, the regional unit, the state, supranational communities and the international community at large.

Yet, though the issue of migration and integration can be viewed from different perspectives, it is still one and the same issue, and different perspectives do not mean that migration and integration cease to be an issue that has to be dealt with in an integral form.

A. An issue of global government

The issue of migration and integration is, politically spoken, an issue for government. Government, however, has to take a comprehensive approach to the issue of migration and integration. In a globalized world, a comprehensive approach can only be a global approach. At the same time, government has to have regard to the principle of subsidiarity. Subsidiarity means that in regulating migration

and integration regard has to be had to the interest of the lower level; but subsidiarity does not require that the interest of the higher level be disregarded. To put it to the extreme: the interest of the individual has to be respected; but in pursuing its interest, the individual must not ignore the interest of society at large, whether the interest of the national or of the international society.

At this point we could start on an *excursus* on subsidiarity; but this is not the proper time and place for such an *excursus.* Suffice it to say that there is no procedure by which it could be decided in an absolutely objective manner whether a certain conduct by government respects or violates the principle of subsidiarity. Here, as in other cases, the outcome will be determined by what the German jurist RUDOLF VON IHERING called "The struggle for law"[1] which is fought by legal and extra-legal means, not excluding passive or active resistance if this is required by that duty that every responsible person owes to himself, namely the duty to assert his rights.

B. The present lack of global government

The issue of migration and integration in a globalized world is a global issue; and global issues are a matter for global government. Unfortunately, so far there is no global government. Government, in the full meaning of the term, requires the existence of all three powers of government: the legislative, the executive and the judicial power. And it requires their existence in an institutionalized form. The United Nations Organization is no world government, for it lacks the power of legislation, it lacks the power of adjudication, and its executive power is limited to the preservation and restoration of peace by the Security Council in a procedure that has often proved to be ineffective.

1. No global legislature

It is said that in an international community that is not yet sufficiently organized, international treaties may take the place of international legislation; indeed, MANLEY O. HUDSON gave to his collection of "law-making treaties" edited between 1931 and 1950 the

[1] RUDOLF VON IHERING, *Der Kampf ums Recht,* Vienna 1872; English translation: *The Struggle for Law*, 1879)

title *International Legislation*.[1] However, the cumbersome procedure leading to a general multilateral treaty does not fit the notion of legislation and this for various reasons, the most important one being that there is no institutionalized legislative system which functions continuously or at least can be set in motion by request of one or more states. International treaty-making thus does not cope with the need for continuous adaptation of the law in a continuously changing world.

The problem was recognized as early as 1919, when the Covenant of the League of Nations was drafted; and the attempt to resolve it resulted in an Article 19 which provided that "[t]he Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable". However, Article 19 did not work as a sufficient incentive for international law-making by treaties; it did not even make obsolete the application of the legal figure referred to as the *clausula rebus sic stantibus* the (by its very nature unilateral) invocation of which the London Protocol of 1871 had unsuccessfully tried to bar.

The fact that state practice reflects the hesitation if not unwillingness of states to revise treaties advantageous for them even if disadvantageous to others resulted in the insertion, into the Vienna Convention on the Law of Treaties of 1969, of an Article 62 (*Fundamental change of circumstances*), according to which "[a] fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may […] be invoked as a ground for terminating of withdrawing from a treaty [if] the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty." Since the *clausula rebus sic stantibus* is an objective ground for the termination of a treaty, a state which justifiably invokes it does not depend on the good will of the other party or parties to the treaty for freeing itself from an unreasonable burden.

[1] MANLEY O. HUDSON (ed.), *International Legislation. A Collection of the Texts of Multipartite International Instruments of General Interest*, 9 vols. covering the period of 1919-1945, New York 1931 *et seqs.*

2. No global judicature

The fact that there is no institutionalized international legislator would (perhaps) be less problematic if there existed an institutionalized international regime of adjudication, because there have been many domestic legal orders where the law was adapted, to new demands originating from continuing social, and in particular economic, development not by legislature but by the courts. This was, and to a certain extent still is, the situation in the countries in the English legal tradition; because the common law relied on judicial precedents rather than on statutes. However, in order to be able to fulfil this function of progressive development of the law the jurisdiction of the courts has to be compulsory so that no legal subject can render ineffective this process by refusing to submit to adjudication.

The same could be true for the international legal order if the jurisdiction of (for example) the International Court of Justice, the primary judicial organ of the United Nations Organization, were compulsory. How important the role of an institution of supranational jurisdiction in clarifying and unfolding the law can be, even in a system that mainly relies on legislative acts has been proven by the European Court of Justice.[1] The most important principles of Union law (as, e.g., the primacy of Union law, the direct effect of norms of primary and secondary law not correctly transformed by Member States, and Member State liability) have taken shape only in the interpretation – restrictive, extensive and corrective – of the Court.

But the jurisdiction of the Court of Justice of the European Union[2] is compulsory; and that of the International Court of Justice is not. Rather, with the rare exception of those "matters specially provided for in the Charter of the United Nations or in treaties and conventions in force", states which want their case(s) decided by the Court have to submit to it in one of the ways provided for in Article 36 of Courts Statute. This can be done either by joint reference of a case by the parties or by the unilateral declaration of a state – made unconditionally or on

[1] Originally the Court of Justice of the European Communities, now the Court of Justice of the European Union.

[2] Today, the "Court of Justice of the European Union", refers to the judicial system of the European Union as a whole which not only includes the European Court of Justice but also the General Court (formerly the Court of First Instance) and possible specialized courts (such as the Civil Service Tribunal created in 2004).

condition of reciprocity on the part of several or certain states, or for a certain time – that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes. All disputes are considered to be of a legal nature which concern the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation, and the nature or extent of the reparation to be made for the breach of an international obligation.

The fact that the jurisdiction of the International Court of Justice if compulsory would relate to "any question of international law" would enable it to play, on the universal level, a role similar to that of the European Court of Justice on the European on the European level. However, since it is not compulsory, it can neither furnish sufficient precedents for the progressive development of international law nor can it exercise its proper function of peaceful settlement of international disputes.

II. SUBSIDIARY EXERCISE OF GLOBAL GOVERNANCE

As long as there is no global government, the subjects of international law, and that means – with certain exceptions – the states as the originary subjects of international law, have to step in and to provide the function of government for their part of international relations. And where – as it is the case in the European Union – states have transferred powers to a supranational entity, it is for this entity to exercise these powers for its part of international relations.

A. Ius cogens

1. Positive law

However, the states and the European Union are not completely free in deciding how to exercise, for their part, the function of international government. Rather, the states and the European Union are bound, in exercising this function, by international law, i.e. treaty law, customary law, and the general principles of law recognized by civilized nations.[1] Special regard has to be had to those norms of international law

[1] Cf. Article 38, paragraph 1, lit. a – c, Statute of the International Court of Justice.

which are of a peremptory character. Article 53[1] of the Vienna Convention on the Law of Treaties of 1969 defines a peremptory norm of general international law as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. All the just-mentioned rules are to be interpreted in the light of the principles of international law which are at the basis of the international legal order.

2. Natural law

Those principles of international law cannot be derived from positive international law alone, or from positive domestic law via the general principles of law recognized by civilized nations; rather, they set the framework within which states as well as the European Union exercise their international function of government. This framework is not determined by just the will of these entities, is not subject to their unrestraint volition. This framework is determined by the nature of the international community itself.

B. The international common good

1. Pluralism and the common good

While the international community is pluralistic and no state and no European Union may impose its philosophical and ideological view on others, a working international community still requires the recognition of certain common goals and the means necessary for their attainment by all states who aspire to the international common good.

The international common good can be formulated in analogy to the common good of the state which, in turn is nothing but the common good of its citizens or inhabitants. It comprises peace, freedom and welfare. Equally, the international common good comprises peace, freedom and welfare for every nation and every individual world-wide. It is for this reason that Alfred Verdross, when speaking about the international common good, was speaking about the expansion of the

[1] Article 53 – Treaties conflicting with a peremptory norm of general international law ("jus cogens").

classical notion of the common good into the common good of mankind (*bonum commune humanitatis*).[1]

Although, in a pluralistic society, no individual, and so also no state, can be forced to believe in the common good, those who do will see to it that they are not molested in, or altogether prevented from, their enjoyment of this common good, and – if necessary – will protect this common good in an act of self-defense. Even in the pluralistic society, whether national or international, those who do not abide by the rules necessary for the preservation of the common good, will be regarded outlaws and will be treated as such.

2. Recognition of the international common good

As regards the universal international level, the question of whether or not states recognize the establishment and preservation of the common good as the primary goal of the international community is practically moot, because all Member States of the United Nations have declared in the Charter their determination "to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,"[2] […] "to practice tolerance and live together in peace with one another as good neighbors, and to unite [their] strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples".[3]

Since the overwhelming majority of states are members of the United Nations, it is justified to say that the common good of mankind has been "accepted and recognized by the international community of

[1] See ALFRED VERDROSS, Der klassische Begriff des *bonum commune* und seine Entfaltung zum *bonum commune humanitatis*, 28 *Österreichische Zeitschrift für öffentliches Recht* (1977), p. 143 *et seqs.*
[2] Preamble, paragraphs 1-4, UN Charter.
[3] Preamble, paragraphs 5-8, UN Charter.

States as a whole" in the meaning of the term as used in Article 53 VCLT.[1] Moreover, there are no Non-Member States which would officially deny that they support the ends and means stated in the Preamble of the Charter. If not all of them live up to their respective commitments, nor do all Member States of the UN; but this another question.[2]

3. Traditional acceptance of the idea of the international common good

The notion of the international common good – like the notion of *ius cogens*, i.e. of peremptory norms of international law – is a notion that is central to natural law thinking and has been prominent throughout the history of international jurisprudence from Augustine (and perrhaps even from the Stoa and Cicero) through Thomas Aquinas down to the modern representatives of natural law thinking, like Samuel Pufendorf and Christian Wolff, and is still reflected in Vattel's *Droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*[3] which first appeared in 1758 and was widely used far into the nineteenth century. It was only with the rise of legal positivism in general and positivism in international law in particular that the common good stopped to by a guiding notion of the theory of international law and international relations and gave way to all kind of power-state theories of which that of Hegel was only one though at the time the most popular.

4. Repudiation and restoration of the idea of the international common good

Thus the idea of a common good of mankind was sidelined by the idea that each nation and its state had every right to pursue its interest at

[1] "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[2] It is a general principle of law that violation of the legal order by one or the other legal subject does not deprive that order of its binding force. Equally, if certain states violate the common good of mankind this does not deprive it of its character of the principal end of the international community.

[3] Leiden 1758

the cost of other nations and other states. Since this went hand in hand with an extreme idea of unrestrained sovereignty which even put the individual nationals at the mercy of their state, the idea that there would be an international duty to promote the common good of all men did not even come into the focus of positivist jurisprudence and power-state politics.

It was only after 1945 that the international community, forced by the traumatic experiences of two World Wars, returned to the idea that there was a

The idea of the international common good also finds expression in the notions of fundamental rights and fundamental duties of states, corresponding concepts which have evolved after the Second World War.

C. The European Union, the common good and the European values

What is true for the universal level is also true for the European level, both for the Council of Europe and the European Union. It is the latter we are concerned with here.

The European Union is not only bound by the common good of mankind under international law; it professes itself this common good, especially in Article 3 TEU which states that "[t]he Union's aim is to promote peace, its values and the well-being of its peoples"[1] and that "[t]he Union shall offer its citizens an area of freedom, security and justice".[2] And the European Union does not claim these goods only for its own citizens; rather, it considers them as goods for everyone. Accordingly, Article 21 TEU proclaims that "[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."[3] Article 21 TEU thus relies, for the international relations of the European Union, on the same values which are common to her and all Member States, namely the values of respect for human dignity, freedom,

[1] Article 3, paragraph 1, TEU.
[2] Article 3, paragraph 2, TEU.
[3] Article 21, paragraph 1, TEU.

democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities", and which presuppose "a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[1]

D. Migration and solidarity

The European Union is thus bound to respect these values in connection with migration, integration and citizenship. One of these values is solidarity. Solidarity is therefore an important aspect of the European policy in these areas; and if the European Union and its Member States are to fill out the existing lacuna in world government, solidarity must be taken into consideration also in the context of migration.

III. A GLOBAL VIEW OF MIGRATION

One of the main reasons for flight and migration are the more and more opening scissors between the poor and the rich.[2] Notwithstanding the process of globalisation, the world is more split than ever. The global north with its economic, political, and cultural dominance forms one side, the global south with its zones of distress, of exclusion and of humiliation forms the other. Moreover, inequality, especially economic inequality, is increasing not only between north and south but also between different groups within the various countries. The euphemisms of the "global village" is misleading; rather, new walls are erected everywhere which are but the expression of the increasing division.

The philosopher Zygmunt Bauman[3] has used a metaphorical pair of notions in order to describe the global tension. He distinguishes between tourists and vagrants. Tourists are the inhabitants of the rich north, for whom a world-wide freedom of movement is accepted, even

[1] Article 2 TEU.

[2] Much of the following is taken from THOMAS GEBAUER, Flüchtlinge an den EU Außengrenzen. Eine Herausforderung für unser Handeln (Paper delivered at the Ecumenical Centre of the Evangelische Kirche in Mitteldeutschland, Magdeburg, on 11 November 2010), in: *PRO ASYL e.V. & medico international*, 1 December 2010.

[3] Born in 1925 in Poznań, Zygmunt Bauman is a Polish-British Sociologist. Cf., inter alia, his book *Globalization: The Human Consequences*. New York 1998.

requested. Vagrants are the inhabitants of the poor south who do not feel at home anywhere and who are welcome nowhere.

A. Migration caused by war and political persecution

Political refugees and persons fleeing from war enjoy the protection of the Convention relating to the Status of Refugees (CRSR), a multinational treaty adopted under the auspices of the United Nations in Geneva in 1951 that defines who is a refugee, and sets out the rights of individuals who are granted asylum and the responsibilities of nations that grant asylum. Presently, there are more than 10 million people falling unter the Convention and thus in the competence of the United Nation's High Commissioner for Refugees. In addition, there are 5 million Palestinian refugees for whom a special institution has been set up, the UNRWA (United Nations Relief and Works Agency for Palestine Refugees in the Near East). The number of political refugees is relatively constant, with a temporary increase in the case of a major military conflict, as during the Iraqi war and the civil strife in Syria.

B. Migration caused by ecological disasters

But there are many more refugees who do not enjoy any special protection under international law because they do not come under the Geneva Convention, because they are people whose migration is caused by economic and/or ecological crises. There is an estimated number of 50 to 150 million people who were forced to leave their home region because of draughts, desertification or other ecologic catastrophes. The International Migration Organisation (IMO) predicts for the midst of the century a further increase in the number of ecological refugees up to 250 million.

C. Migration caused by economic problems

However, the greatest part of migrants consists of people who are just in search for a better life. While estimates vary, they number more than 200 million even now; and there is a constant increase. They are often referred to as "refugees for economic reasons" and looked upon as people who are not forced to migrate but only set out in order to

participate in the wealth of the north. However, in most cases their situation requires them to leave; and therefore they can also be subsumed under the notion of forced migrants.

D. The broad notion of "forced migration"

Forced migration is a broader notion than spontaneous flight from civil war or political oppression and also comprises that kind of migration where people decide to leave their homes because they have come to the conclusion that misery, lack of land or destruction of the environment do not permit them to stay and to live a decent life.[1]

IV. GLOBALISATION AND MIGRATION

A. A critical view of globalisation

According to its critics, globalisation is an economic strategy for the better use of capital. If economic growth comes to its limits, profits can only be made through a decrease in the costs of production. This leads to the outsourcing of labour with the consequence that working places are lost, to the setting up of tax havens with the consequence that budgetary means for social measure are diminished, a lowering of the prices for raw materials, wage dumping and the turn from regular to irregular labour contracts. (Critics also list free trade in this context, but free trade as such is no negative consequence.)

Critics also argue that globalisation is characterised by two opposing trends. On the one hand, world has become integrated in a global economic and, consequently, also worldwide system social system. On the other hand, parts of the world population has become economically excluded and turned into losers for whom there is no place in worldwide economic system and who are regarded *redundant people*.

[1] For the following, see also the article: Migration und Flüchtlingsschutz im Zeichen der Globalisierung, *PRO ASYL e.V. & medico international,* 8. Oktober 2008*;* also: VIKTORIA BECHSTEIN, Grenzenlos. Migration in einer begrenzten Welt, *ASYL e.V. & medico international,* 11 September 2013. Cf. also the documentation of the Conference held in Berlin on 2 September 2013 on the topic: Grenzenlos. Migration in einer begrenzten Welt, in: *epd Evangelischer Pressedienst. Dokumentation*, No. 40, 1 November 201.

B. Globalisation and unrestricted capitalism

However, the main reason for this dilemma is not globalisation but unrestricted capitalism for which the maximisation of profit is the supreme end and which considers labour as much a variable production factor as other, non-human factors in the economic process. This unrestricted capitalism was propagated, after the collapse of the Eastern bloc with its system of real socialism, by the new "neo-liberal" school in the United States, especially at Harvard. However, it has been long established, within the International Labour Organisation, that "labour is not a commodity" and that, therefore, the supreme end of the economy is not the maximisation of profit but the maximisation of the conditions which would guarantee a dignified life to everyone. The notion of redundant people is a monstrosity incompatible with the supreme value of any civilised society, i.e. with the dignity of man.

C. Remedy: Ordo-Liberalism

If critics of capitalism argue that the capitalistic system does not only create prosperity but also poverty, this is only correct with regard to an economy where capitalism is not restrained by measures derived from the theory of Ordo-Liberalism[1] and is not embedded in a social welfare system that is able to cope with the problem of poverty, be it only by a system of transfer payments.

D. Lack of a world-wide welfare system

Neither globalisation nor capitalism is to be blamed for the opening pair of scissors between rich and poor. It is only the lack of a world-wide welfare system that would permit all people around the world to have a share in prosperity that leaves some, or even many, people in poverty. However, the establishment of such a world-wide welfare system has so far been impossible for lack of a world-wide government with legislative power.

For this reason, many problems exist. For many people in Africa, Asia and Latin America flight to the rich north is their only hope. While

[1] With its practical implementation in the form of social market economy.

people from Africa mainly turn to Europe, people from Latin America turn to the United States. As regard's people from Asia, they look both to Europe and to prosperous countries nearer to them, as Australia and New Zealand.

E. Practical aspects of forced migration

1. Brain drain

Forced migration entails not only the most needy of the people in these continents, it plays a role with regard to those members of the society who, because of their training and education, would be able, in principle, to make a living at home. They do not compare their own fate with that of the poorer ones in their own countries but with the status of persons of equivalent education in the rich(er) countries. This leads to a brain drain for the home countries because those who leave are those who have gone to school or even to university. It is said that the costs of theirs training and education which are borne by their home countries prior to their emigration exceeds the development aid which these countries receive from countries who are the beneficiaries of this training and education.

2. Re-transfer of money

On the other hand, many of these migrants transfer money back home. These private transfer payments amount to about 300 billion US$. This is more than the development aid given by the industrialised to the developing countries, which is around 100 billion US$.

3. Fending off unwelcome migrants

Since the best way for people in poor countries to improve their situation is to migrate to rich countries, and since the rich countries are not prepared to receive an uncontrollable number of migrants, various system have been devised in order to keep off unwelcome people. And since this makes it more difficult for them to overcome the legal and factual obstacles on their way to the north, people smuggling has become a more profitable occupation than even the smuggling of drugs.

4. Negative and positive aspects of illegal migration

Moreover, the position taken in the industrial countries towards illegal immigration is ambivalent. While they officially fight illegal

immigration, illegal immigrants form an appreciable part of their labour force and contribute to the gross domestic product by up to 20 per cent.

5. Global migration networks

World-wide migration is also favoured by global networks which connect migrants all over the world with their respective country of origin and play a major role in the global parallel (or "shadow") economy. These networks provide newcomers with the necessary information and a minimum of cultural support. While they also facilitate the transfer back of money and other assets, they not infrequently are also the basis for mutual exploitation of migrants.

6. Globalisation "from the bottom"

Forced migration can be regarded a kind of globalisation from the bottom. People in countries of origin regard migration part of their survival strategy. Many families, clans and villages rely on the diversification of income and distribute part of their members all over the world. Safeguarding the future is one of the main grounds for engaging in the migration process.

V. CONTROLLING MIGRATION PART OF SUBSIDIARY WORLD GOVERNANCE

Since industrial countries cannot control this globalisation from the bottom, they regard it as dangerous and take measures against it. Migration management encompasses all political strategies and all measure taken for a better controlling of migration.

A. Critical views of European migration policies

While this may be considered as a contribution to subsidiary world governance, the political strategies are often dominated by utility criteria which are more oriented on the advantage of the receiving countries than on that of the countries of origin.

Thus, the European Union allegedly favours migration only inasmuch as it contributes to higher competitiveness and strengthens economic growth. Therefore, refugees – since they cannot be selected according to these criteria – are not welcome. Together with illegal

immigrants they are regarded a threat to the sovereignty of the receiving states and to an orderly migration management.

For these reasons, the European Union and its Member States are said to have adopted a restrictive border, refugee and migration regime. They have also developed what critics call security imperialism, i.e. policies which force countries of origin to co-operate in measure of migration management, to prevent people from illegal migration to the Europe and to take back those who have illegally entered the European Union.

Critics argue that the migration model of the European Union and its Member States is the expression of the wish to keep those away for whom there does not seem to be a place in the profitable zones of the world. It allegedly serves to secure the world of tourists against the world of vagrants.

B. Solidarisation or de-solidarisation?

Critics also point out that there seems to be an incoherence between the de-solidarisation at the political level and the solidarisation on the level of the civil society, as it is demonstrated by the appreciable contributions made in the course of the various donation campaigns. They regard this fact the expression of an ethical protest against all the misery in the world; in their view, what is needed is to channel the ethical protest into a political programme.

C. Private charity v. public social care

According to these critics of the present migration policies, charity alone is not enough for bringing about lasting improvements; what is needed is the consequent realisation of human rights in general, and the right to a decent life, in particular. It is not sufficient to believe in human rights; it is necessary to enforce them in social struggles. This might be especially necessary for the so-called social human rights which do not give an absolute right to a certain standard of life but only to measure aiming at what is reasonable and possible.

VI. CONCLUSIONS

A. The desirability of a global migration policy

It does not come as a surprise that the critics of the present global situation call for binding legal structures at a universal level. But they have little understanding for the complex situation states and unions of states find themselves in if – as it is the case today – the world-wider legislator does not yet exist. And they hardly ever face the question who is to blame for it. Twenty-eight Member States of the European Union have been ready to transfer much of their sovereign powers to a supranational union. How many states of the third world would be prepared to do so? And how many would claim that such a world order is but form of neo-colonialism?

1. The European approach the second-best one?

The European Union and its Member States thus have to see to it that things work out as best as they can in their own sphere of influence. And this cannot mean that Europe alone has to shoulder the burden of an unjust world characterized by the lack of solidarity.

2. Solidarity and responsibility

The European Commission has caused a study to be made on *Active Inclusion of Migrants.* The study was jointly prepared by Institute for the Study of Labor (IZA) and the The Economic and Social Research Institute (ESRI) and presented in 2011.[1] The purpose of this study was threefold, namely to "provide [.] the European Commission with (i) an expert assessment of the main trends in the situation of migrants with regard to social assistance and access to social services, (ii) an in-depth analysis of the main determinants of these trends, and (iii) a comprehensive account of the mutual interaction of migration policies and broadly defined social assistance policies."[2]

The study comes to the conclusion that "that there is no *a priori* evidence that migration would pose a burden on welfare systems."[3] This conclusion is based on the insight that there is a "relatively *low* use of welfare by migrants vis-à-vis *comparable* natives (in spite of higher

[1] Bonn – Dublin – Brussels 2011.
[2] At p. vi.
[3] Ibid.

poverty rates), and so the policy discussion should be about the social protection of migrants and the extension of social supports and enabling services to them."[1]

At the same time, the study finds that "[i]mmigration and active inclusion policies need to be implemented in a coordinated manner" and that "[t]here is a need for a battery of policies, including those aiming at improving antidiscrimination legislation, the educational attainment, training and language skills of migrants, improved migration policy, frictionless recognition of foreign qualifications, unrestricted access to public sector jobs, and effective dissemination of labour market information among migrants. Housing and access to credit are other important areas that deserve attention. Finally, data collection, monitoring and evaluation mechanisms are absolutely crucial to provide for learning and dissemination of good practices in active inclusion strategies."[2]

The study proves three different aspects of European migration policy, namely: first, that the European Commission is aware of the deficiencies of the European migration policy; second, that the European Commission is actively engaged in the migration issue which it approaches with a far less negative attitude than critics like to argue; and third, that there still remains much to be done in this field.

B. Towards global justice based on global values

The critics of the present state of affairs are right in claiming that the world should be made a more just place. They are right if they demand, for everyone, the right to go and the right to remain: the right to go in order to seek better conditions of life; the right to stay in order not to be forced to flee from undignified situations, from ecological degradation, from persecution and from force.

In their support, they invoke Immanuel Kant who, in his opus *Zum ewigen Frieden. Ein philosophischer Entwurf,*[3] spoke of a world citizenship based on the idea of universal hospitality. Kant relied on the argument that there is a common right of all to the entire world surface

[1] Ibid.
[2] Ibid.
[3] 1st ed. 1795, 2nd ed. 1796.

and therefore a right to be tolerated by others because "originally no one has more right to be at any particular spot of the world than any other". This approach neglects the fact that no one – be it a single state, a regional union of states or the international community of states as a whole – is at the point of distributing the world for the first time. The world is already distributed; and the idea that no one should be entitled to unilaterally change this distribution is an important condition for preserving peace among the nations. It is true that the globalisation has not only set the frame for global intercourse but has also provided the means for rectifying world-wide inequalities, at least in theory. But this theory has to be transformed, first, into a world-wide political programme and, second, into a world-wide legal order.

Yet, a world-wide legal order presupposes a world-wide agreement on the principles of living together, principles which can be no others than those based the values listed in Article 2 and 3 TEU.[1] As long as we do not have a world-wide community of states which recognize pluralism, adhere to freedom, democracy and the rule of law and respect human rights, we will not have a world-wide government and therefore no really equitable distribution of the goods of this world.

[1] Article 2 states the following values and their social basis: "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." Article 3, Paragraph 1 TEU provides that "[t]he Union's aim is to promote peace, its values and the well-being of its peoples".

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

CONTEMPORARY MEANING OF THE SOVEREIGNTY IN POLAND

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Abstract:

To characterize the essence of the principle of sovereignty of the nation we referred in our article to Polish constitutions from the period between World War One and Two as well as to the achievement of the Polish legal thought from the present period. Also, in our study we intend to analyze the delegation to an international organization or international institution the competence of organs of State authority in relation to certain matters as limitation of Sovereignty. To this end we have analyzed the procedure of passing the statute granting consent for ratification of an international agreement limiting the execution of sovereignty.

Key-words: *Sovereignty, contemporary, Poland*

1. THE NATION AS THE SUBJECT OF SUPREME POWER IN POLAND

At the beginning of the transformation of the political system the constitutional amendment of 29 Dec. 1989 rejected the principle of sovereignty of the working people and determined the nation as the subject of supreme power in Poland. The constitution of 2 April 1997 introduced no amendments in this area and proclaimed the principle of sovereignty of the nation, stipulating in art. 4 that supreme power is vested in the nation, who exercise this power either directly or through their representatives. This is an explicit reference to the traditional concept of the principle of sovereignty in Polish constitutional law, dating back to the Constitution of May 3, 1791. This Constitution was in force for only 14 months. The intervention of the armed forces of Russia put an end to the Polish revolution of that time. In the course of the next few years, as a result of the second (1792) and third (1795) partitions the Polish state ceased to exist. For over one hundred years Poles were deprived of their own state. The defeat of Germany and Austria-Hungary in 1918, the support of the countries of the Entente and the USA for

Polish aspirations for independence, as well as the outbreak of the revolution in Russia, made it possible for Poland to regain its independence in November 1918.

To characterize the essence of the principle of sovereignty of the nation it is necessary to refer to Polish constitutions from the period between World War One and Two as well as to the achievement of the Polish legal thought from this period. The Constitution of 1921 defined the collective subject of state authority - the nation and introduced the principle of the sovereignty of the nation. To characterize the contents of this principle it is necessary to study Polish legal opinion and judicial decisions of Polish courts before the World War 2. The Polish Constitution of 1921 introducing the principle of sovereignty of the nation stimulated a heated discussion on this subject. The theories of law of other European countries were drawn upon in it. On the one hand there were opinions recognizing the nation from the legal point of view as a personifying fiction, because of the absence in the state of organs realizing its authority completely[1]. On the other hand, however, efforts were made to define sovereignty positively. It was identified with different subjects: the ethnic nation, the body of electors, the whole of the inhabitants[2]. The opinion based on the French doctrine of constitutional law, according to which the nation is a political community comprising all citizens regardless of their ethnic affiliation, became widespread. It found supporters even after the adoption of the constitution of Polish Peoples Republic which clearly recognized the working classes as the sovereign[3].

At present, the Constitution treats the Nation – creators of statehood, subject of power – in a political sense as a community that directly decides on its issues or the one that uses its representatives and the creator of the state bodies legalizing their activities. In the constitutional approach the people means a group of individuals tied with one another in a political sense, separate from other groups, aware of that fact and acting in accordance with that awareness. Their will concerning the issues of the political system does not reflect the will of all but a common will in the meaning given it by J. J. Rousseau. A question arises

[1] Vgl. *W. L. Jaworski*, Prawa Państwa Polskiego, Kraków 1921, Bd. II, S. 116
[2] Vgl. *W. Zakrzewski*, Pojęcie narodu w Konstytucji Marcowej, Panstwo i Prawo 5-6/1946.
[3] Vgl. *W. Zamkowski*, Dyktatura, suwerenność, demokracja, Ossolineum 1974, S. 45.

here, if the People (or Nation) so understood may be identified, in accordance with the view that took root over the decades, with the citizens in general. That would be confirmed by the expression contained in the preamble to the Constitution: 'We, the Polish Nation– all citizens of the Republic of Poland . . . establish our Constitution . . .'

Besides, this in principle is the only possible positive definition of the sovereign. However, such an interpretation poses a serious threat that the legislator creating the provisions determining the acquisition and loss of citizenship would decide on the subjective scope of community of citizens. Thus, not the community constituting the state, but the creator of e.g. the Constitution or the legislator forming the institution of citizenship might become the subject of power. Therefore, reservations are voiced that the Constitution can neither in this way nor any other define the notion of the sovereign[1]. On the other hand, identification of the nation with the community of citizens may be misleading, because apart from the individuals entitled to political activity it comprises minors or legally incapacitated person holding Polish citizenship, who are excluded from political life and denied the right to decide on the matters of the state. However, they are included in the community constituting the state, "they also belong to the Nation and participate in exercising power for the simple reason that their good is also (or possibly primarily: children) accomplished in the state of this Nation"[2].

It should be added here that in case of the elections to the European Parliament, as well as in elections to councils of communes the election right have not only citizens of the Republic of Poland but also citizens of other EU-states. After adoption of the Act of January 23, 2004 on the elections to the European Parliament the group of the deputies lodged a complaint to the Constitutional Tribunal indicated that the granting of electoral rights to the European Parliament to foreigners being citizens of other EU-states in elections conducted in Poland violates the principle of the sovereignty of the Nation. The Constitutional Tribunal stated: "The European Parliament is not an organ exercising authority in the Republic of Poland but an organ realizing defined functions within the structure of the EU. […] In consequence, the electoral procedure to the European Parliament does not influence the

[1] Vgl. *P. Sarnecki*, Idee przewodnie Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r., Przeglad Sejmowy. 5/ 1997, S. 19–20.
[2] *P. Tuleja*, Prawo konstytucyjne, Warszawa 1995, S. 33.

method of the creation and functioning of the organs of the Republic of Poland and its realization does not have the intention of exercising supreme power in the Republic of Poland."[1]

The Constitution does not define the Nation in terms of ethnicity, though certain doubts may be caused by vague wording from the preamble quoted above, referring to the "Polish Nation", art. 6 section 1 stipulating that the Republic of Poland shall provide conditions for the people's equal access to the products of culture which are the source of the "Nation's" identity and art. 5 stipulating that the Republic of Poland safeguards the "national heritage". In essence, however, these phrases should not be understood as the reference to the concept of an ethnic nation. In this case the thesis formulated by the Supreme Court at the threshold of political transformation still retains its validity, stating that the notion of the "Polish Nation" used in art. 8 of the Constitution then in force simply denotes the nation living in Poland and does not differ from the notion of "nation" (without the quantifying adjective "Polish") as the subject of sovereignty[2].

Such a notion of nation is tightly connected with the principle of self-determination of the nation, i.e. the nation's right to legal subjectivity in international relations, the right to establish an independent state and the right to become the subject of supreme power in this state (the sovereign). This principle is the basis for inferring the prohibition to conduct any activity by one state aiming at undermining the independence of another state. The UN Charter stipulates the principle of a nation's self-determination as the basis of friendly and peaceful relations between nations. The methods used to implement the principle include elections, plebiscites, wars for national liberation, etc.

Reference to the collective subject of sovereignty in art. 4 of the Constitution might provoke a discussion whether this might not constitute the grounds for narrowing the scope of individual rights. Nation as the subject of power is not a sum of individuals constituting it. Constitutional regulations concerning legal status of an individual provide the grounds for dispelling such reservations. They guarantee a citizen the right to participate in political life and thus control public matters, to decide on the matters of the state in person or through elected

[1] OTK-A 2004, No 5, item. 47. [OTK - ruling of the Constitutional Tribunal].

[2] Vgl. *K. Grzybowska*, Obywatelstwo i narodowość – konstytucyjna koncepcja, Rzeczpospolita 14.2.1990, S. 4.

representatives. More importantly, the Constitution does not treat an individual as a means to accomplish the state's aims but as a point of reference for the activity of public authority, for the activity of the state.

It is necessary to point out that the acceptance of the principle of sovereignty of the nation has an external aspect. Art. 5 of the Constitution emphasizes such values as the independence and integrity of the territory of the Republic of Poland.

2. DELEGATION TO AN INTERNATIONAL ORGANIZATION OR INTERNATIONAL INSTITUTION THE COMPETENCE OF ORGANS OF STATE AUTHORITY IN RELATION TO CERTAIN MATTERS AS LIMITATION OF SOVEREIGNTY

From the point of view of the principle of sovereignty a very significant regulation is contained in Article 90 of the Constitution. The art. 90 states:
"1. The Republic of Poland, by virtue of international agreements, delegates to an international organization or international institution the competence of organs of State authority in relation to certain matters".

2.A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.
3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.
4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

This regulation allows only to delegate the competences but not to limit the sovereignty. Even when on the basis of an international agreement Poland has conferred the legislative competence onto an international organisation or body, the Constitution remains the supreme law in the Republic of Poland. The Constitutional Tribunal ruled: "The Constitution remains 'the supreme law of the Republic of Poland' in

relation to all international agreements, including agreements delegating competence. In particular […] there could not come about a delegating of competence to the extent that would cause Poland not to be able to function as a sovereign and democratic state. Furthermore, the limiting of the scope of delegating to 'certain matters' means a prohibition on delegating: firstly, the entirely of the competence of a given organ; secondly, competence in the entirely of matters in a given field; and thirdly, competence as to the essence of matters defining the management of a given organ of state authority".[1]

The regulation from art. 90 of the Constitution is quite detailed when defining the manner of granting consent for conferring the competences of the state authority bodies onto the international subjects; however, it is too vague in its treatment of the essence of the matter. Not a single word is devoted to sovereignty, even though it may be unequivocally inferred from its content that it is concerned with this matter. Limitation of exercising sovereignty as stipulated by art. 90 is by no means tantamount to the limitation of sovereignty.

K. Działocha comment states the following in his comment: "The constitutional norm referring to the conferral ('may confer') of competences of state authority bodies onto an international organisation or body in certain matters is an act which results in the fact that the Republic of Poland resigns from its monopoly of exercising power within a determined area, admitting the application of legal acts of an international organisation (international body) within this area in its domestic matters"[2].

After Poland's accession to EU on the strength of an independent decision by the body determining Poland's political system the conferral of competences is tantamount to replacing the Polish legislator by the EU legislator, which results in complete application of respective EU norms. The above concerns not only the *sensu stricto* norms of EU law but also the norms from outside the system which are referred to by EU law. This therefore excludes the situation when a Polish state body maintains that it is only bound by Polish law and the law of an international organisation or body onto which the Republic of Poland has conferred legislative competences in a given sphere of social relations, but refuses to apply the

[1] OTK-A 2005, No 5, item. 49.

[2] *K. Działocha*, Commentary of art. 90, p. 3 [in:] *L. Garlicki* (ed.), Constitution Commentary, Warszawa.

norms enacted by another legislator to which the Polish or EU legislator refers.

In short – if you have said A, you must also say B. If we agreed to recognize the legislative competences of EU bodies in a given sphere of social relations, we have to acknowledge all the consequences, including the recognition of primacy of certain norms from other systems over EU law if this results from the will of the EU legislator. It is interesting that reference to other legal acts or even legal systems is not reprehensible in itself. It is justified by the principle of rationality of legislative activity inferred from the principle of a democratic stated ruled by law (cf. commentary to art. 2). If a matter is well regulated (from the point of view of the legislator, i.e. it suits the aims of regulation yet to be enacted) by a legal act, the legislator faces two options: either repeating it in the new regulation or referring to the already existing legal act.

As has been aptly noted by Polish legal commentators dealing with EU law, "the lack in the treaty materials of any clear delimitation as to the EU institutions' powers to legislate, in effect allows them to enact secondary law on the basis of competencies that arise under primary Community law. This occurs by applying a teleological interpretation enabling the EU [...] to so function notwithstanding the absence of any specific treaty authorization. One can scarcely fail to note here, that such a *modus operandi* represents a serious challenge to the sovereignty of the Member States".[1]

Perceiving this risk, the Constitutional Tribunal has held that: „Each international organisation is a secondary subject whose functioning is dependent on the will of member states. The Member States of the European Union, therefore, retain the right to assess whether the organs managing the European Community are acting within the frameworks of the delegated competences and the principles of subsidiarity and proportionality. Regulations passed in the contravention of these frameworks are not covered by the principle of the primacy of Community law".[2]

Ratification of an agreement determined by art. 90 section 1 of the Polish Constitution depends on the discretionary powers of the President, but he or she may ratify it only after the parliament grants

[1] J.W. Tkaczyński, R. Potorski, R. Willa, *Unia Europejska. Wybrane aspekty ustrojowe*, Toruń 2007, p. 126-127.
[2] OTK-A 2005, No 5, item. 49.

consent in a statute. Undoubtedly, the statute granting consent may, or even should, include the provisions determining the moment of its coming into effect. It also might include the provisions determining the guidelines for interpreting the norms of the international agreement; however, they should not be too detailed in order not to infringe the principle of separation of powers. On the other hand, it can not make the consent for ratification conditional to fulfilling any requirements (e.g. ratification of the agreement by all remaining or only some states-parties to the agreement). The act on granting consent to ratify an international agreement should not include additional provisions safeguarding the permanence of all or some treaty norms. Such additional guarantees might infringe the principle of separation of powers.

It must be remembered that the President of the Republic of Poland decides on ratification, while the parliament's consent only enables him or her to exercise his or her competences. If the ratification was subject to additional stipulations, this would infringe the principle of separation of powers. If the parliament considers it necessary that certain conditions are met, it may postpone enacting the statute until this is accomplished. If it grants its consent, the President should be able to exercise his or her competences concerning the ratification without being burdened with, e.g. the obligation to interpret the conditions included in the statute.

The parliament should be able to express its opinion on amending the scope of the agreement already in force following the same procedure as that used for granting consent for the agreement in its original wording, which would constitute the case of implementing the constitutional concept of separation of powers (art. 10 of the Constitution) and at the same time would define what is meant by the phrase "conducting the internal affairs and foreign policy by the Council of Ministers" from art. 164 section 1 of the Constitution. It explicitly emphasizes its executive character. Granting consent for ratification of international agreements determined in art. 89 and 90 of the Constitution, the parliament sets the guidelines for implementing tasks in the area determined by the agreement in question and then the Council of Ministers implements it with the use of administrative methods. Adoption of this evident principle offers two options to the legislator: either each instance of amending the agreement already in force and ratified pursuant to the consent granted by statute requires ratification

within the procedure determined in art. 89 or 90 of the Constitution or each amendment which does not result in substantive modification of the agreement is subject to the specific repetition of the procedure of granting consent, whereby the original consent is complemented, thus admitting passing the statute which does not include abstract and general norms. Thanks to the above the procedure of granting consent for amending the scope of agreement already in force will be the same as in the case of the agreement in its original wording and the statute granting such consent would in principle only complement the statute granting consent for ratification of the original agreement. This would ensure both the parliament's full control over the activity of executive power and implementation of principles resulting from art. 89 or 90 of the Constitution. The other option is more rational and compliant with the principle of legislator's rationality, constituting an important element of the constitutional principle of a democratic state ruled by law (art. 2).

3. CONSENT FOR RATIFICATION

Art. 90 of the Constitution regulates the procedure of passing the statute granting consent for ratification of an international agreement limiting the execution of sovereignty. In this context the following ruling of the Constitutional Tribunal deserves a quote: "the following interpretation of art. 90 is admissible: if the statute authorizing the President to ratify an agreement determined in art. 90 of the Constitution is not passed due to absence of a qualified majority of votes, the Sejm may pass a resolution to adopt the referendum procedure and transfer the capacity for making decision ('consent') on the issue of authorization for ratification to the sovereign acting directly"[1]. The result of the referendum on granting consent for ratification of an agreement is binding if more than half of eligible voters participate in it. The subject of the referendum is decided if one of the alternative solutions (consent or lack of consent) receives the majority of votes. If the majority voted for the positive solution, the President is authorized to ratify the agreement; otherwise, he or she can not do it. If the referendum is binding, the President should not have the competence to question it and thus his or her discretionary power to abate what results from the

[1] OTK-A, No 5, item. 43.

principle of sovereignty of Nation is waived. In this case the ratification is only an act confirming the sovereign's will.

However, one more situation is also possible, resulting from the fact that the number of eligible voters participating in the referendum is smaller than what is necessary for its results to be binding. This situation is tantamount to not meeting a requirement determined in the Constitution (art. 125 section 3) and the referendum results in absence of formal decision on granting consent, while its results acquire only a consultative character. In the case of such an important issue as ratification of an agreement pursuant to the procedure stipulated in art. 90, such a possibility would cause numerous systemic problems.

Therefore the legislator (in the act on nationwide referendum of 14 March 2003; Dz. U. No. 57, item 507 with subsequent amendments) decided to adopt the solution according to which if the result of a referendum is not binding, the Sejm may pass another resolution on selecting the procedure of granting consent for ratification of the agreement, thus beginning the process anew. The Sejm may pass a resolution on ordering a referendum as a way of granting consent again and the whole referendum procedure is repeated. "The legislator (…) resorted to a technical trick, which however is not a normative novelty, proposing the mechanism resulting from the construction of art. 90 of the Constitution of returning to the parliamentary procedure if the Sejm decides that such a procedural measure is appropriate. This measure is indispensable for accomplishing the superior objective, which is the legally binding authorization of the President to ratify an international agreement"[1].

[1] OTK-A 2003, No. 5 item 43.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE CONSTITUTIONAL CHARACTER OF THE COURT OF JUSTICE OF THE EUROPEAN UNION, SPANISH CONSTITUTIONAL COURT AND CONSTITUTIONAL COURT OF ROMANIA

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Abstract

The Court of Justice of the European Union has recently gained an unexpected new constitutional character. We analyse and consider the similarities and differences between the Court of Justice of the European Union, the Spanish Constitutional Court and Constitutional Court of Romania, focusing on the judicial architecture currently present in the EuropeanUunion sphere.

Key words: *European Union - Court of Justice of the European Union- Spanish Constitutional Court- Constitutional Court of Romania- fundamental rights.*

Currently, the primacy principle of European Law is an unquestionable matter of fact, even though, after the reform of the Treaty of Lisbon[1], in contrast to the project of the European Constitution, the option was chosen not to formally recognize this primacy in the treaties,

[1] The Treaty of Lisbon, which was signed on 13 December 2007 by the 27 Heads of State or Government of the Member States of the Union, comes into force on 1 December 2009. It amends the two fundamental treaties – the Treaty on European Union (TEU) and the Treaty establishing the European Community, with the latter to be known in future as the 'Treaty on the Functioning of the European Union' (TFEU). Only the European Atomic Energy Community or 'Euratom' will remain (Protocol No 1 amending the Protocols annexed to the Treaty on European Union, to the Treaty establishing the European Community and/or to the Treaty establishing the European Atomic Energy Community).

which implies an incumbency of Law whose basis was never explicitly affirmed in the Lisbon Treaty text[1].

If we ask ourselves why the primacy principle of European Union Law was left out of the reformed Treaty, the reason is the same that justified the suppression of the term "Constitution" of the prior Treaty that established a Constitution for the EU. And this occurred because "anchoring the primacy in the treaty itself implies, politically speaking, a move towards a Common European Constitutional Law for the Member States. The term "Constitution" was not ratified, ultimately, because it would clearly limit the sovereign rights of Member States; but we should not forget that the principle of primacy constrains both judges and public regional and state authorities"[2].

Some time ago, Haberle wrote that he saw the genesis of a Common European Constitutional Law emerging from the jurisprudence of the Constitutional Courts and from the scientific doctrine[3], as well as from the existing similarity of the norms concerning the EU. Now, the question is still: do we have a true constitutional legal system? Which, in turn, begs the question whether Community Law fulfils the characteristics of any Constitution, which, in the judgment of Díez-Picazo[4], should entail the following: be the product of the constituent power; be written; be sufficiently rigid so as to not be amended too easily; come before other laws; that its tenets enjoy adequate judicial protection; that it limit the powers and responsibilities of the branches of government; that it guarantee individual rights and liberties, as well as the relation between the Constitution and democracy.

Perhaps more convincing and specific is the view of García Roca[5], when he points out that the essence of a Constitution is indivisibly

[1] MARTÍNEZ ARRIBAS, F.: <<El sistema de competencias de la Unión Europea previsto por el Tratado de Lisboa>>, in *Código Constitucional de la Unión Europea*, Edit. Andavira, 2011, p. 101.

[2] Vid. LÓPEZ DE LOS MOZOS DÍAZ-MADROÑERO, A.: <<La normativización de la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas>>, *Revista Europea de Derecho Público Comparado*, nº 3, 2008, p. 11.

[3] HABERLE, P.: <<Derecho Constitucional Común Europeo>>, in *Revista de Estudios Políticos*, nº 9, 1993, p. 7.

[4] DÍEZ-PICAZO, L.M.: <<Reflexiones sobre la idea de constitución europea>>, *Revista de Investigación Educativa (RIE)*, Vol. 20 – 2. 1993, pp. 541 and ff.

[5] GARCÍA ROCA, J.: <<Originario y derivado en el contenido de la Carta de los Derechos Fundamentales de la Unión Europea: los Test de Constitucionalidad y

linked to the separation of powers, fundamental rights, the principle of democracy and political responsibility, drawing attention to the fact that, though European integration is taking on a more constitutional character the contents are from being such, as European institutions still follow no constitutional scheme of dividing power and, in addition, have no rules that articulate the democratic principle as any Member state does. Let us not forget that article 16 of the Declaration of the Rights of Men and Citizens (1789) stipulated that "any society in which the guarantee of rights is not assured, nor the separation of powers established, has no Constitution".

I would like to recall the reflection of Douglas-Scott[1] in the statement: "The EU's system of governance is incomplete. It lacks the legal means and administration, finances and coercive force of its member states and consequently relies on them to provide these in many instants. In this way the EU is not independent and self-sufficient but complements the states>>. And we cannot ignore that "the European constitutional standards are conditioned on and linked to national constitutional standards, while the national constitutional standards are transformed in their content by the European standards themselves" [2], which has led some to characterize this phenomenon as constitutional pluralism[3]. I would add that the legal system of the EU lacks "Demos and *Pouvoir Constituant*". As Zetterquist said: "The EU is seen both as a source for individual rights and for collective political decision-making without being a state. The question then is whether the EU signifies that we have, with the words of Neil MacCormick, moved beyond the sovereign state and entered a new political landscape based on the rule of law even in the chaotic international domain (MacCormick, p 123-136)

Convencionalidad>>, *Revista de Estudios Políticos (Nueva Época)*, nº 119, January-March 2003, pp. 165 and ff.

[1] DOUGLAS – SCOTT, S.: *Constitutional Law of the European Union*, Edit. Pearson Education, England, 2002, p. 519.

[2] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, Thomson Reuters. Aranzadi, Pamplona, 2013, p. 99. BUSTOS GISBERT, R.: <<Tribunal de Justicia y Tribunal Europeo de Derechos Humanos: una relación de enriquecimiento mutuo en la construcción de un sistema europeo para la protección de los derechos>>, in *Integración europea a través de derechos fundamentales*, Centro de Estudios Políticos y Constitucionales, Madrid, 2009, p. 150.

[3] Vid. ibid, p. 99. Vid. MACCORMICK, N.: *Questioning Sovereignty. Law, State and Practical Reason*, Oxford University Press, 1999, pp. 104 and ff.

or whether the sovereign state is very much alive and is merely awaiting the proper moment to announce that the rumours of its death have been much exaggerated and that the EU in itself (not being a state) is nothing more than, to borrow the classical words of Hobbes, "a kingdom of fairies"[1].

I would agree with Williams that we are still far from having a clear conception of the nature of the European Union, which one could state as follows: "The EU might be interpreted as a conceptual chameleon, shifting its purpose depending on the changing political, social, economic and legal environment as organization, the next, a state in the making. Then again a regime that crosses traditional boundaries, an entity that hovers amidst and between different collective regime-types". From here he sustains the argument that the EU "seems to have a floating character, which, on the one hand, can be treated as an International Organization, while at the same time could be a State in the making"[2].

It is true that alone amongst European institutions, the European Parliament is directly elected by its citizens, and has slowly increased in power, above all in matters of legislation since the entry into force of the Treaty of Nice towards parity in decision-making with the European Council of Ministers. Nonetheless, in my opinion, the most important role in constitutionalizing Community Law has been the Court of Justice of the European Union, which, on the other hand, has undergone little change in its institutional structure[3] since the Treaty of Lisbon[4], as its

[1] Also, vid. ZETTERQUIST, OLA: <<International Courts and Supra Statal Democracy – Part of the Problem or the Solution?>>.

[2] WILLIAMS, A.: *The Ethos of Europe Values, Law and Justice in the EU*. Chapter I: <<The Ethos of Europe: an introduction>>, Edit. Cambridge, Studies in European Law and Policy, 2010, p. 2.

[3] RUIZ JARABO COLOMER, D.: <<El Tribunal de Justicia de la Unión Europea en el Tratado de Lisboa>>, *Revista de Noticias de la Unión Europea*, nº 291, abril 2009, pp. 31 y ss.

[4] With the reform of the Treaty of Lisbon, it has been established that << The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts >>. See Art. 19 of the EU treaty after the reform of Lisbon, as the new treaty introduces Title III comprising "Dispositions concerning the Institutions", Art. 13-19. The jurisdiction of the CJEU is now settled in the treaty, specifically in the dispositions of Art. 19 that maintains the content of Art. 220 of the Treaty on the European Community: "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall

composition, qualifications of its members and terms of office, have remained practically unaltered[1].

The Court of Justice of the European Union (CJEU) in Luxembourg encompasses three distinct courts (Court of Justice, General Court, and Civil Service Tribunal) that exercise the judicial functions of the European Union (EU), which aims to achieve greater political and economic integration among EU Member States. However, the Civil Service Tribunal only considers labour disputes raised by EU civil servants against EU institutions. The CJEU has competence to hear individual complaints of alleged human rights violations, which are decided by the General Court and may be reviewed on appeal by the European Court of Justice**.**

Originally established in 1952 as the Court of Justice of the European Coal and Steel Communities to ensure observance of the law

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provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State. The judges and the Advocates-General of the Court of Justice and the judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 223 and 224 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:
(a) rule on actions brought by a Member State, an institution or a natural or legal person;
(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
(c) rule in other cases provided for in the Treaties".

[1] We can only argue that a new aspect of the Treaty of Lisbon concerns the putting into practice a new, independent Committee that evaluates the suitability of candidates proposed by the Member states. Based on Art. 254 of the TFEU, the EU council is accorded, upon prior petition by the President of the Court of Justice of the EU, the power to adopt a Decision that set the standards of how the Committee functions and a Decision on how its members are designated. These two Decisions have been adopted and are in force since March 1, 2010. See the Decision by the Council of February 25, 2010, that sets the standards for the functioning of the committee envisioned in Art. 255 of the TFEU (2010/124/EU), DOUE L, 50/18, 27.02.2010. See the Decision by the Council of February 25, 2010, that designates the members of the Committee envisioned in Art. 255 of the TFEU (2010/125/EU), DOUE L, 50/20, 27.02.2010.

"in the interpretation and application" of the EU treaties, CJEU currently holds jurisdiction to:

review the legality of institutional actions by the European Union;

ensure that Member States comply with their obligations under EU law; and,

interpret European Union law at the request of the national courts and tribunals.

The CJEU hears complaints brought by individuals through the subsidiary General Court under three circumstances under Article 263 of the Treaty on the Functioning of the European Union (TFEU). First, individuals may bring a "direct actions" against any body of the EU for acts "of direct and individual concern to them." Second, individuals may bring "actions for annulment" to void a regulation, directive or decision "adopted by an institution, body, office or agency of the European Union" and directly adverse to the individual. Third, individuals may bring "actions for failure to act" that can challenge an adverse failure of the EU to act, but "only after the institution concerned has been called on to act. Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures." General Court judgments and rulings on an individual action may be appealed, only on points of law, to the Court of Justice.

The EU recognizes "three sources of European Union law: primary law, secondary law and supplementary law. The main sources of primary law are the Treaties establishing the European Union. Secondary sources are legal instruments based on the Treaties and include unilateral secondary law and conventions and agreements. Supplementary sources are elements of law not provided for by the Treaties. This category includes Court of Justice case-law, international law and general principles of law."

An essential, primary source of EU human rights law is the Charter of Fundamental Rights of the European Union, which covers the civil, political, economic and social rights protected within the EU. The Charter binds EU bodies, and also applies to domestic governments in their application of EU law, in accordance with the Treaty of Lisbon.

The CJEU also views the European Convention of Human Rights as embodying principles of law applicable in EU Member States. *See, e.g., Criminal Proceedings against Gianfranco Perfili*, Case C-177/94, Judgment of 1 February 1996. In that case, the Court stated: According to

settled case-law, where national legislation falls within the field of application of Community law, the Court, when requested to give a preliminary ruling, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights — as laid down in particular in the European Convention of Human Rights — the observance of which the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law (see the judgment in Case C-159/90 Society for the Protection of Unborn Children Ireland v Grogan and Others [1991] ECR 1-4685, paragraph 31).

Thus, although the primary goal of the EU has been economic and political integration, the CJEU has decided many cases that deal with fundamental rights. *See Defrenne v. Sabena*, Case 43/75, [1976] E.C.R. 455 (non-discrimination); *Prais v. Council*, Case 130/75, [1976] E.C.R. 1589 (freedom of religion); *Union Syndicale-Amalgamated European Pub. Serv. Union v. Council*, Case 175/73, [1974] E.C.R. 917 (freedom of association); *VBBB & VBVB v. Commission*, Joined Cases 43 & 63/82, [1984] E.C.R.19. (freedom of expression); and other cases dealing with the legality of anti-terrorism measures.

Without question, since its inception and through its jurisprudence, "the Court of Justice has developed the content of the Treaties to reach an authentic legal system translated into a Law that consecrates the foundation of a Union ever stronger between the European peoples, eliminating the barriers that divide Europe, strengthening the unity of economies, successively suppressing the restrictions on international exchange. But this true and autonomous Law is afflicted by gaps, highlighting the role of the Court of Justice through the systematic, logical, or teleological interpretation"[1]**.**

We should keep in mind that what the Court of Luxemburg has achieved is to give a foundation to the primacy of Community Law and its direct application in the national legal systems of the member states, which has led to the conclusion EU law has a constitutional character by referring to the Treaties as a basic constitutional charter[2]. In the context

[1] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., p. 114.

[2] One good example is the case Parti Ecologiste Les Verts / Parlamento Europeo, 294/83 de 23.04.1986, Rec. 1986, ap. 23.

of the opinion elaborating Article 228 of EECT of April 26, 1977 (Nº 1/76, ECR 743), in the decision Verts, the Court of Justice insisted on this last aspect, stating that the European Community is founded on the rule of law, which implies that no institution can exclude itself from jurisdictional control by Community Law. As well, the Court of Luxembourg has reinforced in its jurisprudence on the protection of fundamental rights guaranteed by EU Law, given its affirmation of article 6 Treaty of Nice [Principles; Fundamental Rights; Relations Between the Union and the Member States] "(1) The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."
(2) The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights added to this Treaty as a Protocol. The Union shall accede to the European Convention for the Protection of Human Right and Fundamental Freedoms. Such accession shall not affect the Union's and the Community's competences as defined in this Treaty or in the Treaty establishing the European Community. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law>>.

This constant effort to constitutionalize the legal system of the EU could be considered an isolated and anecdotal instance, had the Court of Luxembourg not reiterated this concept one year after the decision on Verts in the decision concerning the Hoechst case[1]. In this case, the Court judged the constitutionality of the measures adopted by the Commission, differentiating and defining the concepts of illegality and unconstitutionality. In this context, it was stipulated that illegality results from not knowing the procedure envisioned in the regulation in question, whereas unconstitutionality results from violating a fundamental right recognized as a general principle of law by the Court of Justice[2]: "In this order of ideas, the Court makes a distinction between two levels: between

[1] Case 46/87, Hoechst AG contra Comisión, 26.03 1987, de las Comunidades Europeas, 1987 ECR 1549.
[2] FERNÁNDEZ ESTEBAN, M.L.: <<La noción de Constitución Europea de la Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas>>, *Revista Española de Derecho Constitucional*, Año 14, Enero-Abril 1994.

the control of Community legality that encompasses the control of legality *strictu sensu* and the control of constitutionality that encompasses the control of conformity to the general standards enunciated in the Treaties"[1].

Along the same lines, one should also refer to decision nº 1/91, paragraph 21, which establishes the EEC. Although in the form of an international convention, this does not diminish the fact that it serves as a Constitutional Charter for a Community of Law[2]. As we can see, this line of reasoning continues the constitutionalization of the jurisdictional system envisioned by the Treaties: the jurisprudence of the Court of Luxembourg makes Community law a supreme standard, giving it constitutional characteristics in addition to explicitly referring to it as a Basic Constitutional Charter. The Court of Justice reiterates its position in the Order given in case 2/88, of July 13, 1990, in which it refers to what was earlier established in the decision *Verts* and makes once again clear that the Court has its own its own legal system integrated into the legal systems of the Member States. It should not come as a surprise that within the doctrine, some voices have assured that the Court of Justice acts as a true Constitutional Court, and the academic debate throughout the years has revolved around the words used by the Court, such as: "Constitution, Constitutional Charter, as well as the message transmitted by the same, searching amongst these for commonalities that exist between the Treaties and the national Constitutions, as well as the role of the Court of Justice and the national Constitutional courts"[3]. Also delving into this same issue, one should not forget the judgments of the CFI of 21 September 2005, Kadi / Council and Commission (T 315 /01) and Yusuf and Al Barakaat International Foundation / Council and Commission (T 316 / 01).

[1] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., p. 90.

[2] See the ruling on Art. 228 (2) of the Treaty on the EEC on the Project of the Treaty of the European Economic Area dated December 14, 1991. In this ruling, the Court of Luxembourg was consulted by the Commission regarding Art. 228 of the TCEE, concerning the compatibility of the same with the Agreement of the EEA. The consultation resulted in ruling 1/91 of the Court of Justice, in which the TCEE was declared incompatible with the EEA.

[3] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., pp. 91-92.

Having said all this, nonetheless, I would agree with Balaguer Callejón in affirming that the EU Court of Justice cannot be considered as a "Constitutional Court in practice", and this because the normative system that it should guarantee is not recognized as a Constitution. The author explains that "the more the Court of Justice has approached constitutional matters, the more it has stopped acting as a Court, and the more it has acted as a Court, the more it has distanced itself from constitutional matters"[1].

THE COURT OF JUSTICE OF THE EUROPEAN UNION, SPANISH CONSTITUTIONAL COURT AND CONSTITUTIONAL COURT OF ROMANIA

Curiously, the three jurisdictional authorities are "in essence the guardians and supreme interpreters of the Constitutions and the Constitutional Treaties, an aspect which is covered in the Magna Charta of the same"[2]. The three have the mission to respect the Law, within a broad range of action that permits them to work creatively and to efficiently cooperate in the construction of European Community Law in the case of the EU Court of Justice and the internal constitutional Law in the other two cases. Both the Spanish Constitutional Court and the Constitutional Court of Romania are empowered as the ultimate interpreters of the their nation's Constitution, making them unique within their legal system as they enjoy autonomy and independence from other courts[3]. Nonetheless, the two have been accused of being strongly

[1] BALAGUER CALLEJÓN, F.: <<Los Tribunales Constitucionales en el proceso de integración europea>>, *Re.DCE*, nº 7, January-June 2007, pp. 327-375. MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., p. 184.

[2] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., p. 186.

[3] With respect to the Spanish Constitutional Court, see. art. 1 Chap. I of the LOTC, and with respect to the Romanian Constitutional Court, see art.1. Cap. I, Legea nº 47 / 1992, privind organizarea si funccionarea Curtii Constitutionale, Republicatâ în Monitorul Oficial al României, Partea I, nº 807 din 3 Decembrie 2010, în temeiul dispozitiilor art. V. din Legea nº 177/2010 pentru modificarea si completarea Legii n º 47/1992 privind organizarea si functionarea Curtii Constitutionale, a Codului de procedura civilâ si a Codului de procedurâ penalâ al României, publicatâ în Monitorul Oficial al României, Partea I, nº 672 dine 4 Octombrie 2010, dându-se textelor o nouâ numerotare.

politicized due to the way its members are elected, which also seems to match the profile of the European Court of Justice[1].

Another aspect that the three jurisdictional authorities share in common lies in the impulses they give to the progress of Law in the constitutional sense, as guardians of the same, which implies that the identity of these Constitutional Courts, as is the European Union Court of Justice, is neither closed nor invariable. Indeed, one can say that the three are in permanent evolution, which implies that the positions of these Courts within the legal system should always be defined with caution and not in a fixed manner.

As regards the powers accorded within the constitutional framework, the European Union Court of Justice overlaps significantly with the Constitutional Courts of Spain and Romania in many of its functions. As regards the European Court, its functions are ultimately very similar to the ones a national Constitutional Court exercises in a politically decentralized state. In this respect, the European Court of Justice is called upon to decide on the competencies of the Communities and the Member States; to maintain an institutional equilibrium between the different community authorities; to safeguard the respect for fundamental rights and the general principles of the European Community by both the Institutions and the Member States; to pronounce upon the relationship between Community Law and national Law; to exercise regulatory power to establish its own Rules of Procedure (even though this requires approval by the Council), and so on.

Now, as we know, the jurisdiction of the European Court of Justice extends across the territory of the Member States that form the EU, and its decisions are to be enforced according to Art. 280 TFUE, which produces some perplexity and casts doubt on the constitutional function of the European Court of Justice, as it lacks the necessary instruments to enforce its own decisions, and leaves it up to the National Courts to put these into force and fulfil that which has not been put into action.

In conclusion, "A supra-statal court like the ECJ is thus not only desirable but also indispensable for the legitimacy of a European constitutional order that is not a state. From the point of view of constitutionalism it is not desirable that the EU actually evolves into a

[1] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., pp.192-194.

European sovereign state since this would represent a danger of power concentration on a new level. In this regard, a supra statal legal order with a strong court may be preferable to a sovereign democratic state. This would also be the position most consonant with the aims of post world war two when state sovereignty was seen as a potential problem, not as the only solution, of democratic government"[1].

[1] Vid. ZETTERQUIST, OLA: <<International Courts and Supra Statal Democracy – Part of the Problem or the Solution?>>.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

EUROJUST – A UNIONAL INSTITUTIONAL FRAMEWORK IN THE AREA OF EUROPEAN CRIMINAL JUDICIAL COOPERATION

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Abstract

The creation of a freedom, security and justice area, as a goal, declared and assumed by the European Union, can only be achieved in the context of perfecting the judicial cooperation between Member States.

Within the E.U were created specialized structures, both for the prevention and combat of the cross-border criminality, as well as for the identification, capture and criminal liability of the perpetrators who eluded justice, namely Eurojust, created by the Council Decision No 2002/187/JHA of 27 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime; the European Judicial Network (for criminal matters) established by the Joint Action 98/428/JHA of 29 June 1998, in order to ease the judicial cooperation between Member States, fulfilling the Recommendation No 21 of the Action Plan for Combating Organized Crime, adopted by the Council in 1997, Europol; Liaison Magistrates, institutional mechanism for judicial cooperation in criminal matters established by the Joint Action 96/277/JHA of 22 April 1996 adopted by the Council based on the formed Art k3 of the Treaty on the European Union; European Public Prosecutor Office.

The European Council Decision 2002/187/JHA of 28 February 2002 established Eurojust, a union structure designed to ease the coordination of criminal investigations and prosecutions performed by the competent judicial authorities of the Member States, when they are facing serious forms of organized and cross-border criminality.

Key-words: *Eurojust, EU, criminal judicial cooperation.*

I. **INTRODUCTION**

The Lisbon Treaty states provisions regarding the "Judicial cooperation in criminal matters" in its Title regarding the Area of freedom, security and justice.

The judicial cooperation in criminal matters within the European Union is based on the principle (Art 69 A Para 1 of the Lisbon Treaty) of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States.

According to Art 61 of the Treaty, the Union represents an area of freedom, security and justice, compliant with the fundamental rights and different systems of law and acts in order to ensure a high level of security by measures of preventing criminality.

According to Art 69 A Para 1 corroborated with Art 69 F, judicial cooperation in criminal matters within the Union is based on the principle of mutual recognition of judgments and judicial decisions, while the police cooperation involves all the authorities of the Member States including the police services. The Treaty guarantees a high level of security within the Area of freedom, security and justice by: measures to prevent and combat delinquency, racism and xenophobia; measures of coordination and collaboration between police authorities; easing the judicial guardianship, guaranteeing the principle of mutual recognition of judicial and extrajudicial judgments in civil matters[1].

Regarding the police and judicial cooperation in criminal matters, the competence of the Court of Justice to issue preliminary decisions is *mandatory*, ceasing to subordinate to a declaration of recognition adopted by each Member State, by pointing out in the Lisbon Treaty the national courts which can notify it, the police and criminal justice being located in the area of the common law.

In the light of Art 69 D of the Lisbon Treaty, Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on

[1] F. A. Luzarraga, M.G. Llorente, *Europa viitorului. Tratatul de la Lisabona*, Polirom Publ. House, Iași, 2011, p.189

common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol[1].

In this context, the European Parliament and Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:

a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;

b) the coordination of investigations and prosecutions referred to in point (a);

c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities[2].

In the prosecutions initiated by Eurojust, and without prejudice to Art 69 E, formal acts of judicial procedure shall be carried out by the competent national officials.

II. ORGANIZATION AND FUNCTION OF EUROJUST

Eurojust was created by the Decision 2002/187/JHA of the Council as an organ of the European Union with legal personality with the purpose of improving the quality of the cooperation and coordination between authorities competent in criminal investigations and prosecutions of the E.U Member States on issues of organized crime[3].

Eurojust is formed by a representative of each Member State, who is a prosecutor, a judge or a police officer with similar competencies. They are remunerated by their national states, while for the Eurojust's

[1] EU Agencies, Luxembourg: Office for Official Publication of the European Communities, 2007, p.26

[2] M. Profiroiu, A. Profiroiu, I. Popescu, *Instituţii şi politici europene*, Economic Publ. House, Bucharest, 2008, p.350

[3] EU Agencies, *The way ahead*, Luxembourg: Office for Official Publication of the European Communities, 2010, p.19

administrative staff is applied the Statute of the civil servants of the European Union established by Regulation 259/6S[1].

The statute of the national members of Eurojust, including the duration of their mandate, is established by the represented Member States. Also, each Member State shall define the nature and extent of the judicial competencies assigned to its national representative in Eurojust on its own territory.

The exchange of information between Eurojust and Member States is performed by the national representatives. They have access to informations from the national judicial record or from any other records kept by their Member State.

Within Eurojust there is a college formed by the representatives of the Member States, being responsible by the organization and function of the institution. The college elects a president from the national members and may, when it considers necessary, elect two vice-presidents. The result of these elections is subjected to the approval of the Council[2].

The president performs its attributions on behalf of the council and under its authority, presiding the sessions of the college. The duration of the mandate as president is of three years. He can be reelected only once. Eurojust is assisted by a Secretariat headed by an administrative manager.

The Eurojust College is formed by 28 liaison officers, one for each Member State, headquarted in Le Hague, Holland. They are high rank professionals, prosecutors or experienced judges.

The *objectives of Eurojust*, established by Art 3 of the Decision 2002/187/JHA are:

a) to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions in the Member States, taking into account any request emanating from a competent authority;

b) to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests;

[1] See the Eurojust official website: http://eurojust.europa.eu/Pages/home.aspx

[2] See the Eurojust official website: http://eurojust.europa.eu/Pages/home.aspx and http://eurojust.europa.eu/about/structure/college/Pages/college.aspx

c) to support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective[1].

Eurojust may support criminal investigations and prosecutions performed by a Member State which is not part of the European Union or by a Member State and the Commission, when are aimed offences prejudicing the financial interests of the European Community. The vision of Eurojust is to be the key player and the center of excellence in the efficient judicial action taken against organized crime. Eurojust has the authority to solve a wide range of offences, among which is terrorism, trafficking in human beings, difficult cases of fraud etc.

The competencies of Eurojust, established by Art 4 Para 1 of the Decision 2002/287/JHA refer to:

a) the types of crime and the offences in respect of which Europol is at all times competent to act pursuant to Article 2 of the Europol Convention of 26 July 1995 (terrorism, illicit trafficking of drugs and narcotic substances, illegal immigration networks, illicit trafficking of radioactive and nuclear materials, vehicles, forging the Euro currency, money laundering connected to international criminal activities);

b) the following types of crime: computer crime, fraud and corruption and any criminal offence affecting the European Community's financial interests, the laundering of the proceeds of crime, environmental crime, participation in a criminal organization within the meaning of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organization in the Member States of the European Union;

c) other offences committed together with the types of crime and the offences above mentioned.

The tasks of Eurojust acting as a college are stated by Art 7 of the Decision 2002/187/JHA, based on which the Eurojust:

a) may in relation to the types of crime and the offences referred to in Art 4 Para 1 ask the competent authorities of the Member States concerned, giving its reasons: to undertake an investigation or prosecution of specific acts; to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts; to coordinate between the competent authorities of the Member States

[1] I. Gâlea, M. Augustina, C. Morariu, *Tratatul instituind o Constituţie pentru Europa*, All Beck Publ. House, Bucharest, 2005, p.259

concerned; to set up a joint investigation team in keeping with the relevant cooperation instruments; to provide it with any information that is necessary for it to carry out its tasks;

b) shall ensure that the competent authorities of the Member States inform each other of investigations and prosecutions of which it has been informed and which have repercussions at Union level or which might affect Member States other than those directly concerned;

c) shall assist the competent authorities of the Member States, at their request, in ensuring the best possible coordination of investigations and prosecutions;

d) shall give assistance in order to improve cooperation between the competent authorities of the Member States, in particular on the basis of Europol's analysis;

e) shall cooperate and consult with the European Judicial Network, including making use of and contributing to the improvement of its documentary database;

f) may assist Europol, in particular by providing it with opinions based on analyses carried out by Europol;

g) may supply logistical support including assistance for translation, interpretation and the organization of coordination meetings.

The tasks of Eurojust acting through its national members are stated by Art 6 of the Decision 2002/187/JHA. Thus, Eurojust[1]:

a) may ask the competent authorities of the Member States concerned to consider:

- undertaking an investigation or prosecution of specific acts;
- accepting that one of them may be in a better position to undertake an investigation or to prosecute specific acts;
- coordinating between the competent authorities of the Member States concerned;
- setting up a joint investigation team;
- providing to Eurojust with any information that is necessary for it to carry out its tasks.

[1] See also the Joint Action No 96/668/CFSP of 22 November 1996 adopted by the Council based on Art J.3 and K.3 of the Treaty on European Union concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

In order to perform these objectives, Eurojust acts either through its national members, or as a college. Also, for the achievement of these objectives, Eurojust shall perform the following functions:

1) through one or more national members interested;

2) as a college for the cases: a) in which one or more national members are concerned in a case treated by Eurojust shall file a request regarding it or b) regarding investigations with repercussions for the Union.

If Eurojust is acting through its interested national members, it:

a) may request the competent authorities of the concerned Member States to consider an investigation based on specific facts; to form a joint investigation team;

b) shall ensure the mutual information of the competent authorities of the states regarding the investigations of which it is aware of;

When Eurojust acts as a college, it:

a) may in relation to the types of crime and the offences aimed to ask the competent authorities: 1) to undertake an investigation or 2) to ensure the mutual information of the competent authorities regarding the investigations of which it is aware of.

At the reunion of the heads of states and governments of 18 June 2004[1], among the proposals for the modification of the constitution for Eurojust were stated the following *attributions*[2]:

a) the initiation of the criminal investigation, as well as the proposal for the initiation of the criminal prosecution, performed by national competent authorities, especialy for offences prejudicing the Union's financial interests;

b) the coordination of the criminal prosecution;

c) the coordination of the judicial cooperation, including by solving the conflict of jurisdictions;

Also are attributions of Eurojust the following:

a) improving of the inter-institutional cooperation within Member States in solving the requests for extradition;

b) supporting the criminal investigation regarding the Union and one Member State;

[1] V. Ciocan, E. Nuna, *Instituţii europene. Noţiuni de drept comunitar*, Graf Net Publ. House, Bucharest, 2004, p.139

[2] G. Fábián, *Drept instituţional al U.E.*, Hamangiu Publ. House, Bucharest, 2012, pp.220 – 221

c) cooperation with Europol based on an agreement concluded on 9 June 2004.

The *offences* for which Eurojust has competencies are the following: corruption, fraud prejudicing the Union's financial interests, informatics crime, environmental crime and organized crime.

III. THE RELATIONS BETWEEN EUROJUST AND EUROPOL

The relations with Europol are materialized in cooperation necessary for the fulfilment of the tasks and objectives established for Eurojust. The key elements for the cooperation are established by an agreement approved by the Council, after consulting with the joint body of control[1].

Eurojust has with the European Judicial Network a relation of complementarity which includes the following aspects:

a. Eurojust shall have access to centralized information from the European Judicial Network and to the telecommunication network;

b. The secretariat of the European Judicial Network shall form part of the Eurojust secretariat, functioning as a separate and autonomous unit, being able to draw on the resources of Eurojust;

c. The national members of Eurojust may attend meetings of the European Judicial Network and its contact points may be invited on a case-by-case basis to attend Eurojust meetings.

Eurojust establishes a close cooperation with the European Anti-Fraud Office (OLAF), the national members of Eurojust being recognized by the Member States as authorities competent in the investigations conducted by OLAF.

Also, Eurojust may, in order to accomplish its objectives, establish contacts and exchange experiences of a non-operational nature with other bodies, in particular international organizations.

In the Preamble of the Decision 2002/187/JHA of 28 February 2002 it is shown that, to the extent to which this is necessary for the accomplishment of its tasks, Eurojust may cooperate with third party states and may conclude agreements with them, having priority the candidates to the European Union.

CONCLUSIONS

[1] https://www.europol.europa.eu/

From the analysis of the Decision 2002/187/JHA of 28 February 2002 a few conclusions are obvious[1]:

1. The cooperation in the area of the third pillar of the European Union has an institutionalized feature;
2. Eurojust acts as an organ of the European Union, but it may perform some of its atributions through its national members representing the Member States which are not officials or agents of the Union;
3. A special attention is offered to the right of the persons to access their personal data stored by Eurojust, establishing mechanisms to control and prevent abuses;
4. Eurojust's activity is performed with the participation of the Commission and under the supervision of the Council and the European Parliament;
5. The rules regarding public access to Eurojust's documents must be in accordance with the principles and limits established by Regulation 1049/2001 of 30 May 2001 of the European Parliament and the Council regarding public access to European Parliament, Council and Commission documents.

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[1] Ovidiu Tinca, *Eurojust – organ al Uniunii Europene în lupta împotriva criminalităţii*, in the Romanian Commercial Law Review No 6/2002, pag.81

8. EU Agencies, Luxembourg: Office for Official Publication of the European Communities, 2007

9. Joint Action No 96/668/CFSP of 22 November 1996 adopted by the Council based on Art J.3 and K.3 of the Treaty on European Union concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom

10. Eurojust official website: http://eurojust.europa.eu/Pages/home.aspx

11. http://eurojust.europa.eu/about/structure/college/Pages/college.aspx

12. https://www.europol.europa.eu/

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Pitesti, 23 - 24 May 2014

THE ANTHROPOCENTRIC APPROACH OF MODERN EUROPEAN CONSTITUTIONALISM AND THE DEVELOPMENT OF PERSONALITY RIGHTS

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Abstract

Dignity, autonomy and freedom of the human being are the value basis of modern European constitutionalism. The individual has to be in the center of law and political concern. The finality of public power, exercised by the State or by supranational organizations, is to serve the individual, directly or indirectly, to protect and to promote her/his physical, spiritual, intellectual and social existence.

The development of human rights and fundamental freedoms are based on this idea. Substantive and functional efficiency of the individual's protection is crucial for the Constitution as a basic legal order of State and society.

Human dignity is closely linked to personal autonomy with its main expression in the recognition of personality rights. Progress in science and technology may endanger individual personality. Constitutions often provide general or specific rights for an adequate protection in this respect. However, constitutional texts to a great extent cannot keep pace with the rapidly upcoming dangers, a general phenomenon which requires the prompt reaction of the constitutional interpreters to make available new dimensions of protection.

The Constitution is based on the idea to protect efficiently the individual against whatever emerging danger both by written or unwritten safeguards. Fundamental rights in a constitutional order never can have gaps. The finality of protection is comprehensive, substantially and even functionally complete. If the safeguard in form of fundamental rights is not expressed in the text of the Constitution it has to be found by way of interpretation.

The Constitution is a living instrument with an imperative and an adaptive character. Its protective function adapts to the upcoming challenges and extends to what is necessary for the individual. This adaptation is not a process of constitutional change, it is the realization of what the Constitution prescribes, explicitly or implicitly, even by the interpretative enlargement of the written norms, in order to implement the basic finality of protection which is the essential function of the Constitution.

Personality rights are the dynamic heart of fundamental rights. They are particularly close to the individual and interconnected with human dignity. They are barriers against the manifold threats of potential intrusions into the individual's privacy.

There are the types of the general personality right and the spectrum of specific personality rights mainly developed by constitutional jurisprudence. It corresponds to the anthropocentric approach of the constitutional order that these rights flow from an ebullient jurisdictional source. The interpretation dynamism in this field seems to be a common phenomenon in many European countries and demonstrates, to a certain extent, the growing importance of individuality in law.

However, this process is not only constitution-related but also, even in more original dimension, a product of civil law. It is obvious that personality rights have by their nature a dual dimension, both an instrument of defense against public power intervention and a safeguard against undue private impact. Legislation has to find an adequate protection system in both respects. This is what nowadays results from the constitutional obligation of the legislator to protect the individual against not only public but also private interference with her/his genuine rights as a person

If we try to categorize personality rights in constitutional law we may distinguish between the protection of (a) the individuality, the person as such, and of (b) the instruments serving the safeguard of the individuality.

a) The person's individuality is related to her/his identity in various respects: physical identity (life, health, physical and genetic integrity, physical appearance), intellectual identity (thoughts, expressions, creation of art), psychic - emotional identity (conscience, religion, ethnic traditions), sexual identity, social identity (name, reputation), and historical identity (knowledge of origin and ancestry).

Various situations shall be taken into account:

- *to keep the indicated individuality aspects intact (no interference by public power or private action without the individual's consent)*
- *to freely develop or change the individuality aspects (without being hindered by public or private interference)*
- *to freely communicate with others by using individuality aspects (active dimension), to exclude others to use the individuality aspects without consent or to falsify individuality aspects in the process of communication (negative dimension).*

b) The instruments for the safeguard of individuality can be spatial (inviolability of domicile) or instrumental in a narrow sense (means of communications).

It shall also be distinguished between individuality aspects which are per se protected by personality rights (direct individuality aspects) and those which are only protected in this way if they are related to the private or intimate sphere (indirect individuality aspects). The first group is related directly to the individuality characteristics (e.g. genetic integrity). The second group refers to per se neutral actions or omissions (expressions, communications, behaviors, etc.) which take place within the domicile, the family, with exclusion of the public, in the quality of secrecy (diaries) or confidential communications, etc.

Personality rights can be restricted for legitimate aims of public interest except those which are direct reflections of human dignity. It seems adequate to fully protect without any restriction the innermost sphere of private life conduct (in accordance to the distinction made by the confirmed jurisprudence of the German Federal Constitutional Court). If restrictions of personality rights are admitted, the strict application of the principle of proportionality is indispensable.

The tendency to protect personality rights is widespread in European constitutionalism and recognized also by civil law. The national guarantees are reinforced by international and supranational safeguards such as the European Convention of Human Rights as well as the EU Fundamental Rights Charter. It is significant for the field of personality rights that constitutional interpretation has widely enlarged the protection spectrum. This goes alongside with the anthropocentric orientation of present time constitutionalism in Europe.

Keywords*: personality rights, human dignity, anthropocentric approach of constitutionalism, individuality, interpretation dynamism, identity.*

1. THE ANTHROPOCENTRISM OF EUROPEAN CONSTITUTIONALISM

Dignity, autonomy and freedom of the human being are the value basis of modern European constitutionalism. The individual has to be in the center of law and political concern. The finality of public power, exercised by the State or by supranational organizations, is to serve the individual, directly or indirectly, to protect and to promote her/his physical, spiritual, intellectual and social existence.

The development of human rights and fundamental freedoms are based on this idea. Substantive and functional efficiency of the individual's protection is crucial for the Constitution as a basic legal order of State and society.[1]

Human dignity is closely linked to personal autonomy with its main expression in the recognition of personality rights.Progress in science and technology may endanger individual personality. Constitutions often provide general or specific rights for an adequate protection in this respect. However, constitutional texts to a great extent cannot keep pace with the rapidly upcoming dangers, a general phenomenon which requires the prompt reaction of the constitutional interpreters to make available new dimensions of protection.

The Constitution is based on the idea to protect efficiently the individual against whatever emerging danger both by written or

[1]See Rainer Arnold, Begriff und Entwicklung des Europäischen Verfassungsrechtes, in: Staat – Kirche – Verwaltung, Festschrift für Hartmut Maurer, M.-E. Geis/D. Lorenz (Hrsg.), München 2001, S. 855 – 868andInterdependenz im Europäischen Verfassungsrecht, Essays in Honourof Georgios I. Kassimatis, Athens 2004, p. 733 – 751.

unwritten safeguards. Fundamental rights in a constitutional order never can have gaps. Substantive efficiency of the fundamental rights protection means completeness of safeguarding the individual in front of all the threats existing in presence or upcoming in the future regardless whether the rights are written or not.The finality of protection is comprehensive, substantially and even functionally complete. Functional efficiency means that restrictions of fundamental rights for public interestsmust be made by law, must not affect the essence of the right and has to satisfy the requirements of the principle of proportionality, principle of supreme importance in contemporary constitutional law.

If the safeguards in the substantive and functional sense are not expressed in the text of the Constitution they have to be developed by way of interpretation. The judge, in particular the constitutional judge, has the power and the obligation to complement the constitutional text by interpretation in order to satisfy the basic constitutional principle of comprehensive and efficient protection of the individual. This task can be explicitly laid down in the Constitution, in particular by the instalment of constitutional justice, or has to be regarded at least as an implicit principle of the constitutional order.

The Constitution is a living instrument [1]with an imperative and and adaptive character. Itsprotective function adapts to the upcoming challenges and extends to what is necessary for the individual. This adaptation is not a process of constitutional change, it is the realization of what the Constitution prescribes, explicitly or implicitly, evenbytheinterpretative enlargement of the written norms, in order to implement the basic finality of protection which is the essential function of the Constitution.

2. PERSONALITY RIGHTS AS THE CORE ELEMENTS OF THE CONSTITUTIONAL PROTECTION OF THE INDIVIDUAL

Personality rights are the dynamic heart of fundamental rights. They are particularly close to the individual and interconnected with

[1]For the European Convention of Human Rights (qualification transferable to the Constitution) see ECtHRJudgm. March 23,1995, Loizidou (Preliminary Objections), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920 and ChristophGrabenwarter, EuropäischeMenschenrechtskonvention, 3rd ed. 2008, §5 (=p. 39) with note 32.

human dignity. They are barriers against the manifold threats of potential intrusions into the individual's privacy.

There are the types of the general personality right and the spectrum of specific personality rights mainly developed by constitutional jurisprudence. It corresponds to the anthropocentric approach of the constitutional orderthat these rights flow from an ebullient jurisdictional source. The interpretation dynamism in this field seems to be a common phenomenon in many European countries and demonstrates, to a certain extent, the growing importance of individuality in law.

However, this process is not only constitution-related but also, even in more original dimension, a product of civil law[1]. It is obvious that personality rights have by their nature a dual dimension, both an instrument of defense against public power intervention and a safeguard against undue private impact. Legislation has to find an adequate protection system in both respects. This is what nowadays results from the constitutional obligation of the legislator to protect the individual against not only public but also private interference with her/his genuine rights as a person.

3. THE CATEGORIZATION OF PERSONALITY RIGHTS

If we try to categorize personality rights in constitutional law we may distinguish between the protection of (a) the *individuality*, the person as such, and of (b) the *instruments* serving the safeguard of the individuality.

The person's individuality is related to her/his identity in various respects: physical identity (life, health, physical and genetic integrity, physical appearance), intellectual identity (thoughts, expressions, creation of art), psychic - emotional identity (conscience, religion, ethnic traditions), sexual identity, social identity (name, reputation), and historical identity (knowledge of origin and ancestry).

Various situations shall be taken into account:

- to keep the indicated individuality aspects intact (no interference by public power or private action without the individual's consent)

[1] See as an example German Federal Court BGHZ vol. 13, p. 334; vol. 27, p. 284; vol. 35, p. 363.

- to freely develop or change the individuality aspects (without being hindered by public or private interference)
- to freely communicate with others by using individuality aspects (active dimension), to exclude others to use the individuality aspects without consent or to falsify individuality aspects in the process of communication (negative dimension).

The instruments for the safeguard of individuality can be *spatial* (inviolability of domicile) or *instrumental* in a narrow sense (means of communications).

It shall also be distinguished between individuality aspects which are *per se* protected by personality rights (*direct individuality aspects*) and those which are only protected in this way if they are related to the private or intimate sphere (*indirect individuality aspects*). The first group is related directly to the individuality characteristics (e.g. genetic integrity). The second group refers to *per se neutral* actions or omissions (expressions, communications, behaviors, etc.) which take place within the domicile, the family, with exclusion of the public, in the quality of secrecy (diaries) or confidential communications, etc.[1]

4. EUROPEAN STANDARDS FOR THE SAFEGUARD OF PERSONALITY RIGHTS

Personality rights can be restricted for legitimate aims of public interest except those which are direct reflections of human dignity. It seems adequate to fully protect without any restriction the innermost sphere of private life conduct (in accordance to the distinction made by the confirmed jurisprudence of the German Federal Constitutional Court[2]). If restrictions of personality rights are admitted, the strict application of the principle of proportionality[3] is indispensable.

The tendency to protect personality rights is widespread in European constitutionalism and recognized also by civil law. The national guarantees are reinforced by international and supranational

[1] For other classifications see FriedhelmHufen, Staatsrecht II, Grundrechte, 2nd. Ed. 2009, p. 184-185.
[2] Federal Constitutional Court (FCC), vol. 109, p. 279
[3]See R. Arnold, El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional, together with J.I.Martínez Estay, F. Zuniga Urbina, in: Estudios Constitucionales 2012, Santiago de Chile, 65-116.

safeguards such as the European Convention of Human Rights[1] as well as the EU Fundamental Rights Charter[2]. It is significant for the field of personality rights that constitutional interpretation has widely enlarged the protection spectrum. This goes alongside with the anthropocentric orientation of present time constitutionalism in Europe.

If we consider European constitutionalism as a process taking place on three major levels, the national, the supranational and the conventional level[3], we can state the emergence of common standards of safeguard of personality rights within this "block of constitutional law".

The fact that these three levels are functionally interconnected is the main reason for a strong tendency of convergence in the field of fundamental rights and in particular of personality rights. This convergence refers to the substantive as well as to the functional dimension of the rights.

As a first aspect the dynamism of judicial interpretation in developing personality rights has to be mentioned. This characteristic can be found on all three levels. In the framework of national constitutions the interpretation of older constitutions which have not yet explicitly introduced safeguards such as the protection of personal data or the protection of private life makes reference to basic values such as personal freedom or dignity (dignity has been first expressed by the German constitution, probably under the influence of the text of the Universal Declaration of Human Rights proclaimed one year before the creation of the German Basic Law, and then resumed by successive Constitutions, in Spain, Portugal, Greece and later in the New Democracies). Younger constitutions have more detailed personality rights written down in their texts, corresponding to the fact that the new dangers for the individual, in particular in the field of data protection and biotechnology, have become

[1] See Art. 8 ofthe ECHR; Stephan Breitenmoser, Der Schutz der Privatsphäre gemäß Art. 8 EMRK, 1986; Chr. Grabenwarterop.cit., p. 190. See also recent judgments Gross, Application no. 67810/10, May 14, 2013; Costa and Pavan, Application no. 54270/10, August 28, 2012.

[2] Art. 7 and 8; see Judgment of the CJEU, case C-293/12 and C- 594/12, Digital Rights Ireland Ltd., Minister for Communications, Marine and Natural Resources and KärtnerLandesregierung, April 8, 2014.

[3] As to these three levels see R. Arnold, The concept of European constitutional law, in: The emergence of European constitutional law, R. Arnold ed.,XVIIth Congress of the International Association of Comparative Law, Utrecht 2006, National reports, Athen 2009, 15 – 23.

aware for the drafters of the constitutional texts. A certain exception is article 8 of the European Convention of Human Rights drafted in 1950 which safeguards private and family life. Constitutional texts which have been drafted in a more recent time period regularly have data protection clauses, often in form of a detailed text, such as article 8 of the EU Fundamental Rights Charter. The safeguard of private life and family life has been formulated in a more general way, even in recent texts, in some cases combined with the protection of the domicile and of the personal communication. Such provisions are based on the confirmed jurisprudence of national and international courts. The existence of relevant jurisprudence of courts on various levels, in particular on the level of the ECHR, is favorable for an extended dialogue of judges and for conceptual approximation. This coincides with the Europewide tendency to interpret national constitutional law in favor of international law[1] and to recognize the leading role of the jurisprudence of the Strasbourg court. However, the important impact of this court has been the basis of a certain counterbalance tendency in the sense of the demand for "subsidiarity of values"[2]. The national interpretation of own constitutional concepts shall be accepted as justified by a margin of national appreciation keeping intact national solutions in particular in moral and individual related issues. This counterbalancing tendency is expression of the autonomy of the society's perspective which follows its own historical, ethnic and cultural orientations of a determined society.

The converging process in interpretation is justified if it is accepted by the national courts while the control function of international courts should refrain to standards which are commonly accepted and indispensable for a European civilization. This is a newly upcoming tendency which finds its expression in the additional protocols no. 15 and no. 16 to the ECHR[3]. It seems adequate to combine convergence and subsidiarity in order to get a fully accepted "European bloc of constitutionality" ("bloc constitutionnel européen").

[1]See German FFC http://www.bverfg.de/entscheidungen/rs20110504_2bvr236509.html , Sicherungsverwahrung, Judgment of May 4, 2011 (relation tothe ECHR).
[2]See R. Arnold, Fundamental Rights Review in Europe: Substitution or Standard Control? In: F. Palermo/G. Poggeschi/G. Rautz/ J. Woelk (eds.), Globalization, Technologies and Legal Revolution, Nomos, 189-198.See also Council of Europe,http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp
[3]See http://conventions.coe.int/Treaty/en/Treaties/Html/213.htm and http://www.echr.coe.int/Pages/home.aspx?p=basictexts.

A second aspect to be treated here is that personality rights can be restricted for justified public interest reasons. Balancing of public interest and private interest in the field of personality rights is very sensitive and has to strictly observe the principle of proportionality. The private interest is the more important, the more the core area of personality rights is concerned. If the "innermost area of private life" is at stake, human dignity would be affected if public power interventions would admitted.

The differentiation between the innermost private sphere (sometimes called intimacy sphere), the general private sphere and the social sphere with graduated restrictions is in tendency common in European constitutional law.

A third aspect is that personality rights are a very significant criterion for the modern concept of Rule of Law. The various moderating and balancing elements of this concept permit the legislator to adapt, in a differentiated way, to the specific needs of protection of personality rights. Examples from the German jurisprudence, which can also be found in other systems, are: the requirement that laws must clearly determine the conditions of public interventions (clearness of the law), a close relation between restriction and ground for restriction, in security law the existence of a concrete, not only of an abstract danger[1], furthermore the need for clearly determining procedural rules which limit the public power limitations. This procedural dimension is of particular importance in the field of data protection. Here the idea that procedure is able to prevent from violating fundamental rights is particularly relevant.[2]

As a conclusion it can be stated that personality rights are a core element of modern constitutionalism and in dynamic development in particular through interpretation by constitutional courts. Civil law and constitutional law jurisprudence complement each other. Common European standards are emerging. Despite the convergence tendencies the question of subsidiarity of values is increasingly getting important.

[1] See FCC http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html.

[2] In German constitutional doctrine the concept of "fundamental rights protection by procedure" is of high importance. See the jurisprudence of the FCC on "self-determination of the individual as to personal data", vol. 65, p.1 and vol. 93, p. 181.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

MEANS OF PROTECTING THE RIGHTS OF CREDITORS

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Abstract

Under "Means of protecting the rights of creditors", the Civil Code regulates the measures that creditors may use for the preservation of their rights. The means of protecting the rights of creditors are grouped by the legislature into three categories: preventive measures, protective measures and the Paulian action. As preventive measures, the legislature enumerates, for illustrative purposes: preserving proofs, meeting formal requirements related to publicity and information on the debtor's account, exercising the indirect action on behalf of the debtor and taking protective measures (art. 1558 of the Civil Code). The protective measures enumerated by the Civil Code are protective distress upon property and protective seizure of property (art. 1559 of the Civil Code), but they are regulated by the Code of Civil Procedure. The indirect action (included by the legislature in the category of preventive measures), as well as the Paulian action are distinctly regulated.

Unlike the former Civil Code which regulated preventive measures from the perspective of the creditor's patrimony, the new Civil Code starts from the premise that the creditor's rights make the object of prevention.

As for transition law, art. 116 of Law 71/2011 for the enforcement of Law no. 287/2009 on the Civil Code specifies that the provisions of the Civil Code concerning the means of protecting the rights of creditors are also applicable to creditors whose claims appeared before its coming into force, i.e. 1 October 2011, if they are due after this date.

Key-words*: creditors rights, protection, Civil Code*

1. PRELIMINARY ISSUES

In accordance with art. 2324(1) of the Civil Code the one who is personally bound (debtor, co-debtor, guarantor) secures his debt by all his movable and immovable property (in existence when the obligation starts), present and future property (i.e. which will exist at the time of the performance of the obligation). It stands for a common guarantee of his creditors; the goods which are not distrainable cannot make the object of the creditors' common guarantee.

The doctrine categorically asserts that the creditor's right to all the property of his debtor is called the general pledge of the creditor. [1] The syntagm "general pledge" is a doctrinal creation, not legally entrenched by the 1864 Civil Code or the 2009 Civil Code[2], the former using the expression "common assurance of creditors" in order to express the idea which constitutes the content of this syntagm, and the latter the expression "common guarantee of creditors".

The general pledge of creditors or common guarantee of creditors involves both the creditors' right to have a judgment enforced against the debtor's property[3], and their right to take measures for the protection of the creditors' rights[4]; the Civil Code provides, under the name of "means of protecting the rights of creditors": preventive measures, the indirect action and the Paulian action.

The general pledge belongs to all creditors, including those who have no other guarantee for their claims, called unsecured creditors, and those who have special guarantees for this purpose, or guarantees as such (personal guarantees, real estate guarantees, privileges); consequently, the means of protecting the rights of creditors may be used by creditors belonging to either category.

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[1] T. R. Popescu in T. R. Popescu, P. Anca, *Teoria generală a obligaţiilor*, Editura Ştiinţifică, Bucureşti,1968, p. 343; C. Bârsan in C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor,* ediţia a IX-a, revizuită şi adăugită, Editura Hamangiu, 2008, p. 349; I. F. Popa, in L. Pop, I. F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligaţiile*, Editura Universul Juridic, Bucureşti, 2012; p. 753 et seq.; P. Vasilescu, *Drept civil. Obligaţii*, Editura Hamangiu, 2012, p. 95.

[2] This 2009 option of the legislature was justified by the doctrine by the fact that the syntagm "general pledge" is a juridical oxymoron, the two words being apparently contradictory, since the word pledge sends to "the classical movable guarantee, which is a specialized real right, and therefore contradicts the notion of "general"; yet, the expression "general pledge" is preferred by the doctrine and the judicial practice because it "is common and precise as far as its legal regime is concerned" (P. Vasilescu, op. cit., 2012, pp. 95-96); the new Civil Code uses the notion of unsecured creditor, but in another normative context: art. 1093, 1596, 2345 and 2427 of the Civil Code.

[3] The doctrine has pointed out that on the basis of the right to a general pledge, a creditor cannot prevent a debtor from transferring the goods of his patrimony (T. R. Popescu, op. cit., 1968, p. 343).

[4] Within the scope of the 1864 Civil Code, the object of preventive measures was the debtor's patrimony (T. R. Popescu, op. cit.,1968, p. 343; C. Bîrsan, op. cit., 2008, p. 350); in accordance with the 2009 Civil Code, the object of these measures are "the rights of the creditor" (art.1558).

2. PREVENTIVE MEASURES

The law enumerates, for illustrative purposes, the following measures: preserving proofs, meeting certain formal requirements related to publicity (for instance, registering a real estate guarantee), meeting certain formal requirements related to information on the debtor's account, exercising the indirect action or taking protective measures, as provided by the Code of Civil Procedure[1] (i.e. protective distress upon property and protective seizure of property)[2].

The doctrine also considers, as preventive measures, the following[3]:

1) the intervention in the debtor's lawsuits (as provided by art. 61 and the following, Code of Civil Procedure); for instance, the right of the personal creditors of a co-owner to intervene, at their expenses, in the

[1] Starting from the remark that the new Civil Code includes protective measures within the scope of preventive measures, professor P. Vasilescu wonders (rhetorically?) if the distinction between the two types of measures is lexical, rather than content-based; if one cannot argue that to preserve/prevent has a wider meaning than to protect/assure, and their legal purpose is the same (to preserve the claim or/and the debtor's goods), why are preventive measures the genus, and the protective ones the species? (P. Vasilescu, op. cit., 2012, pp. 99-100).

[2] Pursuant to art. 1559 of the Civil Code, the main protective measures are distress (protective distress upon property, as provided by art. 951-958 of the Code of Civil Procedure, and judicial distress upon property, as provided by art. 971-976 of the Code of Civil Procedure) and protective seizure of property (as provided by art. 969-970 of the Code of Civil Procedure). Pursuant to art. 951 of the Code of Civil Procedure, "protective distress upon property" is the lack of availability of the debtor's movables or/and immovables which can be claimed, and which are in his possession or a third party's possession for the purpose of using them when the creditor of an amount of money obtains a writ of execution. Pursuant to art. 971 of the Code of Civil Procedure, "judicial distress on property" is the lack of availability of the goods making the object of the litigation or, as provided by law, of other goods, by entrusting them to a distress administrator. Pursuant to art. 969 and 952 of the Code of Civil Procedure, "protective seizure of property" can be established upon the debtor's movables and immovables (sums of money, bonds or other incorporeal movables which can be claimed and which are owed to the debtor by a third person or which this person will owe in the future on the ground of existing legal relations), at the request of the creditor who has not got a writ of execution, but whose claim is acknowledged in written form and has fallen due, if he proves that he started a legal action (the court can make him pay a bail) and the creditor whose claim is not in written form, if he proves that he started a legal action and deposits, with the distress application, a bail amounting to half of the claimed value.

[3] C. Bîrsan, op. cit., 2008, p. 351; I. F. Popa, op. cit., 2012; p. 760; P. Vasilescu, op. cit.,2012, pp. 99-100.

division required by co-owners or another creditor, as provided by art. 679 of the Civil Code; or the right of the personal creditors of heirs to require the revocation of the distribution of property, without the obligation to prove the fraud of co-heirs if, although they had required to be present, the distribution took place in their absence and without prior convocation, as provided by art. 1156(4) of the Civil Code;
2) the action for simulation (as provided by art. 1289 and the following, Civ. Code), usually initiated by the creditor of a party, who is prejudiced by the apparent act and has an interest to invoke the secret act which is favourable to him;
3) the right of the creditor of the inheritance to require that a competent notary public should dispose the drafting of an inventory of the goods in the inheritance patrimony (art. 1115 par. 1 of the Civil Code);
4) the right of the creditor of the inheritance to agree to the appointment of an administrator, where there is a risk of transfering, losing, replacing or destroying the inheritance goods and the right to lodge a complaint with a competent court if he thinks he is prejudiced by the drafted inventory or the preservation and administration measures taken by the notary public (art. 1117 of the Civil Code);
5) the right of the creditors of the heir who disclaimed his share and defrauded them, to require in a court of law the annulment of the disclaimer as far as they are concerned (art. 1122 par. 1 of the Civil Code);
6) the right of the creditors whose claims arose before the opening of the inheritance to require to be paid from the joint property before the distribution of the inheritance (art. 1155 par. 2 of the Civil Code);
7) the right of the creditors of the inheritance to be preferentially paid, before the personal creditors of the heir, from the inheritance property assigned at the time of the distribution, as well the property replacing it in the heir's patrimony (art. 1156 par. 5 of the Civil Code);
8) the direct action exercised by the creditor (in the enterprise contract or representation contract) against a debtor of his debtor in order to recover his debt up to the amount that the third party-debtor owes to the debtor who did not pay at the time of starting the action (art. 1856 of the Civil Code)[1].

[1] Some authors analyze the direct action as real or genuine exceptions from the principle of the relativity of contract effects (L. Pop, op. cit., 2012, op cit., p. 198 et seq.), some

2.1. The indirect action.

2.1.1. Notion.

The indirect action (in Romanian called "oblique action" or "subrogatory action") is a legal means (for the protection of the creditor's rights) by which a creditor exercises the rights and actions of the debtor when the latter, to the detriment of the creditor, refuses or neglects to exercise them (art. 1560 par. 1 of the Civil Code). For instance, a debtor who lent someone a sum of money, does not exercise, out of negligence, the right to recover the debt, although the right to action for the recovery of the debt will soon be prescribed; or, a debtor carried out a work but, in bad faith, he does not pursue the beneficiary to obtain the payment; or, the debtor, although he has to formally notify one of his debtors for the performance of an obligation, fails to do it

The so-called "oblique action" is also named in the doctrine an indirect action, because, instead of being exercised directly, it is exercised by a creditor (indirectly); it is also called "subrogatory action", since it is exercised by a creditor who substitutes himself for the debtor[1].

The name "oblique action" is controversial in the specialized legal literature:

a) in one opinion[2], the name "oblique action" refers to both cases dealing with an action in a court of law, and cases where the debtor's right may be exercised within the extrajudicial scope; the creditor may formulate, on behalf of his debtor, requests, notifications or other 'amicable' procedural acts; for example, the creditor may put an end to an extinctive prescription, he may notify a debtor, the insurance company that the risk was produced, he may invoke the acquisitive prescription, tabulate a right

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others as preventive measures and measures for the protection of the claim (P. Vasilescu, op. cit., 2012, pp. 112-113).

[1] The doctrine constantly highlights, while referring to the "subrogatory action" as a synonym for the "oblique action", the fact that it must not be taken for the personal subrogation as a means of transferring obligations (as provided by art. 1593 et seq., Civil Code); in the case of the indirect action or "subrogatory action", the creditor exercises another person's right, the right of his debtor, while in the case of the personal subrogation, he exercises his own right; in the former case the right exercised remains in the patrimony of the debtor, while in the latter case the creditor becomes, at the time of the payment, the holder of the exercised right.

[2] I. F. Popa, op. cit., 2012, p. 762; P. Vasilescu, op. cit., 2012, p. 100.

in the land register, register a right in the Electronic Archive for Security Interests in Movable Property, declare a claim of the debtor in a class action in case of bankruptcy;
b) in another opinion[1], that we agree with, it is argued that the name "oblique action" is limited to the cases where an action is started in a court of law, because the creditor's rights which might be exercised extrajudicially, do not fall within the scope of the "oblique action", and they are considered preventive measures as such (as provided by art. 1558 of the Civil Code)

In support of this opinion, we have to notice the fact that, while regulating preventive measures, the legislature enumerates, for illustrative purposes, both judicial measures and extrajudicial measures that a creditor may take for the preservation of his rights; some come under civil law, some others under civil procedural law. The legal meaning of the notion of "action" involves that the one who has a right will lodge an application within a jurisdictional body in order to exercise his right; likewise, the semantic content of the notion "extrajudicial" involves acts, measures which are taken or administered outside a jurisdictional body; by including acts within the extrajudicial scope into the notion of "oblique action", the result is a useless alteration of the content of both notions.

2.1.2. Legal nature. The legal nature of the "oblique action" is specified by the legislature, which includes it in the category of preventive measures for the preservation of the creditors' rights (art. 1558 of the Civil Code); as a consequence, it is certain that it is not an execution measure, because it has no purpose or effect to recover the creditor's debt (some authors argue that this action is, together with the Paulian action, "at the limit between execution acts and methods for the preservation of the claim") [2].

2.1.3. Scope of application. The legislature specifies that, by way of the indirect action, the creditor may exercise "the rights and actions of

[1] C. Zamşa in Fl. A. Baias, E. Chelaru, A. Constantinovici, I. Macovei (coordonatori), *Noul Cod civil. Comentariu pe articole*, art.1-2264, Editura C. H. Beck, Bucureşti, 2012, p. 1656.
[2] P. Vasilescu, op. cit., 2012, p. 100.

the debtor", except for the rights and actions which are closely connected with the person of the debtor (art. 1560 of teh Civil Code).

With regard to the scope of the indirect action, the doctrine has mentioned that[1]:

a) the creditor may exercise only the rights and actions which are in the debtor's patrimony, but are in jeopardy to be lost because of the debtor's conduct; within the category "the rights and actions of the debtor" which might be exercised indirectly by his creditor comes, too, the request for a writ of execution, because, if the creditor could not act for the enforcement of the judgment that he would obtain, "the indirect action would be an illusion" [2];

b) the creditor cannot exercise a debtor's rights which are closely connected with him as a person (art. 1560 par. 2 of the Civil Code) such as: non-patrimonial personal rights (establishing filiation, paternity denial, action for civil status etc.); the patrimonial rights the exercise of which involves taking into account some moral reasons, therefore a subjective assessment of the debtor, (revocation of a donation between spouses, revocation of a donation for ingratitude) [3];

c) the creditor cannot exercise the debtor's rights if they have an object that cannot be pursued, such as maintenance[4];

d) creditors cannot conclude juridical acts of administration or disposal on the debtor's patrimony by substituting themselves for the latter; for instance, a creditor cannot rent movable or immovable property belonging to the debtor, he cannot cultivate land (either personally or on lease), demolish a building which risks falling down, publish a work as its author, apply for a patent on an invention, sell or change goods belonging to the debtor.

[1] T. R. Popescu, op. cit., 1968, pp. 344-345; C. Bîrsan, op. cit., 2008, pp. 352-353; L. Pop, op. cit., 2006, p. 355 et seq.; I. F. Popa, op. cit., 2012, p. 762 et seq.; P. Vasilescu, op. cit., 2012, pp. 102-103.

[2] T. R. Popescu, op. cit., 1968, p. 344.

[3] Instead, as deriving from judicial practice, the action for getting out of joint ownership is not an exclusively personal action of the debtor, therefore it can be started by the creditor by way of an indirect action (C. Bîrsan, op. cit., 2008, p. 353).

[4] With regard to the maintenance performance owed on the basis of a maintenance contract, the legislature provides the possibility for creditors to exercise the indirect action (art. 2259 of the Civil Code), although, at the same time, it declares the maintenance right as a non-transferrable and non-distrainable right (art. 2258).

Instead, the debtor may dispose freely of his property, conclude any juridical act regarding the goods in his patrimony, assume new obligations and acquire new rights, his legal capacity not being affected by any constraints.

2.1.4. Legal requirements for the exercise of the indirect action. The requirements for the exercise of the indirect action are the following:

a) the creditor's claim must be certain and enforceable (art. 1560 par. 1 of the Civil Code), but it is not necessary for the creditor to have obtained a writ of execution, because the indirect action is a measure for the preservation of the debtor's patrimony, not an execution measure; likewise, the value of the creditor's claim is not important and neither is the date when it appeared because the creditor's right to a general pledge comprises all the goods in the debtor's patrimony from the date when the claim becomes certain and enforceable until it is executed[1];

b) the debtor must be inactive, i.e. he must not exercise his right out of negligence, in bad faith or out of ignorance (art. 1560 par. 1 of the Civil Code)[2];

c) the creditor must have a serious and legitimate interest in initiating the action, an interest that he has to prove; the creditor's interest is legitimate when the attitude of the debtor prejudices the creditor (art. 1560 par. 1 of teh Civil Code); for instance, *the creditor's action lacks any interest if the debtor is solvable* or if it refers to non-distrainable property.

The formal notice sent to the debtor or the act of introducing him in the lawsuit are not requirements for the exercise of the indirect action; yet, it is useful for him to be a party in a lawsuit because, as a result, on the one hand, the judgment will be enforceable against him, and on the other hand, the debtor may file defences and exceptions which might benefit the creditor as well[3].

[1] T. R. Popescu, op. cit., 1968, p. 345.

[2] Therefore, if the attitude of the debtor changes and takes over the indirect action promoted by the creditor, the latter loses the status of a party in the lawsuit, but he can apply for intervention in his own interest in order to protect his interests (T. R. Popescu, op. cit., 1968, p. 345).

[3] T. R. Popescu, op. cit., 1968, p. 345; it is not always that the serious and legitimate interest must be identified with the debtor's insolvency; for instance, the creditor, as a promising buyer of some goods in co-ownership, may require, by way of the indirect action, instead of the promising seller, the division, within which he may require the

Referring to the moment when the requirements for the admissibility of the indirect action must be met, the juridical doctrine argues that it is the moment when the judgment is delivered[1].

The defendant against whom the indirect action is exercised can defend himself by all means that he might have used against the debtor, since the creditor exercises a right of the debtor (art. 360 par. 3 of the Civil Code); the exceptions raised by the defendant might be grounded in juridical acts prior or subsequent to the beginning of the indirect action; for instance, the defendant may invoke the compensation of his claim with another claim that he has against the debtor, which appeared before or after the indirect action had been brought in court, or he may invoke a transaction concluded with the debtor after this date, which will lead to the termination of the indirect action[2];

Instituting the indirect action has no such effect as the unavailability of the debtor's patrimonial rights, therefore the debtor may dispose of this property during the lawsuit too, such disposal acts being enforceable against the creditor, except for the case where they are fraudulent in nature[3].

2.1.5. Effects of the admission of the indirect action. Since the creditor exercises an action on behalf of his debtor, the consequences are the following:

a) the admission of the indirect action entails the return into the debtor's patrimony of the property threatened to be lost[4];

b) the judgment admitting the indirect action benefits all creditors, without any preference in favour of the creditor who brought the action in court (art. 1561 of the Civil Code). Therefore, the doctrine emphasized the fact that a direct action (similar to the one provided by law for the

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assignment of the goods in his property in order to obtain later the conclusion of the sales and purchase contract (L. Pop, 2006, p. 365). As for the different opinions referring to the enforceability of the judgment in case the debtor is not a party in the lawsuit, see (L. Pop, op. cit., 2006, p. 371).

[1] L. Pop, op. cit., 2006, p. 366. The author also specifies that in the case of preventive measures (taken by the creditor for the preservation of his rights) which are extrajudicial in nature, the conditions for the exercise must be met when the creditor formulates the request.

[2] L. Pop, op. cit., 2006, p. 370.

[3] T. R. Popescu, op. cit., 1968, p. 343; L. Pop, op. cit., 2006, p. 371.

[4] C. Bîrsan, op. cit., 2008, p. 354.

enterprise contract or the representation contract) would be of greater interest to the creditor than the indirect action[1].

The indirect action is rarely used in practice because, as a rule, the object of the obligation is a sum of money, a case where the creditor's alternative to the indirect action is the seizure, which is preferred due to its effectiveness[2].

3. THE REVOCATORY OR PAULIAN ACTION

3.1. Notion[3]**.** The revocatory action[4], also called Paulian action by doctrine and jurisprudence[5], is the action through which the defrauded creditor brings an action in court, requiring that the juridical acts

[1] C. Bîrsan, op. cit., 2008, p. 354.
[2] T. R. Popescu, op. cit., 1968, p. 346.
[3] For a more detailed list of the definitions given to the Paulian action under the 1864 Civil Code, see L. Pop, op. cit., 2006, pp. 375-376. For definitions given after the coming into force of the new Civil Code, see I. F. Popa, op. cit., 2012, p. 767; P. Vasilescu, op. cit., 2012, pp. 105-106.
[4] The name of "revocatory action" is criticized by part of the doctrine arguing that in the basic regulation of this action, the legislature starts from the premise that, from the perspective of its legal nature, it is an action unenforceable against the fraudulent legal act of the debtor (art. 1562 par. 1 of the Civil Code) and, consequently, the effect of the admission of the action is the declaration of the challenged act as unenforceable against the creditor who started the action; if we accept the idea that this revoking action is an action unenforceable against the fraudulent act, the use of the term "revocatory" is improper, being subject to confusion; the proper term for this kind of action would be that of Paulian action, traditionally used by the doctrine; yet, in the legal texts constituting applications of the revocatory action in various areas of civil law (art. 1122, art. 1156 par. 4, art. 2260 Civil Code), the legislature considers that the effect of this action consists in the revocation of the challenged act; this is subject to criticism because the judicial revocation (for instance, the revocation of donations or legacies for ingratitude or for failure to fulfil the obligations) involves the illicit conduct of the debtor and its effects are erga omnes, and usually retroactive (L. Pop, op. cit., 2006, pp. 410-411; I. F. Popa, op. cit., 2012, p 778). Although we agree with the above-mentioned authors, we prefer the term "revocatory action", as a consequence of the idea that the terms consecrated by the legislature should be used in legal works.
[5] The name of the Paulian action comes from Roman law, its creator being the praetor Paulus; in Roman law, the Paulian action was a class action, being exercised on behalf and on the account of all creditors by a trustee; "in current civil law, in the absence of civil bankruptcy organized by law, the Paulian action is individual, and it may be initiated on one's own behalf by each creditor and its admission benefits the claiming creditor" (L. Pop, op. cit., 2006, pp. 376-377).

concluded by the debtor in the fraud of the creditor's rights should be declared unenforceable against him (art. 1562 of the Civil Code)[1].

The Paulian action is distinct from the indirect action from several standpoints:

a) the indirect action is brought by the creditor on behalf of his debtor, whereas the Paulian action is brought by the creditor on his own behalf, it is a direct action[2];

b) the indirect action is motivated by the debtor's passivity, corroborated or not with the intention to defraud the creditor, whereas the Paulian action is determined by the debtor's action, built on the intention to defraud[3];

c) the indirect action benefits all creditors (art. 1561 of the Civil Code), whereas the Paulian action benefits the creditor alone, who exercises it (art. 1565 par. 1 of the Civil Code).

The basis of the Paulian action is the principle according to which the debtor guarantees the performance of his obligations by his entire patrimony from the date when the obligations become enforceable, alias the right of general pledge of unsecured creditors (art. 2324 par. 1 of the Civil Code) and the principle of performing obligations in good faith (art. 14 of the Civil Code), the main purpose of the Paulian action being to enable creditors to protect themselves "against the premeditated insolvency of debtors", that is to protect the general pledge of creditors[4].

3.2. Legal nature. In the doctrine, opinions converge towards the idea that the Paulian action is an action for the unenforceability of the act concluded by the debtor with the intention to defraud the creditor's

[1] For instance, the creditor is ready to recover a debt, and the debtor donates the item of property, thus creating the state of insolvency, since he has no other goods of economic significance (C. Bîrsan, op. cit., 2008, p. 355) or in order to hide the goods from the imminent pursuance of the creditor, the debtor sells the goods in cash and hides the money, thus becoming insolvable or increasing insolvency, so that his creditor cannot recover his debt (T. R. Popescu, op. cit., 1968, p. 346).
[2] T. R. Popescu, op. cit., 1968, p. 347.
[3] L. Pop, op. cit., 2006, pp. 373-375, 407.
[4] T. R. Popescu, op. cit., 1968, p. 346.

rights[1]. In other words, the Paulian action is a personal action because its purpose is to protect a creditor's claim right[2].

3.3. Scope of application. The Paulian action can only be used against juridical acts because they are committed with the intention to defraud[3]. Not all the juridical acts of the debtor can be challenged by the creditor via the Paulian action; the only juridical acts that can be "revoked" are the acts diminishing the debtor's patrimony[4].

The other juridical facts (juridical facts as such), committed without the intention to take legal effects, are excluded from the scope of application of the Paulian action[5].

The following juridical acts cannot be annulled through the Paulian action:

a) the acts referring to exclusively personal rights, either non-patrimonial personal rights (adoption, paternity suits etc.) or patrimonial rights the exercise of which involves a personal assessment on the part of the debtor: request for the remedy of moral damage, revocation of a donation for lack of gratitude, refusal of a donation (the exercise of the right to accept or decline belongs exclusively to the debtor, therefore the creditor cannot substitute himself for his debtor so as to accept the donation) etc.[6];

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[1] C. Bîrsan, op. cit., 2008, p. 360.

[2] T. R. Popescu, op. cit., 1968, p. 352; L. Pop, op. cit., 2006, p. 409; I. F. Popa, op. cit., 2012, p. 778; in another opinion, the Paulian action is a mixed, personal and real action (to mention this opinion, see L. Pop, op. cit., 2006, p. 409).

[3] T. R. Popescu, op. cit., 1968, p. 348; the juridical acts which are part of the scope of application of the Paulian action can be of several types: unilateral acts or contracts, onerous acts or free acts, right waivers (for instance, the right to usufruct or succession), constitutive acts or acts transferring rights, unilateral or bilateral acts, debt cancellation etc. (T. R. Popescu, op. cit., 1968, p. 348; L. Pop, op. cit., 2006, p. 378).

[4] T. R. Popescu, op. cit., 1968, p. 348.

[5] We would like to mention that the doctrine divides legal facts into two categories: a) events independent of the will of people (birth, death of a person, with the legal effect of the birth or death of a person with legal rights and obligations), events of force majeure, the passing of time, related to the end of the extinctive prescription etc. and b) voluntary acts of persons, with legal effects, some without intention (but the legal effects are produced on legal grounds; these acts may be licit or illicit), some others with intention; for example, juridical acts (M. N. Costin, C. M. Costin, *Dicţionar de drept civil de la A la Z*, ediţia a doua, Ed Hamangiu, 2007, pp. 456-457).

[6] In the doctrine, it has been noticed that there are cases of acts concluded for the exercise of some rights of a personal nature which may be annulled by way of the

b) the acts referring to non-distrainable rights and goods of the debtor[1]; for instance, renouncing the maintenance that someone is entitled to on legal grounds, renouncing a benefit awarded by the state on the ground of a special law, renouncing copyright, a literary award or a scholarship;
c) the payment of an enforceable debt (it cannot be challenged by the Paulian action because, for the debtor, it is a necessary act, which is not subject to fraud and corresponds to a legitimate interest for the creditor who received it; on the other hand, the payment is not an act which diminishes the patrimony, but a neutral act, because in case an item of property is no longer part of the patrimony assets, this is compensated by the payment of a debt which put a charge on the liabilities); instead, if the debtor pays a debt which is not enforceable (for instance, it is a natural obligation or under a suspensive condition), the Paulian action is admissible[2]; similarly, equivalent payment cannot be annulled as a matter of principle by the Paulian action, but if the value of the goods given as an equivalent payment is higher than the value of the goods that the debtor had initially promised, thus defrauding the creditors, it loses the characteristics of the payment of an enforceable debt and can be annulled at the request of the creditor with an interest in it[3];
d) the juridical acts by which the debtor assumes new obligations do not fall within the scope of application of the Paulian action because the debtor, regardless of the amount of the debts, still has the right to administer his patrimony; the exception is the case where the contracting of the new obligation by the debtor is performed with the intention to defraud his creditors; for instance, if the debtor reached an agreement with the new creditor, namely to share the gain obtained from the new juridical act, to the detriment of other creditors[4];
e) the acts of the legal division cannot be annulled, as a matter of principle, by the Paulian action[5] (art. 679 par. 1 of teh Civil Code), but,

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Paulian action; for instance, if the debtor of a maintenance obligation agrees to pay an exaggerated sum of money so as to defraud his creditors(T. R. Popescu, op. cit., 1968, p. 348).

[1] T. R. Popescu, op. cit., 1968, pp. 348-349; L. Pop, op. cit., 2006, p. 379.

[2] L. Pop, op. cit., 2006, p. 383.

[3] T. R. Popescu, op. cit., 1968, p. 349.

[4] T. R. Popescu, op. cit., 1968, p. 349.

[5] In case of a division of property ended not by a jugment, but by the parties' transaction certified by a judgment, the above-mentioned assertion must be detailed; the doctrine has advanced the opinion that the creditor may require, by way of the Paulian

in order to prevent the defrauding of the creditors' interests by the division contract, the law provides that they are entitled to intervene in the division process required by co-owners or another creditor, as well as to require that the division should take place while they are present. As an exception, creditors may challenge by a Paulian action, a division which has already been performed if, although they required to be present, the division took place in their absence and without prior convocation, as well as in those cases where the division was simulated or took place in such a manner that the creditors could not intervene[1]. The voluntary division can be annulled under the general provisions regarding the Paulian action.

In the doctrine, it has been argued that the scope of application of the Paulian action is not different from that of the indirect action, a reason why, from one case to another, the creditor may be entitled to choose between the indirect action and the Paulian action "according to his interest and the fulfilment of the conditions under which either action can be instituted"[2].

3.4. Requirements for the exercise of the Paulian action. In order to be admissible, the Paulian action must meet the following requirements:

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action, the declaration of the unenforceability of a fraudulent transaction between the debtor and the opposing party in a litigation, even if on this basis, the court delivered a judgment based on the transaction between the parties (L. Pop, op. cit., 2006, p. 385).

[1] The situation of creditors in case of distribution of property upon succession is regulated by art. 1156 Civ. Code, which provides that the personal creditors of heirs may require the distribution on behalf of their debtor, they may require to be present at the time of the distribution by way of mutual agreement or they may intervene in the distribution lawsuit. Creditors may require the revocation of the distribution of property without the obligation to prove the fraud of the co-heirs on condition that, although they required to be present, the distribution took place in their absence and without prior convocation. In all other cases, the action for the revocation of the distribution remains subject to the provisions of art. 1562, i.e. creditors must prove the prejudice.

[2] C. Bîrsan, op. cit., 2008, p. 355; the famous author referred to a decision in a case (decision 4126/2005, published at http://legeaz.net/spete-civil-iccj-2005/decizia-4126-2005) in which the supreme court established that a creditor was entitled to require, upon meeting the legal requirements, the annulment of his debtor's disclaimer of succession and to accept succession on his behalf, the wide formulation of the principle in this field entitling him to choose either of the two actions (indirect action or Paulian action).

a) the creditor's claim must be certain, determined and enforceable. Referring to the conditions regarding the claim, the Civil Code provides that it must be certain, specifying the moment: the time of bringing the action in court (art. 1563 of teh Civil Code); but the doctrine and judicial practice are unanimous when considering that a claim must also be determined and enforceable[1].

The legislature does not specify the time when the claim must be determined and enforceable, and the doctrine of the new Civil Code expresses the opinion that the time is the delivery of the judgment[2].

The persons who may initiate the Paulian action are the following:

i) the holder of a simple claim;

ii) the holder of a claim affected by a suspensive time limit as provided in favour of the debtor, because the insolvency state entails the impossibility of observing the time limit on the part of the debtor, the claim thus becoming enforceable in advance (art. 1417 par. 1 and art. 1418 of the Civil Code), and if the claim was not detrmined, the creditor may introduce the debtor in the lawsuit so that the court will establish the value of the debt[3];

iii) the holder of a claim affected by a suspensive time limit as provided in favour of the creditor[4];

The holder of a claim under a suspensive condition cannot initiate the Paulian action because he has the right to take only preventive measures, and the Paulian action is more than a preventive measure, but

[1] With regard to the reasons justifying the need to meet the three requirements by the claim of the creditor who makes use of the Paulian action, see I. F. Popa, op. cit., 2012. p. 770.

[2] I. F. Popa, op. cit., 2012. p. 770; the author argues that in the Civil Code of Quebec, a source of inspiration in the drafting of the Romanian Code, it is provided that the claim right must be certain at the time of starting legal proceedings, and determined and enforceable at the time the judgment is delivered and the fact that, in the Romanian doctrine developed around the former Civil Code, in the absence of a law text, an opinion was expressed, arguing that a claim must be certain, determined and enforceable at the time the court adjudicates on the Paulian action.

[3] T. R. Popescu, op. cit., 1968, p. 349; in such a case, the claimant will require that the court should adjudicate in the same judgment on the admissibility of the Paulian action, as well as on the debtor's loss of the benefit of the suspensive time limit (L. Pop, op. cit., 2006, p. 387).

[4] L. Pop, op. cit., 2006, p. 387.

less than an execution act, therefore the claimant does not need a writ of execution[1];
b) the claim must be, as a matter or principle, prior to the challenged act; the justification of this requirement is the fact that, at the time creditors concluded a contract with the debtor, the transferred goods were part of his patrimony, namely of their general pledge, therefore the creditors prior to the fraudulent act were defrauded[2]; as an exception from the above-mentioned principle, the Paulian action is admissible if it is proved that the creditor concluded the challenged act for the purpose of defrauding a future creditor[3].

If the right of the creditor originates in a juridical fact, the anteriority of his claim as related to the fraudulent act of the debtor can be proved by any means[4]; similarly, if the creditor's claim is not certainly dated, since it originated in a juridical act acknowledged by a signed document, the date of his claim prior to the challenged act may be proved by any means, because the challenged act was concluded for the purpose of defrauding the creditor, situation in which he becomes a third party in relation to that act, and it is not enforceable against him as a successor of the debtor[5];
c) the fraudulent act of the debtor must have prejudiced the creditor; provided that he proves a prejudice, the creditor may require that the juridical acts concluded by the debtor in fraud of his rights should be

[1] T. R. Popescu, op. cit., 1968, p. 350; for arguments supporting this opinion, see I. F. Popa, op. cit., 2012. p. 772 ; for the opinion according to which a writ of execution is a necessary condition for the Paulian action, arguing that only if the enforcement had started, can the creditor prove that he suffered a prejudice which consists in the impossibility of recovering the debt due to the debtor's insolvency, see L. Pop, op. cit., 2006, p. 390.
[2] T. R. Popescu, op. cit., 1968, p. 350.
[3] T. R. Popescu, op. cit., 1968, p. 350; for instance, the transfers made by the author of an accident before being forced by a judgment to pay damages to the victim (L. Pop, op. cit., 2006, p. 388); likewise, the fraudulent act concluded for the purpose of taking away goods so that they will not be seized or executed, can be annulled by the Paulian action if it was concluded before the beginning of the prosecution, but after the commission of the act which led to the conviction of the doer, i.e. payment of civil damages or confiscation of property(C. Bîrsan, op. cit., 2008, p. 357).
[4] T. R. Popescu, op. cit., 1968, p. 351.
[5] C. Bîrsan, op. cit., 2008, p. 357; for the opinion according to which a signed document acknowledging the claim of the creditor must be dated in order to be enforceable against the third party who acquired the property fraudulently transferred by the debtor, see T. R. Popescu, op. cit., 1968, p. 351.

declared unenforceable against him (art. 1562 par. 1 of the Civil Code); for instance:
c1) the creditor is prejudiced if by the fraudulent act *the debtor creates or increases an insolvency state*; likewise, the creditor is prejudiced if the fraudulent act is performed by the debtor for the purpose of maintaining the insolvency state; for instance, the debtor's fraudulent disclaimer of a solvable legal inheritance can be annulled under art. 1122 Civ. Code, which provides that the creditors of the heir who disclaims the inheritance in their fraud may require that the court should annul the disclaimer as far as they are concerned within 3 months from the date when they knew the disclaimer; such a disclaimer is fraudulent because the insolvent debtor refuses to accept the inheritance in order to prevent his creditor from recovering the debt; the admission of the revocatory action produces the effects of the acceptance of the inheritance by the debtor-heir with regard to the claimant-creditor and within the limit of his claim;
c2) besides these legal examples, the doctrine considered as acts prejudicing the creditor, the following:
i) the acts impoverishing the debtor due to the disequilibrium between the performances of the parties (sale for a lower price as compared with the real one[1], rental for a small amount of money) or due to the absence of counter-performance (direct and indirect donation);
ii) the acts concluded for the purpose of taking away part of the debtor's goods so that the creditor will not recover them, by substituting those goods for other goods which might be easily hidden, such as money[2];
iii) the acts by which a creditor is prevented from exercising his right on determined goods in the debtor's patrimony, a right grounded on a juridical act (if the debtor sells his goods to a third party although he had promised to sell it to the creditor, the latter cannot exercise his right to buy or not the goods)[3];
d) the debtor's right; both the doctrine and the jurisprudence unanimously agree that the debtor's fraud consists in knowing the fact

[1] In order to initiate the Paulian action the creditor must justify some interest; if the goods are sold by the debtor at their real value, the revocation of the sale would be useless for the creditor, therefore he is not interested in starting a Paulian action.
[2] For these examples and other explanations, see L. Pop, op. cit., 2006, pp. 392-393.
[3] L. Pop, op. cit., 2006, pp. 391, 397; for the Paulian action in the publicity system of the land register, see M. Nicolae, *Tratat de publicitate imobiliară*, vol. II, Ed. Universul juridic, 2006, pp. 312-333.

that by concluding the act with a third party he will prejudice the creditor (usually by creating or increasing the debtor's insolvency state), and there is no need of intention to defraud the creditor; the creditor has the task to prove his debtor's fraud[1], and for this, any means of proof is admissible[2];

e) the complicity of the third party to the fraud; in this respect, there is a distinction between the juridical acts by which the debtor aims to defraud his creditor; thus, in the case of an onerous contract, there is a third party's complicity to the fraud when the latter knew the fact that by the concluded act the debtor created or increased the insolvency state (therefore, it does not matter whether the third party knew or not the debtor's intention to prejudice the creditor's interests); the solution is the same in case the payment is made as the performance of an onerous contract (art. 1562 par. 2 of the Civil Code); instead, in case of a contract of the freee type, the debtor's fraud is sufficient, there is no need to prove the third party's complicity[3]; in case the third party transfers the goods to another person, both the doctrine and the jurisprudence consider that the creditor who institutes the Paulian action against him, must prove complicity to the fraud of both the third party and the person who subsequently acquired the goods.

3.5. Effects of the Paulian action.

a) as a consequence of the Paulian action the challenged act will be declared unenforceable against the creditor who initiated the action; it will have the same effect towards the other creditors who, being able to bring the action in court, intervened in the case (art. 1565 par. 1 thesis I of the Civil Code). The claimant-creditor and all the other creditors who

[1] The doctrine has emphasized the fact that introducing the debtor in the case is not mandatory, the creditor acting on his own behalf, but it is useful in order to make the decision enforceable against him (T. R. Popescu, op. cit., 2008, p. 350).

[2] In the doctrine it has been noticed that there are cases where the legislature presumes the existence of the fraud, such as, for instance, the case of the personal creditors of heirs, who "can require the revocation of the distribution of property without any obligation to prove the fraud of co-heirs on condition that, although they required to be present, the distribution took place in their absence and without prior convocation" (art. 1156 par.4 of the Civil Code).

[3] The doctrinal justification for the treatment of the third party in the case of free juridical acts was that in the case of these acts the third party aims to preserve a gain, whereas the creditor aims to avoid a loss, and in the case of onerous acts both the third party and the creditor try to avoid a loss (C. Bîrsan, op. cit., 2008, p. 358).

intervened in the case will have the possibility of requiring a writ of execution as if the goods were still in the debtor's patrimony and will be entitled to be paid from the price of the goods, with the observance of the preference causes existing among them (art. 1565 par. 1 thesis II of the Civil Code);

b) since the admission of the Paulian action takes effects only for the creditor in favour of whom it was declared, the law provides that the acquiring third party may keep the goods, paying the creditor who benefits from the admission of the action, an amount of money equal to the prejudice suffered by the latter by the conclusion of the act (art. 1565 par. 2 thesis I of the Civil Code);

c) if the third party does not remedy the prejudice suffered by the creditor, the judgment admitting the Paulian action makes the goods unavailable until the end of the enforcement of the the claim on which the action was based; the provisions regarding the publicity and effects of the inalienability clause are applied accordingly (art. 1565 par. 2 final thesis of the Civil Code). As a result, so that the measure of making the goods unavailable will be enforceable against third parties, the publicity measures provided by law must be fulfilled; for instance, in the case of immovables, the unavailability measure must be registered in the land register, similarly to the contractual clause of inalienability (art. 628 par, 2 of the Civil Code);

d) if the goods made unavailable by a judgment admitting the Paulian action, were sold after the enforcement of the judgment and the price was higher than the value of the creditor's claim, the surplus belongs to the third party[1];

e) if the third party does not respect the unavailability measure and transfers the goods, the creditor may require the annulment of the transfer act (art. 629 par. 2 of the Civil Code);

f) the third party who acquired the goods may be compelled to pay damages to the creditor in case the goods cannot be recovered (for instance, the goods were sold to a person who was in good faith or were destroyed out of a third party's negligence); damages can cover the creditor's prejudice within the limit of the value of the goods[2].

[1] C. Bîrsan, op. cit., 2008, p. 359; L. Pop, op. cit., 2006, p. 404.
[2] L. Pop, op. cit., 2006, p. 404.

The third party who bought the goods and who was subject to eviction by the creditor through the Paulian action, is entitled to regress against the debtor, based on the eviction guarantee[1].

3.6. The prescription of the Paulian action. The creditor's right to start a Paulian action is prescribed within a special time limit of one year (unless otherwise provided by law); this period starts from the date when the creditor knew the prejudice arising out of the challenged act (this is called by the doctrine the subjective moment of knowing the prejudice[2]), or from the date when he had to know the prejudice resulting from the challenged act, called the objective moment of knowing the prejudice (art. 1564 of the Civil Code); therefore, the law relates the beginning of the prescription of the Paulian action to the (subjective or objective) moment of knowing the prejudice, not the moment when the prejudice occurred, i.e. the conclusion of the fraudulent juridical act[3].

[1] L. Pop, op. cit., 2006, pp. 406-407; the doctrine has analyzed the following hypotheses related to a possible conflict between the pursuing creditor and the third party's own creditors: if the creditor pursues to get the sold item of property in kind, he cannot be in conflict with the unsecured creditors of the third party acquiring the item of property, because by the decision admitting the Paulian action, the act of alienating the property is declared unenforceable against the creditor and, as a consequence, it is considered that the property is still in the patrimony of the debtor and did not enter into the patrimony of the third party; if the pursuing creditor can no longer pursue the property in kind, but he has a claim against the third party, consisting of a sum of money, he will be in conflict with the unsecured creditors of the third party; if the third party constituted real guarantees on the property acquired for the benefit of some of his creditors, they have the legal status of those who subsequently acquire property by an onerous contract in relation to the pursuing creditor and, consequently, the constituted guarantees will be enforceable against him if he does not prove their complicity to the debtor's fraud (Chr. Larruomet, *Les obligations. Regime generale*, Economica, Paris, 2000, p. 270, cited in I. F. Popa, op. cit., 2012, p. 777).

[2] M. Nicolae, *Prescripţia extinctivă*, Ed. Rosetti, Bucureşti, 2004, p. 505.

[3] Referring to the extinctive prescription in the case of the right to action for the remedy of damage caused by an illicit act, the famous author M. Nicolae shows that it does not start from the date when the damage was caused, although from an objective perspective, at that time both the right to action and the right to remedy arise. But, since the victim cannot exercise his right because he does not know the prejudice, "in order to protect the victim's rights, the legislature detached the moment of the beginning of the prescription from the moment when the subjective right to remedy arises (…) and, impliedly, the moment when the right to action arises too, taking into account the subjective moment of knowing the damage and the one responsible for its remedy, establishing that the prescription starts at the time the victim knew both the damage and

Ultimately, the Paulian action is admissible on condition that the creditor's claim right has not been prescribed[1].

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the one responsible for it." On the other hand, because the connection between the beginning of the prescription and the subjective moment of knowing the damage has the disadvantage of postponing, in certain cases, for a too long period, the date of the beginning of the prescription, the legislature also established a second objective moment: the date when the prejudiced person had to know both the damage and the person who was responsible for it, a moment determined by the court accordingly, taking into account the actual circumstances (M. Nicolae, op. cit., 2004, pp. 505-506); sometimes, in order to accelerate the removal of uncertainties from the civil circuit and to prevent litigations referring to the moment when the prescription begins, by special dispositions, the legislature sets out a time limit within which the damage must be discovered and relates the moment of the beginning of the prescription to the expiry of that moment.

[1] C. Zamşa, op. cit., 2012, p. 1660.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

NON-UNION COLLECTIVE EMPLOYEE REPRESENTATION IN POLAND – FAILED HOPES?

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Abstract

1. The most important feature of collective employee representation in Poland at present time is the de-unionisation. While in 1990 as many as about 8 million people were trade union members (over 30% of the employed), according to current estimates the number is about 1.5 to 2 million (ca. 15%). The ratio would be even less (about 7%), if the number was referred to the general number of the working people, regardless of the legal basis of their employment. The reasons for the situation are not quite clear. The most often quoted one is the changes related to the establishment of the market economy system, i.e. the abandoning of the central planning and gradual elimination of state-owned enterprises. The privatization of the latter, started in 1990, has led to a far-going transformation of the economy. To the above mentioned issues massive unemployment should be added, as well as the widespread application of flexible forms of employment, which makes those working much more dependent on the employment establishments.

2. This is why, in the system of collective representation of the employees, ever greater role is now being played by all kinds of non-union representation, filling the gap created by the weakening trade union movement. Initially, they took on non-institutionalized forms (staff delegates elected ad hoc to deal with a specific issue). Institutional representations (works councils) started emerging with time.

3. The now observed growth of importance of the institutional forms of union representation is a result of, first of all, the ever stronger de-unionisation. As it has already been mentioned, it is very difficult to precisely indicate the reasons for the phenomenon. I would go, however, so far as to say that the weakening of the trade union movement results also from the development of the non-union representations. Sometimes the employees – having the possibility to form the work's council - drop the idea of establishment of a trade union organisation at all.

4. It should be added that only a very small number of employees have actually decided to establish the work's council. Starting in 2006, when the law providing for works councils came into force, the bodies were formed at as few as about 10% of the employers. After the initial term of office of the councils the ratio dropped down dramatically, however, and the operation of the bodies was prolonged, for a further period, only at about 2% of the employers. At present the idea of works councils has completely failed. And while the reasons for the situation are many, the shortcomings of the law not being excluded, it seems that the key reason is simply the employees' lack of interest in the form of representation, and sometimes also the employers' unwillingness to support it.

5. *Can thus any high hopes be set on the institution being, in fact, dead? A much better solution seems to lie in supporting the most traditional forms on representation, based on the trade union principles.*

1. In 1989 deep transformation of the political and economic system was started in Poland, exerting impact on almost all spheres of the country's social life. Also the system of collective employee representation underwent profound changes. Those resulted mostly from the restoration of trade union liberty, as well as privatization and the ensuing alterations of the organizational forms of business. After 1989 the employees were given freedom to form trade unions again and made gladly use of it, at least in the initial years of the transformation. It thus seemed that from 1990 on the role of trade unions in the system of collective employee representation would be strengthened. What is more, the union-based model of the representation was viewed as the best one. At that time trade unions in Poland were granted vast rights to represent the employees, some of them being conferred exclusively on the trade unions (e.g. the right to collective bargaining or instituting and conducting labour collective disputes). Rather soon it turned out, however, that after its initial growth, the trade union movement in Poland started losing momentum, and later on, in a relatively short time, the trade unions were even faced with a decline. While in 1990 as many as about 8 million people were trade union members (over 30% of the employed), according to current estimates the number is about 1.5 to 2 million (ca. 15%). The ratio would be even less (about 7%), if the number was referred to the general number of the working people, regardless of the legal basis of their employment.

The existing situation means, in fact, de-unionisation, the reasons for which are not quite clear. The most often quoted one is the changes related to the establishment of the market economy system, i.e. the abandoning of the central planning and gradual elimination of state-owned enterprises. The privatization of the latter, started in 1990, has led to a far-going transformation of the economy. The huge state work establishments have been replaced by small and medium-sized enterprises, now dominating in the country. These are mostly private or commercialized entities (the latter being enterprises still owned or co-owned by the state, but run in accordance with the market system rules, in the legal form of commercial law companies). To the above

mentioned issues massive unemployment should be added, as well as the widespread application of flexible forms of employment, which makes those working much more dependent on the employment establishments. The decline of trade unions is also caused by the changes in the nature of employment (replacement of the contracts of employment with civil law agreements), and a marked rise of the level of education among the employees. The individual providence principle, once widespread among the employees, is now withering away, people believing that their interest can be effectively taken care of by themselves, entirely on their own. They recall trade unions only when in a situation of danger. Usually it is too late then.

This is why, in the system of collective representation of the employees, ever greater role is now being played by all kinds of non-union representation, filling the gap created by the weakening trade union movement. Initially, they took on non-institutionalized forms (staff delegates elected *ad hoc* to deal with a specific issue). Institutional representations (works councils) started emerging with time.

2. At present the following types of non-union employee representation can be found in Poland: a) employee councils in state-owned enterprises, b) employee representatives in information and consultations bodies or participation bodies within transnational business entities, c) works councils in non-state owned enterprises, d) *ad hoc* representatives and occupational safety and health representatives (the forms of so-called non-formalised representation) and e) bodies of professional (trade) self-government. It should be remembered, though, that the catalogue in question is not a closed one, as it includes only the entities whose legal status is provided for by universally binding legal regulations. Meanwhile, certain pieces of legislation allow for the creation of alternative systems (like the Act on European Works Councils) or sanction the systems that were called to being earlier (e.g. the Act on Informing and Consulting Employees).

Not all of the above mentioned forms play an essential role in the system of collective employee representation. First of all, the bodies of employee self-government (employee councils) at state-owned enterprises have very limited scope of operation. Although they enjoy very wide participation (actually co-managing) powers, given the processes of privatization there have been just a few tens of such business entities operating in the country now, and their number

permanently grows smaller. As far as the bodies of professional self-government are concerned, these can be regarded as employee representation bodies only to a very narrow extent, as their primary task lies in exercising supervision and taking care of due and reliable performance of the profession by the members of a specific business (trade) corporation. By far the most important are the works councils operating under the Act of 7 April, 2006 on Informing and Consulting Employees implementing provisions of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

3. As regards Poland's legal system the works council operating under the Act of 7 April, 2006 is the employee representation within the meaning of the provisions of Directive 2004/14. The councils can be established, at the employee initiative, only at entrepreneurs (employers involved in business activity) with at least 50 employees . The Act is thus not applicable to the employers not running business activity, the fact meaning that, in practical terms, almost all employers from the public (budget) sphere are exempt from its provisions.

In the initial years of the operation of the Act in question, the mode of establishment of the works council depended on whether there were representative trade union organization operating at the employer's or not. Where there existed such organizations, works councils were appointed by the organizations themselves; only where consensus between them on the issue could not be reached, the council was elected by the staff from among the candidates nominated by the organizations. In its decision of 1 July, 2008, the Constitutional Tribunal found the union-dependent mode of works council establishment unconstitutional, which resulted in the need to amend the Act on Employee Informing and Consulting. At present, works councils are elected by the staff of the workplace under a democratic election scheme, from among candidates nominated by groups of employees. The works council is composed of 3 to 7 persons, depending on the size of the company. The costs of the elections and operation of the works council are borne by the employer.

The works council is a body which, acting on behalf of the staff, has the right to seek information from the employer on company matters and to express opinion (be consulted) on some of the issues. It can be thus rightly stated that the council is a sort of an intermediary between

the employer and the employees hired by him. The information received by the council from the employer should be made available to the employees.

The scope of the matters on which information must be passed to the council includes: 1) the operation and business standing of the employer and the changes forecasted in that respect, 2) the numbers, structure and forecasted changes of employment at the company and actions aimed at maintenance of the level of employment, 3) actions that may have essential impact on work organization or the basis of employment. The information is provided by the employer if the changes are forecasted or actions are planned and where the works council's motion to receive the information has been filed in writing. In addition, the matters mentioned at 2) and 3) above have to be the object of consultation.

As far as guarantees for the right of access to information are concerned, it is important that the information duty of the employer should be duly met. The information has to be passed at the time, in the form and scope allowing the works council to get themselves acquainted with a specific issue, analyse the information and prepare themselves to the consultations. The above mentioned elements, taken together, form the employer's legal duty. The said means that informing the employees – as the employer's action - does not consist in mere passing the data, but in doing it in a way that would enable the council to make themselves acquainted with the issue. Hence passing the data too late for the council to analyse them does not mean informing the body within the meaning of the Act. In such as situation it is possible to bring the employer or a person acting on behalf of the latter to criminal liability (a fine).

Also as far as consultations are concerned a number of formal requirements are stated. The Act requires that the consultations should be conducted at the time, form and scope allowing the employer to take actions on the consulted matters, and should take place at a due level of management. It is also essential that the works council should be able to meet with the employer in order to learn what his standpoint is and what the reasons quoted in reaction to the council's opinion are. The works council and the employer are supposed to conduct the consultations in good faith, the interests of both parties being respected.

The outcome of the consultations may lie in an agreement concluded between the works council and the employer, although

conclusion of such an agreement is not required by law; due efforts to arrive at it are expected, though.

Under an agreement concluded by the works council with the employer detailed rules for the passing of the information and conducting the consultations can be laid down and other related matters provided for.

Interests of employers connected with the disclosure of the information about the enterprise to the works council are secured by the employee representatives' duty to keep the information confidential. In addition, the Act allows the employer, in particularly justified cases, not to reveal to the works council the information the disclosure of which could, according to objective criteria, seriously disturb the operation of the enterprise or plant concerned or pose a threat of a serious damage to it. The duty to provide information is, in fact, lifted in such case.

Works council members enjoy legal protection. Unless the works council consents to it, the employer is not allowed to give notice, terminate nor unilaterally make an unfavourable change in terms and conditions of the employment relationship of an employee sitting on the works council as long as the person concerned remains a member of the council. In addition, the employee being a works council member has the right to a release from his/her work-related duties (the entitlement to remuneration being retained) for the time needed to participate in the activities of the works council.

4. The right to information and consultation in European transnational companies has been guaranteed by the Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. In Poland the directive was implemented by means of the Act of 5 April, 2002 on European Works Councils having become effective on 1 May, 2004. The Act conforms quite well to the provisions of Directive 94/45.

5. Besides the above discussed institutional forms of employee representation, Polish labour law provides for non-institutionalised representation forms, resorted to by both parties in certain cases. In practice, that type of representation takes the shape of a staff delegate. Delegates like that are appointed if, despite lack of trade unions, the opinion (or, more rarely, the consent) of staff representatives has to be sought on certain issues. That type of representation is only applicable

where there is no trade union organisation at the employer's at all. The delegate is thus a substitute to the trade union representation at the workplace (the principle of subsidiarity). The rules for the appointment of the representation in question are not laid down by law, but left to custom and local practice. The scope of the matters the delegate deals with is strictly limited to those explicitly provided for by law (the *numerus clauses* principle). Examples include, for instance, opining on the rules for mass redundancies or issues of occupational safety and health.

6. The now observed growth of importance of the institutional forms of union representation is a result of, first of all, the ever stronger de-unionisation. As it has already been mentioned, it is very difficult to precisely indicate the reasons for the phenomenon. I would go, however, so far as to say that the weakening of the trade union movement results also from the development of the non-union representations. Sometimes the employees – having the possibility to form the work's council - drop the idea of establishment of a trade union organisation at all.

It comes thus as no surprise that certain increase of the role of non-union representation is ever more often proposed, including a suggestion to confer on such types of representation certain powers exclusively enjoyed by trade unions so far. The rights in question include, for instance, collective bargaining and concluding collective labour agreements or even conducting collective disputes (with the right to proclaim strikes). Such evolution of the employee representation seems rather natural. Hardly can a situation in which the employees have no collective representation at all be accepted.

Attention should be, however, drawn, to two issues that should not be neglected. Firstly, the change of the nature of the collective representation, i.e. a shift from trade unions' dominating role to that subsidiary, entails certain dangers. Trade unions, as organizations of the working people, organized vertically to form trade and territorial structures, have a potential which can hardly be achieved by any kinds of bodies operating in the enterprises, where the staff gets active only on a cyclical basis, when the election time comes. Between the elections the employees remain passive. I do not believe that works councils, as non-union representation, based on the idea of an all-company employee representation, might counterweight the role of trade unions, founded on

the concept of an association supported by regional or national structures.

This is why I find it more reasonable to have a system with trade unions retaining a vast array of representative powers, including the right to bargain collectively, to conclude collective labour agreements and to conduct, on behalf of the employees, collective disputes, bodies of the non-union representation being entitled only to receiving information and being consulted on. This would, of course, require a support to the trade union movement from the state, to an extent much greater than that current. It can be finally stated that once the employees give up creating trade union organisations, they also forgo the protection which the organizations can extend on them. Conferral of the trade union powers onto works councils would, in fact, lead to replacement of a genuine social dialogue with a kind of its crippled, substitutive form.

There is, however, also a second issue which comes a result of the observations of the practical functioning of Poland's non-union employee representation schemes. As it turns out, only a very small number of employees have actually decided to establish that form of representation. Starting in 2006, when the law providing for works councils came into force, the bodies were formed at as few as about 10% of the employers. After the initial term of office of the councils the ratio dropped down dramatically, however, and the operation of the bodies was prolonged, for a further period, only at about 2% of the employers. At present the idea of works councils has completely failed. And while the reasons for the situation are many, the shortcomings of the law not being excluded, it seems that the key reason is simply the employees' lack of interest in the form of representation, and sometimes also the employers' unwillingness to support it.

Can thus any high hopes be set on the institution being, in fact, dead? A much better solution seems to lie in supporting the most traditional forms on representation, based on the trade union principles.

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Pitesti, 23 - 24 May 2014

THE CONFIGURATION AND THE CONTENT OF LEGAL SECURITY IN THE STATE OF LAW

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Abstract:

In this text, the author tells us the problems of the juridical security of the persons in the state of law.

The configurations and the content of the juridical security contains the following components: the non-retroactivity of the law, the accesibility and the predictability of the norm of the law and the unitary interpretation of law.

All these principles are materialised in contents of differend scientifical studies where the accent is placed in the jurisprudence, national doctrine and the international doctrine.

Keywords : *legal security, the content of legal security, retroactivity of tha law, accessibility, predictability, interpretation, unitary interpretation of the law, the requirements of the principle of security, liberty and security of person.*

Legal security designates the safe condition of individuals and societies conferred by legal normativity by compliance of it's prescriptions. It is the result of the legal protection of social values, of attributes of the human being and its legitimate actions, of social environment, allowing „the coexistence of freedoms"[1].

This protection is incomplete, it limited to „legal territory" to those social relations regulated by legal norms. Legal security is relative, because the system of prohibitions, obligations, permissive actions established by legal norms can be violated by the free will of individuals, which, in this case, suports legal sanctions provided by law.

By legal certainty enjoyed, primarily, who complies the legal normativity, having the right to benefit by social relations in which the conducts of other individuals entered in the « perimeter » provided by legal norms, otherwise, agains them may be used procedures,

[1] I. Craiovan. *Finalităţile dreptului*. Bucureşti: Continent-XXI, 1995. p. 120.

mechanisms, guarantees, that protect and restore the violated rights. But it is not annihilated – perhaps paradoxically – not in the case of individuals, which through their antisocial behavior defies, having the right to one particular legal treatment, to defense and other legal guarantees, that allow estimation of a certain social reactions of organs that applying legal norms, proportional with the antisocial offense commited.

Configuration and the content of legal security are specific, according to the type of legal normativity, from which emanates. It can be stifling to the person – as in the case of totalitarian society, as far as existed – or may consist of a social climate, legally protected, allowing free expression of individuals, social creativity, protecting fundamental rights and freedoms.

Legal security sets minimum condition for achieving justice in society. Degree of achievement of legal security – not once infailible – depends by certainty offered by legal norms, by their accuracy, she pointing the importance of legal sources and especially the law, as well the mood in which is ensure the primacy of the law and its effectiveness in society. As noted P Roubier, legal security is a premise of all civilizations. Its existence is born from deep necessity. It is « legal shield » against anarchy[1].

In the legal system of the Republic of Moldova supremacy of the Constitution and laws was elevated to constitutional principle enshrined in Art. 7 of the Fundamental Lawaccording to which „the Constitution is the supreme law. Neither a law or other legal act contrary to the Constitution is not legal power". Is established such a general obligation imposed on all issues of law, including legislative authority which must ensure that the legislative work is done within the limits and in accordance with the Fundamental Law of the country and also to ensure the quality of legislation.That, whereas, in order to observe the law, it must be known and understood, and to be understood, must be sufficiently clear and foreseeable, but it provides legal certainty of its recipients. Was outlined in this regard, in connection with the principle of legality, another principle, of legal certainty. Without expressly established by constitutional norms, but rather a creation of

[1] P. Roubier. *Teorie generale du droit*. Paris, 1946. p. 267-279.

jurisprudence, it is both a fundamental principle of the rule of law state that is appreciated, largely depending on the quality of its laws[1].

Concern for legal security is topical in Moldova, under the law of quantitative growthdetermined by the increasing complexity of law as a result of the development of new sources of law, and the appearance of new areas of regulation. Obviously now is legislating more, but is legislating right? That is why we consider useful presentation of the contents of the main legal requirements, together with examples of recent jurisprudence, particularly of the Constitutional Court. In this latter aspect, legal content includes the following main requirements: *non - retroactivityof the law, the availability and predictability of the law, ensuring uniform interpretation of the law.*

I. NON-RETROACTIVITY OF THE LAW

Established by the French Civil Code of 1804, the principle of non-retroactivity of the law was taken over by the Moldovan legislature, as enshrined in Art. 22 of the Constitution of 1994, so far it has the following wording: „No one shall be held guilty of any act or omission which when committed did not constitute an offense. Nor will apply no harsher punishment than that which was applicable at the time the offense was committed".

Following its constitutional enshrinement this principle has become mandatory for the judge not only law enforcement but also for the legislature, which is held both to respect the legislative process, non - retroactivity of the law constitutes a fundamental guarantee of constitutional rights, freedom and security of the person.

Pof. M. Eliescu, shows in this sense suggestively that „... if what was done in accordance with applicable law, may be constantly broken by the new law, any provision in time would be impossible and legal order, however, should be threatened as would weaken confidence in the safety of deputies, the stability of the civil circuit ... if the new law would not respect what was done under the provisions of the old law, the trust would disappear and with it, authority of the law would be achieved because the will to obey permissions, commandments and legal opinions would be, of course, largely demobilized if not what their subject is not

[1] S. Popescu, C. Ciora, V. Ţindăreanu. *Aspecte practice de tehnică şi evidenţă legislativă*. Bucureşti: Ed. Monitorul Oficial, 2008. p. 7.

certain that in doing so, will be under the shield law"[1]. Looking more closely these provisions, we find some inaccuracies in the constitutional regulation given by the Moldovan legislature this principle as follows:

- *First*, in our opinion, there is a mismatch between the name given to article and its contents. Thus, considering the fact that the Constitution is the fundamental law of the state, the name of the item is okay, because this suggests the idea that the country's supreme law enshrines the principle that "the law only for the future". The title given to this article „Non-retroactivity of the law" shows us that any law retroactivează not because the legislature did not expressly specified otherwise. From the title of the article that shows that the law of criminal, civil, family, administrative or any other area is not retroactive, it follows, therefore, a non-retroactivity of laws in general.

But if we analyze the content of art. 22 we find that the legislature has referred only to criminal or administrative law, and not in other areas of law, as in the first part of the sentence expressly regulates only individuals unable to act or omission which, when committed, were not tortious acts. The legislature probably take out that in our country, the vast majority of those whom they are intended normative acts are individuals who did not conflict with state bodies are not criminals, they are peaceful people participating civil circuit between various civil legal relations, family, administrative without violating the country's laws.Answer the question that is asked is: In accordance with the first sentence of art. 22 of the Constitution, not retro - activates only criminal or administrative law or and civil, family, labor, housing, land and so on? From what we see Moldovan legislature established through an express constitutional provision, the principle of non-retroactivity of criminal law or punitive in general, and in other areas, in the absence of express constitutional, it seems that it would be possible to apply the law retroactively if special rules will not have otherwise.

- *Secondly* , the second sentence of the same and the article contains a legal norm , in our opinion , does not refer to the principle of non-retroactivity of the law, but the principle of criminal law enforcement , the more favorable , as follows : " ... nor will apply no harsher punishment than the one that was applicable at the time the

[1] M. Eliescu. *Aplicarea legii civile în timp şi spaţiu, conflictele de legi*. In: *Tratat de drept civil, Vol. I, Partea generală* by T. R. Ionaşcu and others. Bucureşti: Ed. Academică, 1967. p. 80.

offense was committed". This rule strengthens our belief that our legislature established by constitutional provision of the principle of non-retroactivity of the law in repressive in general. In this case , we believe it was appropriate that the name of art . 22 of the Constitution to be "Non-retroactivity of criminal law" or "Non-retroactivity of punitive law" to be in full accord with what he wanted to govern and be governed , in fact , the legislature by this constitutional provision , that there is no difference between name and its contents .

Article 15 para. (2) of the Constitution stipulates that: "The law only for the future, except for the more favorable criminal law", thereby ensuring stability won legal rights. Is a concise form, and at the same time clear. We believe clear, since out all laws are understood not only criminal law.

What does provide us principle of non-retroactivity of the law about legal security of persons?

- Firstly, the stability gained the legal right which can not be suppressed by a new law;
- Secondly, prevents misuse of law by amending laws, if rotation in power;
- Thirdly, ensure the legitimacy of law, recognition as binding and just can not claim compliance with a non-existent law, until the entry into force.

II. AVAILABILITY AND PREDICTABILITY OF THE LAW

Accessibility of the law is its public disclosure, which is achieved by publication of normative acts. For a law lato sensu to produce legal effects must be known by its recipients; law effects occur, therefore, after bringing it to public knowledge after its entry into force. In law rules on entry into force of legislative acts provided by art. 76 of the Constitution[1]. But there is another meaning of the concept of accessibility, predictability associated with the existence of the law, namely, those receiving the module content normative acts by the social body in the sense of understanding it. Legal rule must be clear, understandable, since they address the need not only to be informed in advance about the consequences of their acts and deeds, but also to

[1] The law is pulished in Ofiicial Journal of Moldavia and is entering in force at publishing date or at another date stated in its body. Unpublished law doesnt exist.

understand the legal implications thereof. Otherwise, the principle nemo censetur legem ignorance could not be applied, which also would have serious consequences for the security of social relations, the existence of society in general.

In an extensive case law, the European Court of Human Rights, stressed the importance of ensuring accessibility and predictability of the law, establishing a set of benchmarks that the legislature should consider to ensure these requirements. Thus, in cases such as the Sunday Times v. the United Kingdom of Great Britain and Northern Ireland (1979), Reikvenyi against Hungary (1999), Rotaru v. Romania in 2000, Damman against Switzerland in 2005, the European Court of Human Rights noted that: "can not be considered "law" norm stated with sufficient precision to enable the individual to regulate conduct.The individual must be able to foresee the consequences that may follow from a determined act", "predictable legal norm only when it is formulated with sufficient precision so as to enable any individual - if need can call on expert advice - to regulate conduct", "in particular, a rule is predictable when it offers a certain guarantee against arbitrary interferences by public authorities". Under this legal principle is correlated with another principle, developed by Community law, namely the principle of legitimate expectations.According to the jurisprudence of the Court of Justice of the European Communities (eg facin cases, Dori, Recre v (1994)[1], Foto - Frost v Hauptzolent Lubeck, OST (1987)[2]), the principle of legitimate expectations requires legislation is clear and predictable, consistent and coherent[3]; also necessary to limit the possibility of changing legal norms, stability of rules imposed by them. And the doctrine stated in the same sense that the first of the conditions that ensure the applicability of a is sufficient to define[4], which aims to ensure rigor both in the conceptualization of law, legal concepts and plan drafting normative acts. As noted „legislating is not only an art, but it is

[1] Cauza C-91/92, în Takis Tridimas „The General Principles ef EU Law", Oxford EC LawLibrrary. p. 244.
[2]Cauza 314/85, idem. p. 248. http://www.ier.ro/sites/default/files/traduceri/61985J0314.pdf
[3] TC Hartley, „ The fondations of European Community Law", Oxford, University Press, 2007. p. 146.
[4] J. Dabin Teorie generale du Droit. Paris: Dalloz, 1969. p. 268.

equally exact science or technique, and in addition, a difficult technique"[1].

Strictness enactment find expression in legislative technique, to be observed by the Moldovan legislature in drafting any legislation. Law no. 780-XV of 2712. 2001 legislation[2] states in this respect a number of rules, namely, „the drafting of the legislation ... the principles of transparency, publicity and accessibility (art. 4 para. (3). C)", "be prepared in accordance with legal and technical norms of the literary language (art. 5 para. 82) lit. B)", "phrase is built according to grammatical rules, so as to express correctly, concisely and unambiguously point to be easily understood by all persons concerned (Article 19 point a)" and others.

Lack of accessibility and predictability of laws is increasingly invoked before the Constitutional Court of the Republic of Moldova, which ruled in a number of cases, the violation of these requirements. The Decision no. 12 of 07.06.2011[3] , noting the unconstitutionality of Law. 152 of 08. 07.2011 for amending and supplementing certain acts, the Court held that the amendment of Art. 22 para. (1). p of Law. 544-XIII of 20.07.1995 "On the Status of Judges", as amended by Law no. 152 of 08. 07.2011 is unconstitutional because the disputed legal norm Parliament stipulated disciplinary liability of judges without providing the mechanism and limits of application, thus violating the principle of accessibility of the legislation, which allows discretionary application of this rule by the Board of Magistrates.

The principle of accessibility is closely linked to another requirement of legal certainty, predictability. This principle requires that the legislative authority to regulate social relations by adopting laws that come into effect after a certain period of time so as to enable any person

[1] I. C. Pisis. Union europeenne: comment rediger unee legislation de qualite dans 20 langues et pour 25 Etats members: În. Revie du droit public. Nr. 2, 2005. p.476.
[2] Legea nr. 780 din 27.12.2001 privind actele legislative. În. M.O. al R. Moldova nr. 36-38 din 14.03.2002.
[3] Hotărârea Curţii Constituţionale pentru controlul constituţionalităţii prevederii art.22 alin.(1) lit.p) din Legea nr.544-XIII din 20 iulie 1995 „Cu privire la statutul judecătorului" în redacţia Legii nr.152 din 8 iulie 2010 „Pentru modificarea şi completarea unor acte legislative" nr. 12 din 07.06.2011. M.O. al R. Moldova nr. 102 din 18.06.2011.

to have recourse to expert advice and his conduct[1]. Lack of requirements to determine the legal standard uncertainty of legal relations, which have the effect of damaging citizens' legitimate rights and interests.

Respect for the principle of predictability (predictable) gives the coherence of legal norms legal system being capable of ensuring a smooth and amicable relations between authorities and citizens, the latter not be surprised abusive acts that harm their interests. The lead shown by other content requirement of the principle of legal certainty on the interpretation of the law, because, if the element of interpretation of laws is inevitable, the principle of legal certainty requires certain limits in this respect and strictness.

III. ENSURE UNIFORM INTERPRETATION OF THE LAW

It's another part of legal content. Although apparently this element of legal certainty brings to the fore the role of courts in reality the requirement of all legislative activity because of the way they are governed correlated systematic normative acts depends on their interpretation unit.

After the entry into force of the regulation, the development of which is assumed to have been complied with rules of legislative technique, which we referred to during its existence, may occur legislative events, such as modification or amendment, repeal, republish, suspension or the like, in all these cases returning all legislator ensure clarity and consistency of regulation and its harmonious integration in the legal system to eliminate as far as possible, the differences of interpretation.

Law is unique. And therefore the interpretation must be unique, so that in such cases the same solution will be obtained. Official interpretation of the law can be made by the issuer or casuistic enactment by the court.

Ensuring consistency of judicial practice is required and the constitutional principle of equality of citizens before the law and hence the judiciary. Also unitary judicial practice is essential to increase confidence in the judiciary. Moreover, the legal literature considers, and

[1] În acest sens este una din Hotărârile CEDO în cauza Rotaru împotriva României, publicată în M. O. al României, nr. 19 din 11.01.2001.

we support this opinion regarding judgments that came into power of ruling, as well as secondary.

The principle of obedience of the judge only to the law has no meaning and can not be dealt with and even contradictory application of its provisions relating to that based solely attributed interpretation subjectivity belonging to different judges. Such a view would lead to the consecration, even under judicial independence of solutions that could be a violation of law which is unacceptable, whereas it is the same law, its application may be different and intimate conviction judge can not justify such a result.

In order to eliminate contradictory trends interpretation of different situations deducted court judges must start in our opinion, at least from:

- A consistent and systematic process of lawmaking;
- Sufficient knowledge of the considerations which led development of a particular piece of legislation and its implications for real;
- Increasing requirement of judicial courts, coupled with a rigorous self-insurance Co on its activity courts.

CONCLUSIONS

The importance of the principle of legal certainty for the rule of law requires more attention to the quality of the law. As a result, even if the exponential growth in the number of acts and their complexity can be justified by factors such as historical, sociological, political, economic action is needed discipline and obedience excess regulatory rules enacted rigors of legal certainty.

It is an effort that the legislature - primary or delegated, and which involves diagnosing problems , identifying appropriate remedies, meaning, organization of law-making activity through its rigorous grounding principles of legislative technique and increase accessibility and predictability of legal rules. Let us remember that „[...] language laws should be simple ... When the law is written in a pompous style, she is no longer considered only an object of the parade ... Laws should not be subtle; they are designed for people with modest possibilities of understanding. When exceptions, limitations, amendments to the law are needed, it is better to not exist. Such details always send to us details. No amendments should be made to a law without good reason . The design

should consider the laws that they do not disturb the natural order of things"[1]. Finally have highlighted the need for a Legislative Council to the Parliament , composed not only of lawyers, scientists and scholars in developing laws that specialized consultative body of Parliament would approve draft legislation to systematic unification and coordination of all legislation.

Having the foregoing facts and case law to which I have referred, it seems suitable to the conclusion invoking a French State Council Recommendation[2] determined the finding of worsening problems of legal certainty provided by French law „to enact less but better regulation"[3].

[1] Ch.-L. Montesquieu. Spiritul legilor. În: Philippe Malaurie. Antologia gândirii juridice. Bucureşti: Humanitas, 2007 p. 120.

[2] Conseil d'Etat. Raport public annuel 1991 [2006]. De la sececurite juridique la documetation francaise. Pe larg S. Popescu. V. Ţîndăreanu. Securitatea juridică şi complexitatea dreptului în atenţia Consiliului de Stat Francez. În. Buletin de informare legislative, nr. 1, 2007.

[3] „Legiferons moins, legiferons mieux" http://www.blogdroitadministratif.net/index.php/2006/03/18/79-legiferons-moins-legiferons-mieux

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

PSYCHOLOGICAL ASPECTS OF CRIMINAL INVESTIGATION

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Abstract:

Prosecution is a complicated process that aims to restore a criminal event which has already occurred in the past, and the prosecution is done according to the evidence gathered by the investigating officer in the present. The most important element, determinant, of the psychological structure of the investigating officer's activity consists of collecting and studying various facts on which he will completely restore the past event, the correlations of different persons involved in the related event, as well as the personality of the subject that has committed the offense

Particularly, during the prosecution is determined the criminal feature of the produced offence.

Key-words*: criminal prosecution, criminal prosecution officer (investigator), witness,victim, evodance individual,s, psychic state.*

At the moment of data collection, the investigating officer does not know in which direction will lead these data and of course he does not have the full picture of the criminal feature of the crime. This specific feature of examination process creates some difficulties in collection, selection and evaluation of the obtained data, therefore it is necessary to develop and verify a wide variety of versions regarding the nature or value of particular facts, circumstances, and interactions between them.

The activity of the investigating officer requires deep knowledge and experience in the field of criminology, which helps to search, select and to understand better the necessary or already obtained data. Moreover, knowledge and professional experience represent a prerequisite for the activation of imagination that will help at the restoration of the forensic characteristics of the crime.

The researching activity conducted by the investigating officer consists of simple or complex analysis, developing problem-solving strategy, creative approaching of situations that require such knowledge.

Simple tasks are performed according to an algorithm, by observance of known rules of research. For example, the detection and lifting of the material evidence and its procedural validation is an example of a simple algorithmic task. Also, the realization of more complicated tasks involves a creative heuristic search of solution in different problematic situations.

Carrying out the research of the criminal case, the investigating officer is striving in some way to systematize his own work and to meet the procedural and tactical requirements; giving it a logical shade and methodical approach. For this purpose he uses the theoretical knowledge acquired and his own researching professional experience of certain categories or groups of offenses.

The facts about a criminal event produced in the past are always based on the information received in the present. In this connection, there is indispensable to use forensic models (theoretical and applied) of criminal acts from the past. Models usage includes a methodical activity oriented on verification and evaluation of criminal acts.

When the prosecution starts, the process of data gathering is characterized by a lack of logical sequence. This result from the fact that the discovery of information at this stage does not depend on the will of the person that is responsible for investigation and cannot be fully controlled by him. The amount of information, its pace and the moment of its discovery depend to a large extent on the circumstances of the investigation process.

Offense as an object of research is a complex and multifaceted phenomenon and no eyewitness is aware of all its elements: 1) preparatory actions: 1) understanding between the participants, 3) the subjectivity, 4) causal link between action and result, 5) causes and conditions that have determined the commission of the crime, etc. All of these elements are determined (demonstrated) by mediation of other facts [2, p.46]. Offense investigation is not a theoretical cognitive activity, but rather a practice regulated by the criminal procedure. The Law not only regulates specific procedural actions, but also establishes a particular mode of the whole investigation. The Law regulates the relationships between the investigating officer and the participants in the criminal prosecution, citizens, officials, state and Non-governmental organizations, as well foresees the sequence of different actions, the order of the execution of particular intermediate tasks of investigation,

grants a compulsory character to a complex of actions that are supposed to be done at one or another stage and limits the investigation process in a particular time frame. This confers to the investigating officer's work a normative character, well defined, and that is not specific to other professions.

Moreover, the activity of the investigating officer is distinguished by a variety of unusual tasks whose proper completion requires certain skills, dexterity and knowledge. For instance, there are indispensable special knowledge in medicine and pedagogy, commodity science and accounting, transport, and psychology etc. In order to apply this knowledge in different and complicated situations is important to systematize it. Furthermore, to make use efficiently of psychological regularities manifested in definite procedural actions, the investigating officer has to have knowledge about psychological diagnosis and about the influence on human being in educational purposes, especially, in order to get full and accurate information on the cause investigated [3, p.331].

During the criminal prosecution, the investigating officer is required to overcome the resistance from the side of people who are not interested in the efficient conduct of investigation. Perhaps there does not exist another kind of human activity against which would be opposed such resistance from the part of certain people or groups of people. Therefore, we must take into account that the organized resistance opposed to the investigating officer by suspects or defendant may create severe difficulties; the most interested in this is the offender himself, who usually oppose to the investigating officer in the most active way, efforts to counteract the investigation by trying an unlimited arsenal of the most sophisticated tricks such as trickery, extortion, lie, deceit, slander, forgery, bribery, etc. the latter is obliged to act within the limits of law and morality.

The investigator is entitled only to use tactical processes including psychological ones, that can be specified by their application, authentic or fictional (eg , conception of tactical surprises, without disclosure of the true purpose, the creation of situations which make the suspect believe that his actions were "reasonable", etc.) . However, the effective application of psychological processes should not be overestimated because this do not exempt the investigating officer from the obligation to verify thoroughly all the suspect's testimony, to take all

measures to establish the truth, and to coordinate his actions with legal and ethic norms[4, p.26 -28].

The disproportion between investigating officer's situation and that of persons interested in blocking the investigation of the case is determined by the fact that the latter know which circumstances have to be hidden while the investigator has only a very incomplete picture of what he has to find about the case. The person in charge of investigation following the footsteps of the offender will always be "on the tail of events". But the offender has priorities in terms of time and initiative; constraining the officer to work in extremely difficult and stressful situations.

Taken together all these elements give the prosecution an invisible combat character, which often takes quite delicate forms. The necessity to overcome dangerous situations and to remove obstacles deliberately put in the path of the investigating officer causes him various emotional reactions, demanding continuous efforts of will, and an active intellectual activity.

One of the investigation tasks refers to the permanent evaluation of the created situation, making clear the authenticity of investigation, and visualizing what can be done based on its systematic analysis. The investigating officer must consider the counteracting of people that intend to oppose resistance against objective researches. Organizing a direction of work, he must have a definite confidence that the behavior adopted in a particular situation is the most appropriate, and has to strengthen this choice and to base it by gathering the facts.

Should be noted the fact that the investigation is characterized by the tactical struggle of the offender, but also by other interested persons. The investigating officer is known for his psychological influence on the offender, victim or witness, in order to change their state and the former orients them into the direction of discovering the specific crime and preventing criminality.

Specialized literature speak about the permissivness of psychological process of influence on the investigated person, whose role can be played by an object, a person, a fact, a phenomenon, a message etc.. The core of the given process consists of the fact that a particular person, indirectly, is presented the opportunity under which exclude any false statements; a fact which is a potential psychological stimulator. For an innocent person this is out of importance, but for a guilty one this is

associated with the committed crime and therefore generates a corresponding mental reaction [5, p.55].

As the investigating officer does not have all the information in the beginning of investigation, he is forced to take decisions under conditions of higher or lower uncertainty. Often he works in critical conditions of probative information. As a result of it appears the emotional intensity, as well the need of heuristic methods to elaborate the particular versions, decision making and the need to use such a creative capacity such as intuition.

The background of the investigating officer in the process of investigation has not only to generate and guide of his own actions, but also to harmonize permanently with the intellectual activity of all participants in the process and people involved in it. He has to think not only about him, but also for others; he has to understand the evolution of mental processes, to predict the decisions and actions of participants in process, and to direct them, depending on all these factors, to correct his own behavior. In this interaction, the representatives of various interests intersect that not always correspond, and sometimes are even opposed: prosecuting officer and the suspect, the inquiry officer and the interrogated person, etc. These are incongruity, contradictory and the confrontation of human interests in the investigation that determine the need of a particular tactics of prosecution, that under psychological aspect represent a battle of psychologies: intellect, motivation, and character, moral principles of the investigator and of the participants in process.

In his job, the investigating officer obtains information from people that work in various fields, that often use terms and formulas specific to a process, state, properties, that can be understood only if they are familiar with those specializations. Therefore, it is necessary to control the acuracy perception of some concepts and terms by clarifying their essence or by substituting verbal formulas to graphical models, which simplify that concept. Only acting in such way, the investigating officer will not make mistakes in his way of understanding things and in consolidation the facts and messages. The specifics of the cognitive activity of the investigating officer form him a specific way of thinking and acting professionally.

Another important trait of the investigating officer work is to obtain informations during communication process. Though, in the

investigation of criminal cases the communication has a specific character because of reflexivity and conflictual character. In the process of this communication, frequently, takes place an intense exchange of information that is a motivation and also the produce of reflection.

In order to avoid the errors in the analysis process of the information gathered, the investigating officer has to know and strictly observe the laws of logic and forms of thinking, to address dialectically the known facts, to verify whether has sufficient evidence for a particular decision, conclusion etc.

The investigation process of a criminal case can be understood as a series of procedural and tactical decisions and actions that the investigation officer has to make. Psychological aspects of a particular criminal situation represent just an individual case of the general subject of psychology. The prosecution situation presents a state of affairs established at a certain time from a dynamic information system whose elements are essential signs and circumstances which have an important impact on the examined case, on the relations between them, and between the participants in the process, on the actual or the possible results [6, p.259].

The prosecution activity refers not only to the collection of information, but also to its evaluation in all respects, including in the logical and volitional actions from the final phase. Therefore, prosecuting situation model is not only a logical conclusion drawn from a series of realities and probabilities, but also a kind of informational decision regarding the occurred events in the investigated case or that might happen. The success of elucidating an inquiry situation is largely determined by the professional experience of the inquiry officer.

For the investigating officer is psychologically complicated the situation where are concentrated several criminal cases, and each of them requiring urgent procedural decisions or actions, etc. The most complicated situation might be the one when the investigation terms or those of retaining the persons under arrest are outdated. The elucidation of such situations can be ensured by a complex of qualities and skills, through a proper organization of work, through perseverance and the talent to delegate tasks to other group members. An undoubted importance represents the investigating officer's ability to be a leader, to lead a group of specialists that work on crime detection, in order to identify the guilty persons in a specified period of time.

Judicial experience demonstrates that often this kind of situation puts pressure on the investigator, especially, when we talk about serious criminal cases (murder, robbery, rape, banditry, etc..), and when the offense can not be discovered for a long time. In these cases, there may appear various dangers that have to be taken into account. One of them is the exaggerated pace of the investigating process, which should be avoided. For a successful resolution to the emerged problems or to unravel the crime and its offenders, firstly, it is necessary that the investigating officer defines to himself reasonably and creatively the vector of his investigation, the ways and means to carry out the tasks that lie in front of him. Striving for a maximum efficiency of the designed actions, the simultaneous breach of the principles of legality, objectivity, entirety, presumption of innocence has to be disallowed. We have to have in mind that made gaps in the early stages of research are difficult to eliminate along the process.

Another danger might represent the tendency of some investigators to perform tasks based on the principle "the ends justify the means". In all the cases, must be kept in mind that all the tasks the investigating officer is facing during the investigation have to be achieved through legal means, provided by the law of criminal procedure.

It is known that a qualified prosecuting officer is characterized by the objectivity manifested at the evaluation and analysis of materials collected by him or acquired from various sources. Those with significant professional experience demonstrate that renouncing in due time to the version apparently tempting, but which is in conflict with other objectives of the case materials often can be the condition to the success of the crime discovery. These situations are of particular importance especially to the investigation of cases where take place self-defamation, are involved minors, where have been committed murders, but the evidence gathered is sufficient to reach a decision unequivocally, etc.

The fact that the investigating officer is given State duties and powers gives him a special status with respect to other professions. Therefore, the decisions and orders of the investigating officer based on law and evidence are binding on all citizens, officials, the public and governmental bodies, and economic agents. He acts on behalf of the state; the former is supported by the state authority and the force of power; he has the possibility to apply various sanctions. One of the most

important conditions of the investigator is to use this power rational and lawful.

The investigating officer has to avoid the involvement in personal or service life of citizens; the deviation from current activities and the use of force, if such involvement is not required by the situation. However, despite the danger of counteractions exercised by the interested persons and other specific difficulties of research, the investigator must always honor his obligations; he, diligently, has to conduct the projects of criminal cases. He is facing daily various tragedies, but he must show firmness and strength of character, so that human suffering, though unavoidable, do not affect his personality. Only the sense of rightness of his actions is able to give force to such activity.

A specific feature of the research is the need of concealment of prosecution data. Being inclined to shirk responsibility and to prevent investigation, the person who committed the crime and his supporters usually are interested in obtaining maximum of information about the situation, research orientation, the investigator plans etc.. Early disclosure of the evidence and the investigator plans on particular case may impede the research, bring to failure some procedural actions and put under threat the persons who have contributed to the discovery of the crime.

Disclosure of information obtained during the prosecution is dangerous. The decisions and conclusions that are preliminary and need to be checked can be seen as definitively established facts. Consequently, there is a certain risk that they will influence the witnesses' declarations and the public opinion and thus would be compromised, unjustly, the reputation of some persons.

The investigation of criminal cases may be linked inevitably with penetration into the private life of individuals by studying their past, conditions and their lifestyle, family relationships and strictly private circumstances. Disclosure of such information can cause very large damages, may compromise some people and even lead to personal tragedy. Consequently, the law compels the investigating officer to avoid disclosure of private circumstances that refers to the private life of citizens, if such disclosure is not required by the situation.

Furthermore, he, by virtue of his status, has access to the information related to the event. Some of them are state secrets or have a degree of privacy. Therefore, the investigating officer is obliged to keep

the confidentiality of particular information reffering to the event investigated, as well as general data specific to the struggle against crime.

There are a number of statistics that have interdiction to be disclosed, fact that sometimes creates specific problems in the work of the investigating officer. The secrecy is not a gift from nature, but a product of education and self-education, which also depends on the determination and discipline of the investigator. It is known that the person that has heard a piece of news, who has received some interesting messages, that lives a success or a failure or other strong emotions always feel the need to share it. It's not easy resisting the temptation to tell a gripping story, to show the importance of your work, to boast that you are informed to display your success, especially if you are a young man.

However, the problem does not consist of keeping secrets. It is necessary to comply with certain requirements of conspiracy intended to not disclose the secret information and prevent its slipping out of the circle of people involved in a particular investigation case; this is why among investigating officers, the curiosity expressed regarding an investigation conducted by a colleague without being asked to advice is deemed as an excessive curiosity and a breach of ethical norms. Compliance with these requirements must become a professional habit of all investigators.

Permanent presence of the investigating officer in the center of public interests and the actions of these interests on him adds to him a number of responsibilities, as every notorious criminal case creates around itself a complex socio-political situation, which exerts a significant influence on research. Sometimes the public opinion around a person or another can influence even the expert, who is conducting the researches, relevant expertises, and thus reinforcing the common belief that the accusations brought to a particular person or vice versa. Whence, all the statements and the behaviour of the investigating officer will be interpreted in light of these influences [1, p.211].

The investigating officer must always be cautious during the press interviews or the publication of material relating to a dossier or another. Because when the investigations are not complete, preliminary published data can be perceived as reliable facts and «the operativity " and the media haste to establish the truth might be dangerous. In these cases it seems like the Media gives the sentence, forming a premature conviction,

perhaps erroneous of the public. The investigating officer is obliged to combat this conviction. On him will plane the views already exposed in the media and the created atmosphere around the investigated case.

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CULTURE, NATIONAL HERITAGE WHICH GENERATES ECONOMIC PERFORMANCES

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Abstract:

In the ample process of globalization, one of the domains which will maintain our national character is culture.

This is precisely why in the Adherence Treaty to the European Union signed by Romania, there isn't a chapter regarding culture. To support culture is a necessity, an obligation for Romania and for all administrative-territorial entities, not a whim.

Development and economic performances cannot be done without well trained staff with a cultural view.

This present work is a plea to support culture, a domain which generates economic performances.

Keywords: *culture, creative industries, economic performance, globalization, national heritage.*

The culture, word originating in the Latin *colere* which can be translated by "to cultivate"/"to honor" generally refers to the human activity. The definition provided by UNESCO considers culture as "a series of distinct features of a society in spiritual, material, intellectual or emotional terms".

Culture represents the entirety of material and spiritual values and the institutions required for keeping and passing from generation to generation these values. It contains the thinking, attitude and action models and patterns that influence and characterize a population or a society, including the materialization of these thinking models or patterns.

In a society where the changes (changes in mentality, values appreciation system, etc.) occur, frequently, we ask ourselves where we stand in terms of volume of knowledge gained over the time.

A person knows his/her identity when he/she knows his/her history, traditions, customs. Only then he/she can find himself/herself. In this regard, education has a great influence upon the knowledge gaining

way, upon the way theoretical knowledge is mixed with its practical implementation.

A state without culture becomes oligarchy, meaning a sum of groups of interest, the society "outside the culture" becomes a mass with minimal identity and the civilization becomes a historical impossibility[1]

Culture is in the center of public decision makers' attention. Four decades ago a new definition of culture was proposed at UNESCO level, one that states that culture can be considered as being the entire complex of individualizing features of spiritual, material, intellectual and emotional nature that characterize a society or a social group. It includes not only arts and literature but also ways of live, fundamental rights of a person, the system of values, traditions and beliefs[2].

At EU level, each state has the obligation to create the proper conditions for unhampered exercise of the fundamental cultural rights: the right for access to culture and the right to participate in the cultural life.

In these conditions, one can easily ask two major questions:

- What can the culture sector do for the society?
- What can the society do for culture?

The balanced approach of the answers to these two questions must lead to the strengthening of the bonds of the culture field with the other social and economic fields, but it also must lead to the highlighting of the specificity and uniqueness of this fields' contribution to the development of society as a whole and implicitly to generate public interest for the support of cultural field's development by means of adequate policies and strategies.

The increase of the juridical capacity of the cultural field, of the cultural institutions is capable to determine such a major change regarding the place and role of culture in the economic and social life, as well as the relation with the other social and economic fields.

The organization and functioning of the Ministry of Culture, with its subsequent modifications and completions, takes into account the following main considerations:

- The culture field is an important factor in the process of sustainable development, providing economic models based on the cultural resources, both tangible and intangible;

[1] Baltasiu R., *Sociology - Introductory fundamental elements*, 2001, p.52
[2] Report of World Conference on Cultural Policies, UNESCO,Mexico City, 1982

- The culture field is an important tool for economic development in a global economy, based on services and monetization of the intellectual property rights;
- The culture field is an important instrument for social cohesion and is a factor for social and communitarian development, contributing to elimination of tensions and social exclusion by means of the inter-cultural dialogue and the promotion of the cultural diversity;
- Culture is the expression of identity (individual identity, group identity, regional identity, national identity, etc.) and, in the same time, the expression of the diversity and difference, essential values and fundamental rights;
- The cultural resources represent an important instrument in the process of urban regeneration and revitalization, since they are an essential part of the individuals and society's way of living;
- Culture is an essential tool in providing the educational services, by developing the creativity and innovational approach to all age categories;
- Culture is a factor contributing to the increase of life's quality level, so the assessment of the life quality standards at the level of the individual, collectivity and society must take into account this indicator;
- Culture, creativity and innovation have a central role in the society based on knowledge, one characterized by access and usage of information and knowledge[1].

For clarification of the subsequent action in the field of culture and especially of the cultural products perspectives, UNESCO proposes for analysis the following directions:

- Culture as a sector of economic activity: culture is in most EU member states, like Romania, an economic force with a dynamic evolution, capable of generating economic development with a significant contribution to the GDP;
- Culture as a set of resources that add value to the development interventions and which maximizes their impact: the transversal approaches specific to culture are capable to increase the

[1] Government Decision no. 90/2010

relevancy, sustainability, impact and efficiency of interventions, using the communitarian values and traditions;

- Culture as a sustainable framework for social cohesion and peace, essential for "living together", for human development, participating also in generating the welfare feeling, the understanding and respect for diversity, the social trust and inclusion feeling[1].

A priority for the European decision-makers is to support innovation and creativity. Therefore, a series of initiatives have been developed, by which the inherent connection between creativity, culture, innovation and Economic growth is maintained.

However the cultural act and culture in general cannot exist without support, firstly the financial support provided by the society.

Financing culture in Europe involves three main sources:

a) Public support which includes also the indirect public support.

The direct public support for culture is defined as being represented by any type of support for cultural activities, provided by governmental bodies and/or by other public bodies. The direct public support includes subsidies, scholarships, grants, money transferred directly from public funds in the accounts of the beneficiaries.

The indirect public support consists in measures adopted by the public and/or governmental institutions, usually by means of some juridical documents, in the benefit of some cultural organizations, which involves no money transfer from the first to the latter ones. The indirect measures refer mainly to fiscal expenditures, namely the income the local and national governments renounce to due to the fiscal discounts and exemptions provided to the cultural institutions, to equivalent grants and to other financial and banking arrangements, by means of which the beneficiaries, not the government officers, establish the organizations that are to benefit from it.

b) The private support which represents any financial support provided by means of investments, contributions and other expenditures at individual or nonpublic level. The private support is divided in corporative support, individual contributions and support from foundations and trusts.

[1] UNESCO Culture for Development Indicator Suite, Analytical Framework, 2011

The corporative support denotes the direct investments which refer to the efficiency of the capitals, including the public-private partnership and investments in art collections, and also corporative sponsorships and donations.

The individual contributions contain all the transactions performed by persons with the aim of donating or contributing in the culture's benefit. The individual contributions should be separated from the administration's expenditures for culture, which come under the category of accomplished incomes.

The support provided by *foundations and trusts* denote the support provided by intermediary institutions, constituted usually in compliance with the law, which serve to some objectives and special missions and that are supported through private funding.

c) The achieved incomes – this category includes all individual expenditures for cultural goals, such as entrance fees for cultural institutions or the purchase of cultural objects. The achieved incomes denote therefore all direct incomes achieved by the cultural organizations from the market[1].

Culture's financing implies also the financing of the investments in this field, since between the cultural values and the investments in culture – public or private ones– there is a strong connection.

The private investments in the cultural sector should be encouraged by a proper fiscal policy. The connection between the cultural and fiscal policy exists, yet the fiscal regulations can have both positive and negative consequences over culture. The fiscal legislation is important especially in terms of increasing the financial independence of the cultural sector.

It is important to promote a fiscal policy which considers the realities in the culture sector, to allow taking proper decisions for supporting the cultural projects.

There is a multitude of different terms which are used to refer to the fiscal measures, such as fiscal relieves, fiscal exoneration, fees exoneration, fiscal incentives, etc. Although the majority of these terms refers to debts cancellation which lead to the reduction of the tax base,

[1] EU Internal Policies General Directorate, Culture and Education, the Study *„Encouraging private investments in culture's field"*, Brussels, July 2011, p. 8

fiscal incentives refer to specific measures destined to encourage a desirable behavior in favor of arts and culture[1].

The increase of private investments level in culture was performed by adopting measures and developing mechanisms aimed at encouraging private financing, such as: fiscal incentives for donors, consumers and sponsors, regulating the public-private partnership, sustaining intermediary mechanisms, using public financed coupons that stimulate the cultural organizations to compete for audience and banking regimes that ensure favorable access to loans.

Art and culture are supported by the state also indirectly, by different stimulation measures, including policies that do not involve imposing taxes, by means of which those contributing and the beneficiaries decide which are going to be the beneficiary organizations.

In order to encourage private investments in culture in the EU member states, the culture ministers in all member states have identified **specific mechanisms and measures**, such as:

1. **Fiscal incentives** for the culture sector – those measures in which taxation headlines can be represented by any form of cultural consumption.
2. **Sponsorship** support measures
3. **Public-private partnerships**
4. **Individual donations** – aim at superior cultural values, where profit is not the main motivation.
5. **Corporative donations** represent prizes, in monetary terms or in kind, granted by societies and other legal entities to cultural organizations or to artists.
6. **Banking regimes** represent different arrangements implemented by banks or associated to banking activities, aimed at channeling bank sector support towards the culture field. Can include loan systems providing a preferential interest for cultural activities or any other instruments supporting the cultural activities.
7. **Foundations** – by their nature, they either donate funds and support to other organizations, or ensure the financing for their own charitable goals.
8. **Collective financing and on-line fund raising –** they are rather new instruments, important for encouraging private investments in culture[1].

[1] *Idem*, p.9

The European cultural policies try to mitigate the challenges related to finding a balance between the proposed social and cultural objectives, on one side, and the economic efficiency and productivity on the other side.

In Europe, culture is financed mainly by the state, yet the opportunity to provide incentives for private financing depends on the public policy framework and the political determination.

In most European countries, relatively few new measures were implemented for encouraging private investments in culture, thus demonstrating that the elaborated policies do not act is correlation with the current trends and challenges.

Since fiscal incentives in Europe, as indirect public support measures, are well developed yet their acceptance by beneficiaries and tax payers – citizens, organizations and cultural organization – vary, in several countries the culture of donation must be promoted and nurtured.

An alternative for increasing the financial sustainability of the cultural sector could be the increase of the private contribution in the benefit of arts and culture.

Strategic objectives regarding the encouragement of private investments in the culture field in the following period:

a) **Ensure an equilibrium between direct and indirect public support for art and culture**

Private investment in the culture field must not be influence by the public financing. The public and private funding must be complementary. A public funding with a solid foundation reinforces the trust in the public value of culture, ensuring the stability of the cultural sector.

b) **Increase public awareness and understating of existing benefits and fiscal benefits**

At European level, the favorable fiscal measures are contained within a wide variety of regulations with applicability in different sectors. This situation has generated an extremely low information level among the beneficiaries and investors/donors/sponsors. Therefore, one measure required in order to eliminate this deficiency and for productive usage if the existing regulations is represented by the need to increase the awareness and understanding of the existing and planned fiscal measures.

[1] *Idem*, p.15

c) Elaboration of public support programs designed in favor of professionalizing funds collection practices

In the European cultural system, funds collection is just a complementary and un-regulated mechanism in an environment characterized by the lack of funds required for covering the main costs.

d) Promote awareness of the possibilities conferred by Article 167 (4) of TFEU (Treaty on the Functioning of the European Union) for policy cultural implications elaboration

In its action under the various provisions of the Treaty, the European institutions take the cultural aspects into account. Thus, the EU institutions are given the power and opportunity to promote cultural issues, including mechanisms and measures to direct private investments into culture[1].

e) Supporting the arts and business forums as mediators between art, industry and legislators.

Partnerships existing between the cultural sector and the economic one, implies the fact that business organizations that support cultural projects enjoy a strategic popularization of their brand image and a visibility increase.

f) Promote the exchange of best practices at tax policies, in order to encourage private support to culture in the Member States

Private funds increased involvement in the cultural sector requires the establishment of an appropriate framework where support fiscal policy has an important role. Knowledge of diversity measures and means of action on tax matters in culture is limited to the civil servants and authoritative bodies in the cultural sector

Therefore it is necessary to encourage actions to promote good practice, their trade at tax policy to encourage private support of the cultural sector in European countries.

Also it is important and necessary to monitor and evaluate the effects of fiscal policy implementation in the cultural area. as well as making a comparative analysis at the EU level in order to find the best solutions.

g) Action on cultural policy oriented on different cultural values.

Private investment in culture are influenced by the complexity and diversity of factors involved : some are outside the cultural sector, other are donor related and some are within the cultural sector. Such

[1] Art.167, The Treaty on the Functioning of the European Union

complexity requires cultural policy actions to be multidimensional in terms of formulation and implementation, and which are targeted for various values of the culture .

One of principal design and policy challenges in the cultural sector is to create mechanisms to respond to the constant changes in the social, political and economic environment. It is necessary for cultural policy measures to encourage private investment in culture to address priority skills development in the cultural sector needed to establish mutually beneficial relationships with the private sector .

The result of the cultural sector development policies should be to ensure an adequate legal framework in which mixed economy principles constitute the necessary foundation of sustainability of the sector.

Supporting and developing the cultural sector in the mid 90s benefit from the emergence of a relatively new concept , creative industries and creative sectors of technological development that generates income and that are rethinking culture as an engine of regional and national sustainable development. .

They can help save the economy of communities, where traditional economies based on agriculture, industry and trade were not properly developed to the current needs. .

At European level talks about a revolution of cultural and creative industries based on technology, communicational infrastructure , networks , and the traditions and cultural events and economy based on creative industries is in a continuous growth .

In Romania is trying to outline a political speech on creativity and promoting a framework to support the creative industries. Bucharest has the potential to become a regional pole of creativity in the Eastern Europe, if it is supported by appropriate cultural infrastructure: networks, equipment and workspaces that allow exploitation of creative forces in the area''[1].

Insufficient funding and lack of legislative regulations are two of the biggest problems facing those working in the creative industries in Romania, whether working for an NGO or a company. " Creatives "

[1] General Directorate for Internal Policies of the Union , Culture and Education , study "Encourage private investment in the cultural sector" , Brussels, July 2011

blame the authorities , who say they prefer to promote, in particular, " high culture "[1].

In the category of "creative industries", the following fields are parts: architecture and urban regeneration, art and design, performing arts, film and video, photography, industrial inventions and artificial intelligence, the media (on support paper, audio or video) , fashion and fashion design, traditional handicrafts , monuments and cultural tourism , music , advertising, video games and interactive software , printing and bookbinding , web design.

Creative industries make a significant contribution to the Romanian economy therefore need special treatment.

Thus they meant about 7.2% of Romania's GDP of about 131.8 billion euros in 2012 up from 6% of GDP in 2009, said Peter Barta, General Director of Post -Privatization Foundation in the National Forum of creative and Cultural Industries .

Therefore, creative industries in Romania brought about 9.22 billion euros in 2012 compared to 2009, when they meant around 6.95 billion euros of the country's GDP of 115.9 billion euros at that time.

Also, in 2009, the most creative cities were Bucharest (69.4 % of revenues generated by the industry) , Cluj (4.3%), Timisoara (2.6%) , Brasov (2.1 %) and Iasi 1.85%. .

Here are just a few reasons that reflect a reality, namely: culture has become and can be considered an activity sector that by creating, producing and delivering goods and services in various fields generates a multitude of benefits.

[1] Liviu Chelcea, "Economic contribution of industries based on copyright in Romania", Bucharest, 2009.

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Pitesti, 23 - 24 May 2014

LEGAL STATUS OF NATIONAL MINORITIES IN A MODERN DEMOCRATIC STATE – THE POLISH ACT ON NATIONAL AND ETHNIC MINORITIES

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Abstract:

Until 1989, before the transformation of the political and legal system took place, Poland was considered to be an ethnically homogenous country. Hence, national and ethnic minorities officially did not exist. Only the first democratically elected Prime Minister, Tadeusz Mazowiecki, acknowledged and emphasized in his speech delivered at Sejm, that Poland is a home country for many national and ethnic minorities. Moreover, he further stressed the need to take minority issues into consideration and the necessity to guarantee the rights of discussed minorities in the domestic legislation. The legal status of national and ethnic minorities is regulated in the Polish legal system in International Treaties of which Poland is part, the Constitution of the Republic of Poland (directly in Article 35), the Act on National and Ethnic Minorities and other provisions of general statutory law, not designed specifically to deal with minority issues as well as in relevant executory provisions. The most relevant legal act concerning minority issues is the Act on National and Ethnic Minorities. In Article 2 of the Act on National and Ethnic Minorities it has been directly indicated, which groups shall be considered national or ethnic minorities in accordance with Polish law, thus 9 national and 4 ethnic minorities have been recognized.

Key-Words: *national and ethnic minorities, fundamental rights, legal status, prohibition of assimilation and discrimination, educational and cultural institutions, cultural and religious identity, electoral rights.*

INTRODUCTION

At present, numerous European states are entities with a multinational structure. For this reason, they provide in their domestic legislations the principle of equality of all citizens in the eyes of the law, the principle of equal treatment of citizens by the public authorities and the prohibition of discrimination on any grounds. These principles are

guaranteed both in the legal provisions of international law[1], as well as in constitutional provisions of respective countries[2].

Poland is also such a multinational state. Until 1989, before the transformation of the political and legal system took place, Poland was considered to be an ethnically homogenous country. Hence, national and ethnic minorities officially did not exist. Only the first democratically elected Prime Minister, Tadeusz Mazowiecki, acknowledged and emphasized in his speech delivered at Sejm, that Poland is a home country for many national and ethnic minorities. Moreover, he further stressed the necessity to guarantee the rights of discussed minorities in the legal system. While addressing these matters, the Prime Minister appealed to the good traditions and multicultural heritage of the Second Republic of Poland[3]. Additionally, in 1989 the works on the statute regulating the legal status of national and ethnic minorities in Poland have been commenced[4].

[1] Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Prohibition of discrimination): The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status; and the Protocol No 12, http://www.echr.coe.int/Documents/Convention_ENG.pdf

[2] In the Constitution of the Republic of Poland the principle of equality is expressed in the article 32: 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever. The full text of the Constitution of the Republic of Poland in English http://www.sejm.gov.pl/prawo/konst/angielski/kon1.html

[3] In 1918r., after regaining independence, Poland was a multinational and multidenominational state. National minorities accounted for more than 30% of the society. The Constitution of 17th of March 1921 incorporated not only principles of equality and non- discrimination but also regulations concerning legal status of the national minorities. For instance, article 109 and 110. These provisions were upheld in the consecutive Constitution of 23rd of April 1935.

[4] The Act on National and Ethnic Minorities and on Regional Language has been passed on the 6th of January 2005 and came into force on the 2nd of May 2005. (The Journal of Laws of the Republic of Poland 2005.17.141 with further amendments). More information on drafting of the Act on National and Ethnic Minorities and on Regional Language see: A. Malicka, *Ochrona mniejszości narodowych – standardy międzynarodowe i rozwiązania polskie*, Wrocław 2004, 166 et. seq.; A. Malicka, *Status prawny i ochrona praw mniejszości narodowych w Polsce* [in:] M. Jabłoński, *Wolności i prawa jednostki w Konstytucji RP, Tom I, Idee i zasady przewodnie konstytucyjnej regulacji wolności i praw jednostki w RP*, Warszawa 2014, 518 et. seq.

Before the adoption of the Act on National and Ethnic Minorities and on Regional Language the legal status of national minorities in Poland has been regulated on the basis of International Agreements binding Poland[1], relevant provisions of the Constitution and general statutory law, which only indirectly regulated rights granted to minorities.

In the Constitution of the Republic of Poland from the 2nd of April 1997 the legal status of national minorities has been regulated directly in article 35. Nevertheless, this provision fails to provide special rights for national and ethnic minorities, it solely grants the freedom to maintain customs and traditions, to develop their own culture and the right to establish institutions designed to protect and maintain minorities' national identity and culture[2]. Direct indication of minorities' rights can be found also in article 27 of the Constitution, concerning the official language. Other provisions of the Constitution relate to minorities' rights as well, although, in the wording of these provisions the term minorities' rights is absent.

As an example, one may indicate article 25 assuring equality of churches and other religious organizations or article 53 providing freedom of religion. Among other constitutional provisions concerning minorities' rights issues, the following may be mentioned: article 13, prohibiting establishing political parties and organizations, whose programmes assume racial and national hatred, article 54 and 58 which provide the freedom to express opinions and the freedom of association[3].

Within the scope of general statutory law[4], primary provisions regulating national minorities' rights are contained in article 2 of the Act

[1] International legal regulations concerning national and ethnic minorities may be divided into three groups: the first one consists of regulations of Universal character; these are standards of protection of national minorities issued by the UN. The second group is made up of regional systems for the protection of national and ethnic minorities' rights- conventions of Council of Europe, documents of OSCE, as well as instruments of Central European Initiative (CEI) for the protection of national minorities' rights. The last group of provisions concerning legal situation of national and ethnic minorities can be found in bilateral treaties, the so-called Treaties on Good Neighbourliness, which Poland has signed in years 1991-1994 with the Federal Republic of Germany, the Czech Republic, Slovakia, Ukraine, Russia, Belarus and Latvia.

[2] A. Malicka, Ochrona mniejszości …, 138

[3] *ibidem*, 140 et seq.

[4] Only exemplary legal regulations have been pointed out in this place. For a more thorough discussion on the provisions concerning rights of national minorities in

on the Polish Language[1], article 13 of the Act on the School Education System[2] and provisions executory to it. The rights of national and ethnic minorities are also regulated in articles 1-17 of the Act on Guarantees of Freedom of Conscience and Denomination[3], in article 1 of the Associations' Act[4] and in article 21 paragraph 2 point 9 of the Act on Radio and Television[5]. Provisions concerning equal treatment of persons belonging to national minorities comprise chapter 2 of the Act on the Implementation of Some Regulations of European Union Regarding Equal Treatment[6]. Political rights of national minorities, such as election privileges for election committees established by organizations of national minorities, are guaranteed in the article 197 of the Election Code[7].

The primary legal act fully regulating the legal status of national minorities in Poland is the Act on National and Ethnic Minorities and on Regional Language. Nevertheless, the above-mentioned constitutional and statutory provisions still significantly supplement the provisions contained in this legal Act[8].

The provisions of the Act on National and Ethnic Minorities and on Regional Language

Work on The Act on National and Ethnic Minorities and on Regional Language has been commenced in 1989, when the first draft of the Act on National Minorities has been prepared[9]. The aim of the draftsman has

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general statutory law, see: The 4th Rapport concerning the situation of national and ethnic minorities and regional language in Poland- 2013, http://mniejszosci.narodowe.mac.gov.pl/mne/prawo/ustawa-o-mniejszosciac/raporty-ustawowe/7540,IV-Raport-dotyczacy-sytuacji-mniejszosci-narodowych-i-etnicznych-oraz-jezyka-reg.htm

[1] Dz. U. 99.90.999 with further amendments

[2] Dz. U. 2004. 256.2572 with further amendments

[3] Dz.U.2005.231.1965. with further amendments

[4] Dz.U.2011.79.855 with further amendments

[5] Dz. U. 2011.43.226 with further amendments

[6] Dz.U.2010.254.1700

[7] Dz. U. 2011.21.112 with further amendments

[8] See also: A. Malicka, K. Zabielska, *Legal status of national minorities in Poland: the Act on national and ethnic minorities as well as regional language*, European Yearbook of Minority Issues Vol 5, 2005/6, Koninklijk Brill NV 2007, pp 471-502

[9] The first draft of the Act has been drawn up by the The Helsinki Foundation for Human Rights on the initiative of Marek Edelman, the Chairman of the Commission on National Minorities at the Lech Wałęsa's Civic Committee; see more: A. Kaczyński, *Kompendium praw mniejszości*, Rzeczpospolita from 17.03.1999.

been chiefly arrangement, modification and supplementation of the already existing provisions regarding national minorities and not the enactment of entirely new regulations. After many year of works undertaken by several Sejm Commissions the final version of the Act has been passed by the Sejm on the 4th of November 2004. Subsequently, the Act has been transferred to the Senate and once the Senate's amendments were taken into consideration the Sejm passed the Act on National and Ethnic Minorities and on Regional Language on the 6th of January 2005. This Act has come into force on the 2nd of May 2005.
The discussed Act contains 43 provisions divided into 6 Chapters, in which numerous general provisions can be found. These encompass the definition of national and ethnic minorities, provisions concerning the rules on the usage of minority languages, as well as regional languages, provisions concerning education and culture, provisions relating to the establishment of a relevant organ aimed at dealing with minority issues and the principles of its functioning, along with the register of the amendments in the currently existing provisions.

GENERAL PROVISIONS AND DEFINITION OF NATIONAL AND ETHNIC MINORITIES

Article 1 of the Act determines the goal of this legal statute, which is regulating all issues concerning the preservation and development of cultural identity of national and ethnic minorities, as well as development of regional language. In the Act, the mode of implementation of the equal treatment principle has also been regulated. The competences and tasks of the bodies competent in this regard have been incorporated as well.

Among the general provisions article 2 has particular significance. It contains legal definition of national and ethnic minority along with the exhaustive, closed catalogue of national and ethnic minorities which fulfill the criteria provided for in the Act[1]. This

[1] Due to the lack of the definition of national and ethnic minorities in international and domestic law, the rights provided for these groups were frequently extended to other minority groups of regional character. Exhaustive enumeration of minorities recognized in Poland shall prevent the occurrence of such practices in the future. More on the works on the drafting of the definition, see: Sprawozdanie Komisji Administracji i Spraw Wewnętrznych, Komisji Edukacji, Nauki i Młodzieży oraz Komisji Mniejszości

provision is of the highest importance due to the lacks in the formerly existing international and domestic regulations. Namely, previously, either unambiguous formulation of the subject of these regulations was lacking, or the subject matter was regulated differently in each legal act. According to article 2 paragraph 1, a national minority is a group of Polish citizens fulfilling jointly the following conditions:
A national minority, as defined by this Act, shall be a group of Polish citizens who jointly fulfill the following conditions:

1) is numerically smaller than the rest of the population of the Republic of Poland;
2) significantly differs from the remaining citizens in its language, culture or tradition;
3) strives to preserve its language, culture or tradition;
4) is aware of its own historical, national community, and is oriented towards its expression and protection;
5) its ancestors have been living on the present territory of the Republic of Poland for at least 100 years;
6) identifies itself with a nation organized in its own state[1].

The definition of ethnic minority differs only in point 6. Namely, the ethnic minority does not identify itself with a nation organized in its own state.

According to the criteria assumed in the Act, in article 2 paragraph 2 point 4, 9 national minorities (Byelorussians, Czechs, Lithuanians, Germans, Armenians, Russians, Slovaks, Ukrainians, Jews) and 4 ethnic minorities: the Karaim, the Lemko, the Roma, the Tartar, have been recognized.

PROHIBITION OF DISCRIMINATION AND ASSIMILATION

In articles 4-6 the legislator has developed constitutional provisions and the principles contained in The Framework Convention

Narodowych i Etnicznych from 23.09.2004r. (deputy rapporteur E. Czykwin), www.ks.sejm.gov.pl:8009/kad4/084/40842097.htm

[1] The translation of the text of The Act on National and Ethnic Minorities and on Regional Language is available on the following website: http://mniejszosci.narodowe.mac.gov.pl/mne/prawo/ustawa-o-mniejszosciac/tlumaczenia/6490,Tlumaczenia-Ustawy-o-mniejszosciach-narodowych-i-etnicznych-oraz-o-jezyku-region.html

for the Protection of National Minorities, such as: the right to freely choose whether to be treated or not to be treated as belonging to minority, the right to exercise the rights flowing from the principles enshrined in the Act individually as well as in community with others (article 4), prohibition of any policies or practices aimed at assimilation of persons belonging to national minorities as well as prohibition of undertaking actions leading to changes in the national proportions in the territories inhabited by the minorities (article 5) as well as prohibition of discrimination on the grounds of national or ethnic minority status and the obligation to protect persons exposed to such discrimination (article 6).

MINORITY LANGUAGE

Provisions concerning minority language are to be found in the 2nd chapter of the Act. In this chapter, three major issues have been dealt with. That is, the use of names and surnames in the minorities' language and the usage of minorities' language in private and public life. These issues have already been regulated in the Polish legal system on the basis of bilateral agreements concluded by Poland with neighbouring states and in general statutory law[1].

1. The use of names and surnames in the minority language

According to article 7, persons belonging to the minority have a right to use and spell names and surnames in compliance with the principles of spelling of minority language, including the right to register said names in the registers of marital status and in identity documents. This regulation is of utmost importance, since after the II World War numerous persons have been forced to change their names and surnames to the form consistent with the principles of Polish language[2]. The details on the procedure of conversion of names and surnames into minority language version are contained in the Act on the Change of Names and Surnames[3].

2. The use of minority language in private and public life

[1] The Act on the Change of Names and Surnames or the Act on the School Education System along with its numerous executory provisions can be enumerated here.
[2] See more: A. Malicka, *Ochrona mniejszości* ..., 144 et. seq. and Z. Kurcz, *Mniejszość niemiecka w Polsce*, Wrocław 1995, 163 et.seq.
[3] Dz. U. 2005.62.550

Article 8 grants minorities a set of rights connected with the use of minority language in the private and public life. Among these rights are the following: freedom to use their minority language in public and private life, spread and exchange information in their minority language, run information of a private nature in their minority language, or to learn their minority language or to be instructed in this language. The introduction of this regulation to the Act was possible thanks to the article 27 of the Constitution of the Republic of Poland, pursuant to which, the official language in Poland is Polish, but without prejudice to minorities' rights derived from the ratified international agreements. Similar formulation is to be found also in the Act on the Polish Language[1]. In conformity with these provisions, the existence of regulations conferring the right to use minority language alongside the official language is allowed[2].

3. Subsidiary language

Provisions of the Chapter 2 concern also principles regarding using minority language in public life, especially in contacts with the public authorities' bodies.

Due to the introduction of the so- called subsidiary language, the possibility of using minority language in contacts with the municipal organs has been introduced. Practically, this means that persons belonging to national or ethnic minorities have a right to address municipal organs in their language in the written and spoken form, and the reply shall be delivered in the official language, or if these persons submit an adequate motion, also in the so-called subsidiary language. This provision nevertheless, is limited solely to municipalities which fulfill criteria enumerated in the article 9 paragraph 2 of the Act. According to this Act, subsidiary language may be used only in the municipalities where the number of inhabitants belonging to the minority whose language is supposed to be used as an subsidiary language amounts to no less than 20%[3] of the total population of the municipality

[1] Article 2, Dz. U. 99.90.999 with further amendments

[2] This is not a new solution in the Polish legal system. The use of minority language in contact with organs of public administration has been allowed in a limited scope in the interwar period.

[3] During the work on the Act, the percentage of the population belonging to national or ethnic minorities has been debated. On the one hand, it has been proposed that this threshold should be set as high as 50%. On the other hand, the threshold of 8% has also been proposed. Critical remarks concerning the version of the Act passed on the 4th of

inhabitants. This number is established on the basis of data taken from the General Census. Moreover, the municipality has to be registered in the Official Register of Municipalities, in which the subsidiary language is being used. The Register is run by the Minister responsible for the issues of religious denominations, national and ethnic minorities[1], and the entry to the Register is made upon the proposal of the Municipality Council[2].

The Act provides minorities also with the possibility to use additional official names of places and physiographical objects, as well as street names in the minority language (article 12). Still, the names in the minority languages may only be used after the name in Polish language. The additional name in the minority language may be introduced, if the municipality is inhabited by no less than 20% of the persons belonging to national or ethnic minorities or if at least half of the inhabitants of the municipality supported this idea on the basis of consultancy process carried out in conformity with the provisions of the Act on Municipality Self-Government. What is more, the proposal of Municipality Council has to receive a positive opinion from the Commission of Names and Places and Physiographical Objects.

4. Regional Language

The Act introduces, next to the definition of subsidiary language, the term regional language, establishing at the same time that the status of such language is granted only to the Kashubian language (article 19). The definition of regional language is based on the provisions of the European Charter for Regional or Minority Languages[3]. The scope of

November 2004, are contained in the Opinion on the Act on the National and Ethnic Minorities and on the Regional Languages, prepared by the Legislative Office of the Chamber of the Senate, www.senat.gov.pl/k5/dok/opinia/2004/073/825.htm

[1] Minister responsible for the issues of religious denominations, national and ethnic minorities is the Minister of Administration and Digitization; The Regulation of the Prime Minister of 18th of November 2011, concerning the detailed scope of duties of the Minister of Administration and Digitization, Dz.U. 2011.248.1479

[2] Detailed rules concerning the official register have been established in the relevant regulations. In accordance with the criteria set out in the Act, at present there are 20 municipalities which have been granted the right to use subsidiary language. These municipalities are inhabited by national and ethnic minorities, including the municipalities in which Kashubski language is used as a regional language.

[3] The full text of European Charter for Regional or Minority Languages: http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=148&CM=1&CL=ENG

rights of persons using regional language is regulated through reference to the relevant provisions concerning the use of subsidiary language.

EDUCATION AND CULTURE

The legal provisions concerning education and culture of the minorities have been placed in the Chapter 3 of the Act, comprising of only 2 articles. Article 17 of the Act guarantees the right to learn in the minority language, and also the right of these persons to education of the minority history and culture. The legislator does not provide for specific rules, solely refers to the regulations contained in the Act on the Education System[1]. According to the provisions contained in this Act, public schools are obliged to enable students the maintenance of their national, ethnic, lingual and religious identity. In particular, to provide possibility to learn their own language, as well as history and culture. The activities of public schools for the benefit of national minorities are financed, according to the Act on the Education System, from the State's budget. On the basis of article 18, the organs of public authorities are obliged to support actions aimed at protecting, maintaining and developing cultural identity of minorities. These actions entail primarily grants from the State's budget on the running of activities of cultural institutions, publishing books and magazines, supporting the radio and TV programmes, running of libraries and disseminating the knowledge on minorities.

BODIES RESPONSIBLE FOR THE ISSUES OF NATIONAL AND ETHNIC MINORITIES

One of the goals of passing the Act on National Minorities was to improve the functioning of bodies and institutions responsible for these matters. In accordance with the provisions of Chapter 5 of the Act, for

[1] Chiefly article 13 of the Act on the Education System and article 58 of this Act, according to which minorities possess a right to establish private schools. The details concerning organization of the education in minority language and minority language have been regulated in the Regulation of the Minister of National Education of the 14th of November 2007 on the conditions and manners of execution by the nursery schools, schools, and public benefit institutions tasks enabling students belonging to national and ethnic minorities and to communities using regional language to cultivate their sense of national, ethnic and linguistic identity, Dz. U.2014.214.1579.

the minority issues responsible are the following three bodies, two of them are institutions of public administration: the minister responsible for issues of national beliefs, national and ethnic minorities (article 21), the voivode (article 22) and the Joint Commission of the Government and National and Ethnic Minorities (article 23 – 30), the Prime Minister's advisory body.

The Act regulates competences of specific bodies. According to this Act, the prime task of the minister is coordination of the politics of the government towards the national and ethnic minorities and initiation of changes in these policies. The voivode coordinates the actions of state authorities' organs on the territory of the voivodship. The task of viovode is also to counteract violations of minority rights and their discrimination, as well as giving opinion on the programmes in favour of minorities. While undertaking his tasks, the viovide cooperates with the territorial self-government bodies and minority organizations. The voivode may also appoint the Commissioner responsible for the issues of national and ethnic minorities[1].

The appointment of the Joint Commission constitutes the realization of rights of national and ethnic minorities to participate in resolution of issues concerning their cultural identity contained in the article 35 of the Constitution of the Republic of Poland. It should be also understood as the implementation of article 15 of the Framework Convention, according to which minorities should enjoy conditions allowing them actual participation in the public matters, in particular those relating to minorities.

The Commission provides the minorities with an opportunity to influence the government's administration policy in relation to minorities.

Among the primary tasks of the Commission are: providing opinions on the actions aimed at realization of minorities' rights and the programmes for the development of cultural identity of minorities as well as influencing the contents of relevant legal regulations concerning minority issues. Moreover, the Commission presents opinions in relation to the allocation of state's budget resources earmarked for actions supporting the protection of minorities' rights and the development of their cultural identity. In order to fulfill their tasks the Commission may cooperate

[1] The Office of the Commissioner responsible for issues of national and ethnic minorities has been created in all voivodships.

with the government administration and self-government bodies as well as with the minorities' organizations and seek opinion, standpoints, expertise and information of the scientific communities and social organizations.

In article 24 of the Act the composition of the Commission has been established. Among its members may be representatives of governmental administration bodies and the national and ethnic minorities representatives. The members of the Commission are being appointed and dismissed by the Prime Minister upon the proposal of the minister in charge of religious denominations and national and ethnic minorities, whereas the bodies and organizations of national and ethnic minorities being a part of the Commission submit candidatures.

Thus, the Commission is composed, according to the Act, of the representatives of government administration agencies: the competent minister in charge of religious denominations and national and ethnic minorities, the competent minister in charge of public administration, the competent minister in charge of culture and protection of national legacy, the competent minister in charge of education, the competent minister in charge of public finance, the competent minister in charge of labour affairs, the Minister of Justice, the competent minister in charge of internal affairs, the competent minister in charge of social security, the competent minister in charge of foreign affairs, the President of the Central Statistical Office, the Council for Preservation of Monuments to Struggles and Martyrdom, and the Head of the Chancellery of the Prime Minister.

The number of the minorities' representatives has been determined on the basis of the numerical criterion. Minorities, whose number in the general census has been established as greater than five thousand persons, were granted two seats in the Commission, whereas less numerous minority groups were granted one seat[1]. Moreover, two representatives of the community using regional language are included in the Commission.

The sessions of the Commission shall take place not less frequently than once every six months. The positions of the Commission

[1] The following minority groups have two representatives: Belarusian, Latvian, German, Ukrainian, Lemko and Roma.
The following minority groups have one representative: Czech, Armenian, Russian, Slovakian, Jewish, Karaite and Tartar.

are achieved on the basis of parties' consensus and not voting. The legislator allows the possibility of sessions where only part of the Commission members are present. That is, separate sessions of the representatives of national and ethnic minorities and separate sessions of the representatives of government administration bodies. The Commission comprises of three panels, responsible respectively for: the education issues, the culture issues and the Rome issues[1].

The minister in charge of religious denominations and national and ethnic minorities has been obliged by the legislator to prepare every two years a report concerning the situation of minorities in the Republic of Poland. This report is further opined by the Joint Commission.

CONCLUSIONS

In the Act on National and Ethnic Minorities and on Regional Language the legislator has implemented, developed and specified constitutional and statutory provisions relating to the minority issues. At the same time, the Act constitutes implementation of all the principles' incorporated in the Framework Convention for the Protection of National Minorities and the fulfilment of obligations derived from various bilateral agreements concluded with neighbouring states.

The body responsible for minority issues provided for by the legislator maintains cooperation of the government administration bodies competent in minority issues, with the representatives of minority communities. Due to that solution persons belonging to national and ethnic minorities gained a real possibility to influence the content of the decisions taken in their matters.

The Act on National and Ethnic Minorities and on Regional Language is a comprehensive legal document. It defines the basic terms and sets out in a clear way tasks and competences of the public administration bodies responsible for the minority issues. Moreover, it regulates fundamental rights of persons belonging to minorities and the modes of their realization.

[1] The information about the activities of the Joint Commission of the Government and National and Ethnic Minorities are available on the website http://mniejszosci.narodowe.mac.gov.pl/mne/komisja-wspolna

Poland is one the states[1] which have regulated the legal status of national minorities on the statutory level, following the standards of international law.

[1] The acts on national minorities are in force, among others, in Lithuania, Latvia, Estonia, Hungary and the Czech Republic.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

CONSIDERATIONS ON THE CONCLUSION OF THE INSURANCE POLICY

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***Abstract**:*

The main way of practicing the insurance commerce is the insurance policy, at the conclusion of which emerge the legal relations between the insurer and the insured. Given the specificity of the insurances domain, the process regarding the conclusion of the insurance contract is often complex, the parties having long talks until the will agreement is accomplished. If it is also added the technical character of this mechanism, it is obvious that, for the good knowledge of the legal regime of the insurance contract, it is important an analysis regarding its conclusion.

***Key words**: insurance contract, notification of the parties, offer to conclude a contract, the moment when the contract is concluded.*

1. INTRODUCTION

Given the importance of the insurance policy for generating the legal relations typical to the field of insurances, the new Civil Code[1] dedicates a generous space to it, by means of the regulation contained by its articles 2199-2241. At the same time, in order to determine the main rules on the conclusion of this type of contract, there will also be taken into account the provisions of Law No. 32/2000 on insurance companies and the insurance supervision[2] and of the norms issued by the Romanian Insurance Supervisory Commission.

A definition given to the insurance policy is that given by the provisions of article 2199 articles 2214, 2223 and 2227 of the new Civil Code so that, on the basis of the legal provisions, the insurance policy can be defined as the contract by means of which a person insured takes

[1] Law No. 287/2009 on the Civil Code, published in the Official Gazette No. 511 from 24th July 2009 has been modified by Law No. 71/2011 and republished in the Official Gazette No. 427 from 17th June 2011 and the Official Gazette No. 489 from 8th July 2011.

[2] Published in the Official Gazette No. 148 from 10th April 2000, with the subsequent modifications and amendments.

upon the commitment to periodically pay an amount of money called insurance premium, to an insurer, on the condition that, when the insured risk takes place, the insurer has the duty to offer to the insured, to the beneficiary of the insurance or to a prejudiced third party an amount of money as insurance allowance, within the agreed limits and terms[1].

2. THE CONCLUSION OF THE INSURANCE POLICY

The insurance policy has a special legal regime, while an important part of the features of this contract is determined by the main rules regarding its conclusion. These rules characterize a complex process of concluding the contract, in which there can be distinguished a pre-contractual phase and a phase when the agreement of will is constituted.

2.1. THE PRE-CONTRACTUAL PHASE. THE MUTUAL NOTIFICATION OF THE PARTIES

In the context of the regulations existing in the field of insurances, we can speak about the existence of a pre-contractual phase and about a phase of notification, referring to the duty of the parties to notify one another in good faith on the essential elements of the future contract[2].

2.1.1. THE NOTIFICATION OF THE INSURED

Before the insurance policy is concluded, law provides for the duty of the insurer to notify the persons interested in the insurance on at least the following information: the length of the contract, the way the contract is implemented, the suspension or the rescission of the contract, the means and terms of paying the premiums, the methods to calculate and distribute allowances, the methods to resolve the complaints on the contracts (article 24¹ of Law No. 32/2000). These duties are developed through the provisions of Order No. 23/2009 on the approval of the Norms regarding the information which the insurers and the insurance

[1] For the definition of the insurance contract, see Liviu Stănciulescu, Vasile Nemeş, *Dreptul contractelor civile şi comerciale în reglementarea noului Cod civil,* Hamangiu Publ. House, Bucharest, 2013, p. 452, Eugeniu Safta-Romano, *Contracte civile,* volume 2, Graphix Publ. House, Iaşi, 1995, p.124.

[2] Liviu Stănciulescu, Vasile Nemeş, *quoted works,* pp. 474-475, Irina Sferdian, *quoted works,* p. 81, 86, Gheorghe Piperea, *Introducere în Dreptul contractelor profesionale,* C.H.Beck Publ. House, Bucharest, 2011, pp. 252 - 253.

intermediaries must provide to customers, but also other elements which an insurance contract must comprise. The legislation in the field imposes the written drafting of the information which the insurer must provide, a fact which eases the proof of complying with the notification duty.

Making a special reference to the payment of the insurance premiums, article 2206 paragraph (5) of the new Civil Code rules that the insurer is bound to inform the insured on the consequences of not paying the premiums at the payment terms and to foresee these consequences in the insurance contract. Only after complying with this notification duty can the insurer use his right of resiling from the insurance contract, if the premium is not paid at the due term.

2.1.2. THE NOTIFICATION OF THE INSURER

In accordance with the general principle provided for by article 1170 of the new Civil Code[1], article 2203 institutes the notification duty for the insured, either at the conclusion of the contract or during its enforcement.

The notification information provided for the insured regards the insured risk, reason for which the provisions of article 2203 paragraph (1) of the new Civil Code rule that the person requesting the insurance is bound to answer in written to the questions of the insurer, but also to declare, ever since the moment the insurance contract is concluded, any information or circumstances of which he is aware and which are also essential for the risk evaluation. Law considers all this information useful, which is after all natural, given that the insurance is concluded particularly to prevent the consequences of dangers (risks).

The notification of the insurer is made when the printed standard form is filled in, namely when answers are provided to the questions included in the form, on the probability and the intensity of the risk occurrence.

As a novelty element in relation to the former regulations, article 2204 of the new Civil Codes includes sanctions if the notification duty provided by the previous article is not complied with, a fact which leads

[1] Article 1170 of the New Civil Code refers to good faith in contracts and replaces article 970 of the 1864 Civil Code, by expanding its regulations, both in terms of the negotiation (the notification duty) and the enforcement of the contract (contractual solidarism). The legal norm is imperative, so that thesis II of article 1170 forbids the derogation from its provisions, otherwise the insurance contract becomes void.

in certain conditions to the nullity of the contract. Thus, according to law, apart from the general nullity clauses, an insurance contract also becomes void due to imprecise statements or reluctances made in ill faith by the insured or any other person demanding the insurance, on circumstances which, if had been known by the insurer, would have determined the latter not to give his assent or at least not to give it in the same circumstances, even if the statement or reluctance did not have any influence on the occurrence of the insured risk. In regard to the provisions mentioned above, it must be reminded that, in order to determine the nullity of the contract, an imprecise statement or reluctance must: a) come from the insured or the person requesting the insurance; b) be made in ill faith; c) be made on circumstances which can determine the insurer not to give his assent on the conclusion of the contract or give it in other conditions. The statement or reluctance do not generate the nullity of the contract if the ill faith could not be established. According to article 14 paragraph (2) of the new Civil Code, the good faith is presumed. In this case, the lawmaker makes the following distinction from the moment the imprecise statement or reluctance is acknowledged: before the insured risk takes place or after it takes place.

2.1.3. THE CASE OF INSURANCE AGENTS

The law provides for the notification duty during the pre-contractual period also the insurance agents. Thus, according to article 33 paragraph (3) of Law No. 32/2000, the insurance and/or reinsurance agents are bound to provide to customers, in written, before the conclusion, modification or renewal of the insurance/reinsurance policy, a set of information on: the denomination (name) of the agent, the headquarter (address), the registry where he has been registered and the ways in which the registration can be checked, the possession of at least 10% of the voting rights or of the capital of an insurer/reinsurer, the possession by an insurance company or a parent company holding a certain insurance company of at least 10% of the voting rights or the capital of the insurances/reinsurances agents, the procedures of resolving certain misunderstandings or conflicts emerged in the relations with the customers, but also any other information provided for by the norms issued for the enforcement of law[1].

[1] See Order No. 23/2009 on the approval of norms issued by the Romanian Insurance Supervisory Commission.

2.2. THE WILL AGREEMENT

The essence of any contract is the will agreement[1]. This involves the concordant meeting between an offer to enter an insurance contract and the acceptance of that offer[2]. The contract is concluded either by negotiation or with the acceptance without reservation of an offer, as it results from the provisions of article 1182 paragraph (1) of the new Civil Code, which institutes the rule in the field. This mechanism is valid also for insurance contracts. It happens often in the field of insurances that the parties negotiate for long the perfecting of the insurance policy, as the technical and specific character of the field require such a situation[3]. For that matter, for the conclusion of an insurance contract are also applicable the provisions of article 1182 paragraphs (2) and (3) of the new Civil Code which regulate the exception of the rule already mentioned, by considering enough the agreement of the parties on the essential elements of the contract in order for the latter to be validly concluded, even if they left some secondary elements to be agreed subsequently or entrust their establishment to some other persons.

Referring to the insurance contract, the offer to enter an insurance contract can come either from the insured or the insurer. This aspect is expressed by the provisions of article 20 paragraph (2) of Law No. 32/2000, according to which the insurer is bound to elaborate its own insurance conditions, in relation to the insurance classes and forms practiced. Moreover, according to article 1188 paragraph (2) of the new Civil Code, the offer can come from any other party, the condition being for that party to propose the last essential element of the contract.

2.2.1. THE OFFER TO ENTRY AN INSURANCE POLICY

The mechanism of concluding an insurance policy starts with the proposal of entering that contract, called offer, which a person makes to another or to the general public, of concluding a contract in certain

[1] Ioan Adam, *Drept civil. Obligaţiile. Contractul în reglementarea NCC,* C.H.Beck Publ. House, Bucharest, 2011, p. 96.
[2] Constantin Stătescu, Corneliu Bârsan, *Drept civil. Teoria generală a obligaţiilor,* IX edition, revised and completed, Hamangiu Publ. House, Buchrest, 2008, p. 37.
[3] On the negotiation concept, see Alexandru Bleoancă, *Contractul în formă electronică,* Hamangiu Publ. House, Buchrest, 2010, pp. 47 - 48.

conditions[1]. Consequently, the offer is a unilateral legal act which expresses the possibility of a person to conclude a contract. French literature has defined offer as a firm proposal to conclude in a definitive manner a contract established in conditions equally determined, while all the other proposals do not have the legal value of an offer[2]. In the field of the insurance contract, the specific legislation does not institute special conditions on the offer to conclude an insurance contract. By considering the principle of the symmetry which must characterize the form of legal acts, the new Civil Code establishes nonetheless, at article 1187, that the offer and its acceptance must be made in the form demanded by law for the valid conclusion of the contract. Since the request of the written form is provided for by law *ad probationem* for the insurance contract, it results that the offer to enter an insurance contract can take any form. Regarding the basic conditions which the offer to conclude an insurance contract must comply with, they are those provided for by common law. Thus, the offer in question must be firm, clear, precise and complete, including all the elements which can be considered at the conclusion of the contract[3]. At the same time, the offer must be real, serious, conscious, not vitiated and with the intention of taking upon legal commitments. By regulating the conditions which an offer must observe in order to be valid, the new Civil Code rules, at article 1190, that the request of offers, addressed to one or more determined persons, does not constitute in itself an offer to conclude a contract. Consequently, the offer to enter a contract must not be mistaken with the request of offers.

2.2.2. THE ACCEPTANCE OF OFFERS

The second element of the will agreement is the acceptance of the offer. It represents the unilateral manifestation of the will to conclude the contract according to the conditions established by the offer. From the encounter of the offer with its acceptance, it emerges the contract seen as a legal act. From the point of view of the form in which it must be expressed, the acceptance of the offer is also subject to the provisions of article 1187 of the new Civil Code, which signifies that the acceptance of

[1] C. Hamangiu, I.Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil*, volume II, National Publishing House S. Ciornei P, Bucharest, 1929, p. 804.
[2] Ioan Adam, *quoted works*, p. 97.
[3] Constantin Stătescu, Corneliu Bârsan, *quoted works*, p. 41, Ioan Adam, *quoted works*, p. 103.

the insurance offer can take any form and can be expressed verbally or tacitly, in accordance with the specificity of the treaties between the parties. Regarding the basic conditions which must be met, are enforceable the rules of common law, as they are acknowledged by the provisions of articles 1196-1198 of the new Civil Code. Therefore, the acceptance must be pure and simple, that is to be concordant with the offer, must be unquestionable and must take place before the offer has become void or has been revoked[1].

2.2.3. THE MOMENT WHEN THE INSURANCE POLICY IS CONCLUDED

The moment when an insurance policy is concluded must be analyzed in relation to the circumstances, namely if the insurance is concluded between absent or present persons. From this point of view, three hypotheses can be encountered:

a. The conclusion of the insurance policy between present persons. In this situation, as both the person making the offer and the one accepting it are present, the moment when the insurance contract is concluded is that in which the will agreement on its conclusion intervenes. This is an application of the principle *solo consensu*, while the new Civil Code clearly acknowledges as the moment when a contract is concluded between present parties the moment when the concordant wills of the parties meet, a fact which is accomplished with the mere expression of the offer and the acceptance of the latter[2].

Concretely speaking, the conclusion of the contract is done when it is signed by the contracting parties.

b. The conclusion of the insurance policy by means of modern communication techniques: telephone, videophone, radio, television, internet. Similarly to the situation already presented for the contract concluded between present persons, when modern communication techniques are used, the insurance contract is considered as concluded when the person making the offer and the one accepting have reached an agreement regarding the conclusion of the contract.

c. The conclusion of the insurance policy by correspondence (between absent parties)

[1] Constantin Stătescu, Corneliu Bârsan, *quoted works*, p. 48, Ioan Adam, *quoted works*, pp. 119 - 122.
[2] Ion Adam, *quoted works*, p. 124.

In this situation, common law acknowledges several systems for determining the moment when the contract is concluded, namely: issuing the acceptance; sending the acceptance; receiving the acceptance and notifying it[1]. Before the new Civil Code entered in force, the legal doctrine[2] has adopted the system of receiving the acceptance, being presumed that, from the moment when the acceptance is received, the offerer has taken notice of its existence and content. At present, the system is clearly acknowledged by the provisions of the new Civil Code. Thus, according with the provisions of article 1186 paragraph (1), the contract is concluded when its acceptance arrives to the offerer, even if the later has not taken notice of it, for reasons out if his guilt. Moreover, article 1200 of the new Civil Code states the following: "The offer, but also its acceptance and revocation, produce effects only from the moment when they reach the receiver, even if the latter does not take notice of them for reasons out of his guilt". The notification of the acceptance must be objectively proven, by means of written evidence means (publication, confirmation of receipt), since the fact that the offerer does not take notice of the acceptance for reasons of which he is not guilty has no relevance and the contract is considered to be validly concluded.

In the absence of some special rules in the field of insurances, when determining the moment at which the insurance policy is concluded between the absent parties, will be followed the principles acknowledged by the new Civil Code.

At the same time, the moment when the insurance contract is concluded can be determined also according to the conditions of article 1186 paragraph (2), which state the following: if the person accepting the offer commits an act or a deed in accordance with the offer or the practices established between parties or customs, then this act can be associated with the acceptance of the offer.

In fact, the expansion of the field of contracts concluded between absent parties (*inter absentes*) has generated the diversification of the legal framework for their conclusion, in order to protect contracting parties acquiring products or services at a distance. For that purposes, the contracts at a distance are subject to a particular regulation within the European Union legislation, by means of Directive No. 97/7/CE adopted by the European Parliament and the European Union Council; the

[1] Constantin Stătescu, Corneliu Bârsan, *quoted works,* pp. 49 - 50.
[2] Constantin Stătescu, Corneliu Bârsan, *quoted works,* p. 50.

directive underlines that the real problem of this kind of contracts is not the spatial distance between the contracting parties, but the period of time between the offer and its acceptance, determined by the fact that the offerer and the acceptant are not face to face at the moment when the first makes the offer and the second one accepts it[1].

In the Romanian legislation, the legal regime of the contracts at a distance is regulated by G.E.O. No. 130/2000 on the conditions of concluding and enforcing contracts at a distance, between the commercials providing products or services, on the one hand, and consumers on the other hand[2]. Although it contains provisions which derogate from common law, in order to protect the consumer – the weak party of the contract – in terms of determining the moment when the contract is concluded, law acknowledges at article 5 the same system of receiving the acceptance by the offerer, as it happens in common law. As a particular feature, we underline the fact that the provisions of article 5 of the G.E.O. No. 130/2000 have a suppletive character, so that the parties can derogate, establishing another moment when the contract is concluded[3]. At the same time, the legal regime of the contracts at a distance involving financial services is regulated by the G.O. No. 85/2004[4]. For the purposes of law, a financial service represents any baking, credit, insurance, individual pensions or financial investment service regulated by Law No. 297/2004 on the capital market or any other service involving payment in nature (article 3 letter b). According to the provisions of article 8 of law, the contract at a distance on financial services is considered concluded when the confirmation message is received by the consumer – the insured in our case – in regard to his order.

d. The conclusion of the insurance policy by means of electronic methods

Emerging initially in the field of commercial contracts, the contracts concluded by means of electronic methods have also expanded in the field of civil law. The contract with electronic form is regulated by article 1245 of the new Civil Code, with reference to the special law. In

[1] For more details, see Ion Adam, *quoted works.* pp. 130 -132.
[2] Republished in the Official Gazette No. 899 from 28th December 2007.
[3] For more details, see Raluca Bercea, *Momentul încheierii contractelor comerciale la distanţă,* in R.D.C. No. 6/2004, pp. 109 -113.
[4] Republished in the Official Gazette No. 365 from 13th May 2008.

fact, as it has been correctly underlined by legal literature, the contract with electronic form does not represent a new species of contract, but only "characterizes a new technical manner to conclude a contract, pointing out the manner to enter the contract, and not the object of the contract"[1]. Electronic commerce represents an unquestionable reality, whereas the multitude of transactions concluded within electronic commerce has constituted the premise of special regulations in this field[2]. In internal law, the sphere of electronic commerce is established by Law No. 365/2002 on electronic commerce[3], with reference to Law No. 455/2001 on electronic signature[4]. By correlating the provisions contained by the two regulations, it can be deducted that the notion of contract concluded by electronic means takes into account the contract which is concluded and is proven by a written document in an electronic form[5].

The electronic means are used also for the conclusion of the insurance policy, being known the so-called *on line* insurance contracts. As the regulations in the field of insurances do not contain special rules, we will debate the issue on the conclusion of the insurance contract in an electronic form on the basis of the legal regime instituted by Law No. 365/2002. The legal basis of the field is represented by the provisions of article 9 paragraph (1) of law, according to which the moment when the contract is concluded is the one when the "acceptance of the offer to enter an insurance contract has been notified to the offerer" – in this case, the insured. If the insured sends the offer to enter an insurance contract by means of the electronic means, the insurer is bound to confirm that he has received the offer or that he has accepted it, depending on the case, by means of an equivalent individual communication method. At the second paragraph of article 9 it is foreseen a special situation, the legal

[1] Ion Adam, *quoted works,* p. 165.
[2] The model Laws issued by UNCITRAL in 1996 and in 2001, the UN Convention on the use of electronic communication in international contracts from 2005 and Directive No. 2000/31/EC on certain legal aspects related to the services of the information society, particular electronic commerce, within the internal market. For more details, see Alexandru Bleoancă, *quoted works,* pp. 8-14, Ioan Schiau, *Cdrul juridic al comerţului electronic,* in R.D.C. No. 1/2002, pp. 56 - 72.
[3] Republished in the Official Gazette No. 959 from 29th November 2006.
[4] Published in the Official Gazette No. 429 from 31st July 2001.
[5] For the definition of electronic contract, see Alina Oprea, *Aspecte juridice ale contractelor electronice,* in Pandectele Române No. 6/2005, pp. 178 - 179

text regulating the tacit acceptance of the offer. Thus, when the "contract which, due to its nature or on the demand of the beneficiary, imposes an immediate enforcement of the typical performance, is considered concluded at the moment when its debtor has commenced its enforcement…" Specialized literature[1] considers that these provisions have an exception character from the general rules, especially that the final thesis of article 9 paragraph (2) from law institutes what is considered to be "an exception from the exception", by going back to the general rule according to which, when the offerer demands to be notified in advance on the acceptance, so that the moment of the contract enforcement does not match the moment when the legal relation emerges. The regulations in the field acknowledge the *notification system* but, given the suppletive character of legal norms, determining the moment when the contract is concluded depends on the will of the parties in the end[2].

3. CONCLUSIONS

The insurance policy has experienced a rapid evolution in the last years, so that, in order to understand the legal regime in the field, we have appreciated as necessary to approach and clarify a series of aspects on the conclusion of this contract. As it also results from the current study, the mechanism of concluding the insurance contract shows a series of particular features emerging both from the technical character of specific operations performed but also from the character of adhesion contract. For this purpose, it can be distinguished a well determined pre-contractual phase, meant to insure the efficacy of the will agreement accomplishment, laying emphasize on the mutual information of parties, followed by the phase when the contract is concluded and when the offer to enter the contract meets the acceptance of the insurance offer; a special accent has also been laid on the conclusion of the contract at a distance and by technical means. Without exhausting all the issues in the field, we are hoping that our analysis offers new perspectives for understanding

[1] Tiberiu Gabriel Savu, *Unele consideraţii pe marginea efectelor noii reglementări privind comerţul electronic asupra regulilor în materia formării contractului,* în R.D.C. nr. 9/2002, p. 105.

[2] For more details, see Raluca Bercea, *Momentul încheierii contractelor comerciale la distanţă,* in R.D.C. No. 6/2004, pp. 113 -114, Tiberiu Gabriel Savu, *quoted works*, pp. 105-109.

this field in a continuous expansion, from the perspective of the insurance activity and of the professionals exerting it.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE RIGHT TO A FAIR TRIAL AND THE BRINGING OF LEGAL ACTIONS BY THE JOINT OWNERS

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Abstract:

The right to a fair trial, which involves the right of access to a tribunal , is one of the rights that are guaranteed by the European Convention of human rights and also by the Romanian Constitution. However, it is possible to get to its infringement, not necessarily because of an abusive conduct of the state's authorities, but because of an excessive theoretization of the juridical institutions which omit their finality. This is how it went to the obstruction of the access to a tribunal for the joint owners whose rights were infringed by the third persons, in the situations when not all of them wanted to resort to justice. Considering the revendicating action as a petitory action which can be introduced whether by the exclusive owner of the good or by all the owners together, the action taken by one of the joint owners was rejected as inadmissible by the Romanian courts. This intransigent attitude was temperated after the European Court of Human Rights blamed Romania for breaking up the right to a fair trial in this type of situations and it was abandonned as a consequence of the new civil Code's coming into force.

Keywords: *the right of access to a tribunal; petitory action; joint property*.

1. INTRODUCTION

Not a few times, the simple truths have to pass through sinuous and full of obstacles until they get to obtain an unanimous acknowledgement. Not even the law is excepted from such avatars, the theoretical debates over some controversial matters often influence the legislator.

But, we don't have to think that such obstacles which materialize into intricate theories are certainly the fruit of law's doctrinarian's proud or of the exact misunderstanding of the analysed phenomenon.

Simply, it's about an exaggerated attention given to some collateral aspects against of the law's finality which is that of organizing and maintaining the social order, inclusively by the regulation and by the protection of the subjective rights.

Such truth is the one according to which any right acknowledged by law has to be defended by the introduction of a justice action when it was infringed[1]. The particular case we have in view is the one of entering the legal action by one of the joint owners, for defending the rights acknowledged by law over the common good.

2. THE RIGHT TO A FAIR TRIAL

The right to a fair trial is one of the rights that are regulated by the European Convention of Human Rights, respectively by article 6 paragraph 1 of this international document. According to the first thesis of the mentioned article, "Any person has the right to the judgement in an equitable and public mode, within a reasonable term of its case, by an independent and impartial tribunal, instituted by law, which will decide whether over the complaints concerning his civil rights and obligations, or over the soundness of any penal accusation directed against him".

For our study, it presents importance the guarantees that this provision contains in order to defend in justice the civil rights. In the absence of such guarantees, the protection given to the civil rights would be illusory.

The general guarantees which are ensured by the right to a fair trial are the following: the right of access to a tribunal; the examination of the case in an equitable, public mode and within a reasonable period; the examination of the case by an independent and impartial tribunal instituted by law; the decision has to be pronounced in a public mode[2]. A series of implicit processual guarantees (the equality of arms, the contradictoriness of the trial; the decisions' motivation) or explicit ones are added to them (the process's publicity, the reasonable term)[3].

From all these guarantees, the free access to a tribunal or the free access to justice seems to be the most important to us. The European

[1] The civil law suit's goal is the realization and the establishment of the civil rights and interests that are submitted to the trial and to the forced execution of the judicial decisions or of others executory titles, according to the proceedings provided by law. To be seen, V.M. Ciobanu, T.C. Briciu, C.C. Dinu, *Drept procesual civil.Drept executional civil.Arbitraj.Drept notarial*, National Publishing House, Bucharest, 2013, p. 39.

[2]For the analysis of these guarantees, to be seen V.M. Ciobanu, T.C. Briciu, C.C. Dinu, *op. cit.*, pp. 46-57; C. Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole*, ed. 2, C.H. Beck Publishing House, Bucharest, 2010, pp. 424-489.

[3]*C. Bîrsan, op. cit.*, pp. 489-531.

Court of Human Rights that by its case-law created the notion of right of access to a tribunal and it determined its content, it has pointed out the importance of this guarantee showing that she has not only a processual nature, but it also contains a material right of which content consists in the possibility acknowledged to the titular to have access to an independent tribunal. In the absence of such right, it couldn't be about the equity of some proceedings because the state could suppress certain jurisdictions without being accused of breaking up the Convention's provisions[1].

The right of access to a tribunal hasn't an absolute character, but the states can bring legal limitations to it that can consist in the institution of some prescription terms, material guarantees, regulations concerning the minors or the disabled and others like these ones. "But, the Court ultimately states over the observance of the Convention's exigencies; she has to be convinced that the enforced limits do not restrain the access acknowledged to the person (to a tribunal) in such extent that the right we analyse could be touched in its very substance; such limits conciliate with the provisions of article 6 paragraph 1 only if they aim to a legitimate goal and it exists a reasonable relation of proportionality between the utilized means and the aimed purpose"[2].

Concerning the domain of the right to an equitable trial, its determination involves the pursuit of two coordinates: the rights and obligations with a civil character that can form the object of some contests and the persons who are the titulars of this right.

As in other matters, the Court created her own set of notions of which meaning and content are not necessarily the same with those that exist in the law systems of the states that are members of the European Council. In essence, the civil rights are those which are acknowledged by the legislation of a member state, including the patrimonial and personal non-patrimonial rights that are regulated by the private law, but without limiting to these ones[3].

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[1]To be seen, CEDH from 21th February 1975, case *Golder/vs/Marea Britanie*.
[2]CEDH, 4th December 1995, case *Bellet/vs./France*, paragraph 31, cited by C. Bîrsan, p. 431.
[3]The notion of "rights and obligations with a civil character" as it's utilized in the Court's case law, it finds support in the larger sense of "civil rights" from the anglo-saxonlaw, which is the result of the opposition between the public and private law. C. Bîrsan, *op. cit.*, p. 361.

In order to fall under the incidence of the dispositions of article 6 paragraph 1 from the Convention, it's necessary that the civil right or obligation should make the object of a contest, understanding rather its material signification than the formal one. That is why the solution given to this contest has to be determining for the rights and obligations with a private character[1].

Regarding the titulars of the right to a fair trial, they are the physical and juridical persons of private law that are the titulars of a subjective civil right acknowledged by the legislation of the member state called in front of the Court.

3. BRIEF CONSIDERATIONS CONCERNING THE RIGHT OF COMMON PROPERTY

The common property is the modality of the property right characterized by the concomitant belonging of the right over the same good or over the same mass of goods, to many titulars that are equally entitled to exercise in a concomitant mode all the attributes of the property right over the good or over the mass of goods that form the object of the co-proprietorship**.** In the juridical doctrine, the common property is known as co-proprietorship.

In the Romanian civil law, there are two forms of the common property: the common property on quotas and the joint tenancy.

The right of property on quotas characterizes by that the good over it carries, it concomitantly and concurrently belongs to many titulars, without the fractionization of the good in its materiality, the fractionization is realized only under an ideal and abstract aspect thus, a quota of this right it reverts to each titular.

At its turn, the joint tenancy leads too, to the possession of a good that is not fractionized in its materiality, in a concomitant and concurrent mode by many titulars, but, in contrast with the other form of common property, the extension of the titulars' rights is not known, as the right is not fractionized into ideal quotas.

In any form of the common property, each titular has, from the juridical point of view, a right of the same nature, which it allows to

[1] CEDH, 25th November 1994, *Ortenberg/vs/ Austria*, paragraph 28.

participate, concomitantly with the others titulars, at the exercise of any property right's attributes over the entire good[1].

If we tackle the common property from the perspective of the European Convention of Human Rights, it is part of another right with a larger content, respectively of the right to goods, which it's regulated by the first article of the First Additional Protocol.

As it's about a modality of the property right, we obviously discuss about a subjective civil right, with a patrimonial content, acknowledged by the domestic legislation. Consequently, this modality falls under the incidence of the right to a fair trial, stipulated by article 6 of the Convention, too.

When the right of common property suffers infringements, within the terminology of law, it rises a contest and to its titular - physical or juridical person of private law has to be acknowledged the right of free access to a tribunal, because the solution given in the case is determinant for its keeping in the joint owners' patrimonies.

Under the influence of the old civil Code, in force until 1st October 2011, the common property on quotas hadn't had a complete regulation[2]. Its juridical regime was shaped by the doctrine and case law that started from some disparate provisions of the civil Code that evoked the existence of this form of joint property. This juridical regime that was dominated by the rule of unanimity (the juridical acts concerning the common good had to be drawn up with the agreement of each owner; only all the joint owners, together could enter legal actions)[3] it crystallized in the period before Romania's adhering to the European Convention of Human Rights, thus its provisions concerning the right of goods and the right to a fair trial had no influence. Unfortunately, after the moment of this adhering, the inertness was great enough which it led, as we'll analyse further on, to an insufficient protection given to the common property.

This, despite the fact that the Romanian Constitution adopted in 1991, guaranteed by article 21, the free access to justice.

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[1] To be seen in this respect, G. Cornu, *Droit civil. Introduction. Les persones. Les biens*, Montchrestien Publishing House, Paris, 2005, pp. 508-509.

[2] On the contrary, the joint tenancy had such a regulation which it wasn't contained by the civil Code, but by a Code of Family.

[3] For the unanimity rule's enforcement and its drawbacks, to be seen C. Bîrsan, *Drept civil. Drepturile reale principale*, third edition, Hamangiu Publishing House, Bucharest, 2008, pp. 168-173.

4. THE JOINT OWNERS' RIGHTS DEFENCE UNDER THE INFLUENCE OF THE OLD CIVIL CODE

The problems regarding the co-owners' rights defence has to be analysed on two levels: a joint owner's rights defence in relation with the others ones and the joint-owner's rights defence in relation with the third persons.

Under the first aspect, it was decided that, in the case of co-owners that have only ideal quotas over the good, the one's revendicating action against the others cannot be accepted[1]. The solution is judicious and it keeps its actuality, taking into consideration the fact that each of the joint owners has a concurrent right of the same nature, or more precise, a fraction of this right which has as an object the same good.

However, it can be said that the position of the doctrine's majority was lacked of practical spirit when it had to solve misunderstandings that appeared between the joint owners, concerning the use of the common good. Thus, it was considered as inadmissible the action by which it was requested the partition of usage[2], as a mode of solving the disputes arose between the joint owners, if this mode was not accepted by all them. It was stated that in such situation, the only way to be attended would be the cessation of the common property by partition[3].

But, in the juridical literature it was stated and argued that practical reasons make necessary the admissibility of the usage partition by a judicial way[4].

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[1]The Supreme Tribunal, civil Section, decision number 1335/1978, C.D. 1978, pp. 31-32.

[2]By the partition of usage it's realized whether the division between the joint owners of utilizing as related to a certain material fraction of the good, without getting to its material fractionization, or the division of time in certain periods assigned to the integral or partial utilization of the common good by each of the joint owners. To be seen V. Stoica, *Drept civil. Drepturile reale principale*, second edition, C.H. Beck Publishing House, Bucharest, 2013, p. 285.

[3]To be seen, the Supreme Tribunal, decision number 819/1968, R.R.D. number 11/1968, p. 168; the Supreme Tribunal, decision number 2502/1973, R.R.D. nr. 8/1974, p. 66; the Supreme Tribunal nr. 784/1977, C.D. 1977, pp. 192-196.

[4]To be seen, C. Bîrsan, *Drept civil. Drepturile reale principale*, *op. cit.*, p. 169-170; 481; L. Pop, L.M. Harosa, *Drept civil. Drepturile reale principale*, Universul Juridic Publishing House, Bucharest, 2006, p. 190-191; O. Ungureanu, C. Munteanu, *Tratat de drept civil. Bunurile. Drepturile reale principale*, Hamangiu Publishing House, Bucharest, 2008, p. 304.

Even more inadequate was the position adopted in the matter of the joint owners' rights defence against the third persons. Thus, starting from the reality that the revendicating action is a petitory action, then an action which puts in discussion the right of property itself on its whole, it was considered that it can be instituted only by the good's exclusive owner. Consequently, it was decided that neither of the co-owners, as is not the good's exclusive owner, he couldn't claim alone the good from a third person, his action was to be rejected as inadmissible[1].

A joint owner could claim alone the good only if it was conferred into his lot by the partition as the revendicating action is a decisional juridical act[2]. Thus, it was considered that by the qualification of the legal action as a decisional juridical act, then it automatically falls under the incidence of the unanimity rule, that governated the drawing up of such acts by the joint owners.

This approach, concentrated on the qualification of the juridical nature of the revendicating action has omitted the essential aspect: the joint owner that introduces alone an action against the third person, he firstly does it in order to defence his own right. As it was stated in the doctrine, each of the joint owners is the owner of the entire good [3], even if his right isn't an exclusive one. But, where it exists a right, then it has to exist a legal action for its defence. Rejecting such actions as inadmissible, the instances prevented the co-owner from defending his right, consequently they broke up his right to a fair trial.

The solution offered by the case law for the situations in which not all co-owners agreed upon the entering of the revendicating action, respectively the previous realization of the partition, it was totally unrealistic. Thus, within the necessary period for realizing the partition which, in most cases, could be realized only by the judiciary way, the third usurper remained in the possession of the good and it existed the danger that he could get the right of property over it by the acquisitive prescription.

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[1]The Supreme Tribunal, Civil Section, decision number 2241/1972, C.D. 1972, p. 85; the Supreme Tribunal, civil section, decision number 1030/1975, C.D. 1975, p. 222. In the same respect, to be seen I. Lulă, Opinii referitoare la posibilitatea exercitării acţiunii în revendicare de către un singur coproprietar, Dreptul nr. 4/2002, pp. 75-84.

[2]The Supreme Court of Justice, decision number 1467/1992, Dreptul nr. 7/1993, p. 91; idem, decision number 295/1993, Dreptul nr. 7/1994, p. 85.

[3]Ch. Larroumet, *Droit civil, second volume (Les biens. Droits reels principaux)*, 5th edition, Economica Publishing House, Paris, 2006., p. 147.

Taking into account the similitudes between the Romanian civil law and the French one, the instances could have inspired from the solution given there to this matter.

In the French law too, the exercise of legal actions is submitted to the exigence of the unanimity rule, as the decisional juridical acts. A series of actions are excepted from it and amongst them there are those which have as an effect the conservation of all joint owners' rights in which category is included the revendicating of a joint estate from a third person's that claims to be the proprietor[1].

This solution has determined a doctrinarian reaction, and it was stated the opinion according to which the revendicating action is a conservation act because it tends to bring again the vindicated good in the owner's possession and it interrupts the prescription. Consequently, if the good makes the object of the property in common, then it could be entered by one of the co-owners[2].

The cited author states that even when the recovered good is part of the successional active, the successional seizin becomes incident, which it's indivisible and confers to each heir the prerogative of actioning in all inheritance's name, fact which involves the possibility of entering alone the action for recovery of possession[3].

The problem got in front of the European Court of Human Rights which by decision on 14th December 2006 solved the case Lupas and others versus Romania[4]. As it was expected, the Court didn't try to solve the theoretical dispute concerning the juridical nature of the revendicating action and its titular, but it tackled the matter from the perspective of the necessity for the defence in justice of any right that was infringed. As a consequence, the Court considered that the observance of the unanimity rule is the matter of the revendicating action of a joint good, with the consequence of rejecting such action as

[1]To be seen Ph. Malaurie, L. Aynès, *Les biens*, 4th edition, Defrenois Publishing House, Paris, 2010, pp. 211-213; Ch. Larroumet, *op. cit.*, pp. 153-154 and the case law cited by the authors.

[2]To be seen in this respect, D. Chirică, *Posibilitatea exercitării acţiunii în revendicare de către un singur coindivizar*, Dreptul number 11/1998, pp. 23-30. This opinion was achieved by other authors: L. Pop, L.M. Harosa, *op. cit.*,pp. 312-313; O. Ungureanu, C. Munteanu, *op. cit.*,pp. 428-429.

[3]D. Chirică, *loc. cit.*, p. 21.

[4]The translation of this decision was published in the Official Gazette of Romania number 464 on 10 July 2007.

inadmissible, it constitutes an infringement of the right of access to a tribunal, part of the right to a fair trial guaranteed by article 6 of the Convention, whenever the impossibility of introducing all joint owners in the processual frame it has objective causes, including ones' unjustified refusal to participate to the proceeding.

The Court's decision was picked up by the Romanian instances. Thus, it was decided that the instances have to analyse the rule of unanimity depending on the concrete circumstances of the case and they have to establish in a complete mode the situation of fact and depending on it, if it can be retained that the entitled person can enter alone or not the revendicating action, and not only to limit to ascertain that the imposing of the unanimity rule represents a denial of the right of access to an instance"[1].

5. THE CO-OWNERS' RIGHTS DEFENCE BETWEEN THEMSELVES, IN THE REGULATION OF THE NEW CIVIL CODE

In contrast with the normative act which replaces, the new civil Code contains a complete regulation of the common property. The following aspects present interest for our study: the joint owners' rights defence ones against the others in the cases of abusive usage of the common good and in the cases of juridical acts at which drawing up they didn't participate to, that harm their interest, and also the entering of the legal actions by which the common property is protected against the third usurpators.

Article 636 states the common good's usage which realizes by material acts. The cited legal text took over the solution given by the old case law, according to which the good's usage can be exercised by any joint owner on condition of not impeding the others to utilize the good and of not changing its destination and mode of use[2]. The abusive exercise of usage made by one of the joint owners involves his tortliability for repairing the prejudices caused in this mode to the others.

The action by which the damages are requested is prescriptible within the general prescription term of three years.

[1]The High Court of Cassation and Justice – civil section and of intellectual property, decision number 4442 on 2nd April 2009, Dreptul number 2/2010, p. 265.
[2]The Supreme Tribunal, civil section, decision number 549/1978, C.D. 1978, p.10

Article 637 stipulates that "the fruits produced by the common good are ought to all joint owners, in a proportional mode with their quota of right".

The way in which the others joint owners could value their own rights to the natural and industrial fruits it depends if they still exist or not in the patrimony of the joint owner that endorsed them, according to the distinction made by article 638 paragraph 2.

The natural and the industrial fruits, appropriated by the joint owner are considered as common goods if they exist in the patrimony of the joint owner that appropriated them and they can be distinctly identified from other fruits of the same kind that exist in the respective patrimony. As a consequence, the others joint owners could request their partition.

If the fruits do not exist anymore in the patrimony of the co-owner that gathered them, then it arises the right to compensations of the interested co-owner and he has the possibility to request the fruit's equivalent, proportionally with his quota of right. This possibility doesn't exist if the fruits perished without the guilt of the one who appropriated them ("in a fortuitous mode").

The civil fruits consist in a sum of money so that in their concern it cannot be conceived an equivalent. Consequently, if they were appropriated by one of the joint owners, these fruits are always considered that exist for which reason the legislator, by paragraph 3 of article 638, states the right for the others joint owners to claim their part from these fruits, from the one who gathered them, without any distinction.

Concerning the juridical acts drawn up referring to the common good, it's made the distinction amongst the conservation acts, the administrative acts and the decisional juridical ones. The drawing up of juridical acts represents the favourite domain of the unanimity rule that governated the juridical regime of common property, rule that often proved to be not productive. For that reason, the legislator maintained it only for the decisional juridical acts, in the cased of the other acts it stated rules that are less rigid.

Thus, because the conservation acts' goal is to prevent the loss of the right by all co-owners, any of them can draw up these acts even

without the others' consents (article 640). But, a joint-owner alone could draw up only the conservation acts which involve the emergency[1].

The administrative acts are drawn up only with the agreement of all joint owners that have the majority of quotas (article 641 paragraph 1), the unanimity rule is replaced by the rule of majority[2]. In the case of the administrative acts that substantially limit a co-owner's right of utilizing the good in comparison with his quota or they impose him an excessive task in comparison with his quota or with the expenses incurred by the others joint owners, then it's necessary to obtain his consent (article 641 paragraph 2).

If a joint owner is unable to express his willing or he abusively opposes to the realization of an administrative act that is indispensably for maintaining the utility or the value of the good, the interested joint owner or joint owners can request to the instance to supply his consent by a juridical decision (article 641 paragraph 3).

The decisional juridical acts, respectively those by which the common good is alienated or encumbered with a real guarantee, those by which the dismembered rights of the property right are constituted and others like these, they remain under the rule of unanimity. Three categories of juridical acts that have as an object the common good are assimilated to the decisional juridical acts, therefore they'll have to be drawn up with all joint owners' accords: a) any gratuitous juridical act; b) assignments of estates incomes drawn up for a term longer than three years; c) the locations drawn up on a term greater than three years; the acts that exclusively aim at the good's beautifying.

The law (article 641 paragraph 4, corroborated with article 642 paragraph 1) doesn't ask that all the joint owners should participate to the

[1]The Romanian legislator didn't totally took over the solution that exists in article 640 of the French civil Code according to which any of the joint owners can take by himself all the measures that are necessary to preserve the common good, even if they are not urgent. To be seen I. Sferdian, *Drept civil. Drepturile reale principale*, Hamangiu Publishing House, Bucharest, 2013, pp. 339-340.

[2]The solution has as a source of inspiration the provisions of article 815-3 of the French civil Code, in the drawing received after its alteration by Law on 23 June 2006. According to the mentioned text, certain categories of juridical acts have to be drawn up with the consent of a majority of two thirds of the jointed rights. To be seen N. Reboul-Maupin, *Droit des biens*, 2nd edition, Dalloz Publishing House, Paris, 2008, p. 375.

drawing up of such juridical acts, but they only have to give their agreement in this respect, agreement that can be express or implicit.

There are provided the sanctions that interfere if there were infringed the rules stated for drawing up the juridical acts concerning the common good.

The typical sanction for drawing up a juridical act in the absence of a joint owner's consent, if this it was necessary according to those shown above, it's the inopposability (article 642)[1]. This sanction is enforceable in the case of administrative and decisional juridical acts for which drawing up article 641 requests all joint owners' accord.

The inopposability is a specific sanction, distinct from the nullity that does not involve the title′s validity or the non-validity. His beneficiary couldn't invoke it against the thirds, not even in the case of a litigation, as if this title wouldn't exist.

The inopposability can only be invoked by the co-owner that didn't participate to the act's drawing up or he didn't express his agreement, in other mode, expressly or even implicitly, for its drawing up (article 642 makes an express reference to the implicit accord).

Because, for the co-owner that can invoke the inopposability, the act doesn't exist, it couldn't be invoked neither as a ground of the usage by the beneficiary, reason for which for the harmed joint owner is acknowledged the right to exercise the possessory actions against the act's third beneficiary, under the double condition that he should have entered in the good's possession and the partition shouldn't have interfered.

If the term of an year provided by article 951 paragraph 1 for the exercise of the possessory actions, the harmed joint owner could bring a revendicating action, under the conditions stated by article 643[2].

The possessory action admission's effect is the return of the good in all joint owners' possession, and not only in the plaintiff's possession.

At the same time, the joint owners that hadn't given his agreement to the act's drawing up is entitled to claim damages, under the reserve of the prejudice's proof.

All these rules concern the legal regime of the common property. Under the conditions of article 639 and 644 of the civil Code, the joint

[1]Solution inspired too, form the French law. To be seen, N. Reboul-Maupin, *op. cit.*, p. 373; Ph. Malaurie, L. Aynès, *op. cit*., p. 217.
[2]V. Stoica, *op. cit*., p. 291.

owners can draw up conventions that regulate both good's usage mode and the common property's administration.

6. THE JOINT OWENRS' RIGHTS DEFENCE AGAINST THE THIRD PERSONS, WITHIN THE REGULATION OF THE NEW CIVIL CODE

The new civil Code solves in a pragmatic mode the problem of all actions in justice concerning the joint property, showing that they can be entered by any of the co-owners, alone (article 643 paragraph 1).

The revendicating action is expressly included in the category of those than can be entered up by one of the joint owners, alone.

The dispute regarding the revendicating action's juridical nature (administrative or conservation act ?) loses from its importance and it prevails the necessity of protecting the co-owners rights, inclusively by the observance of their right of access to a tribunal[1].

Symmetrically, each joint owner can stand alone in justice, as a defendant, within any action regarding the joint property.

The legislator gave attention to the harmonization between the solution adopted concerning the actions regarding the common property with the principle of relativeness of the effects of a juridical decision. Thus, article 643 paragraph 1 extends the effects of the juridical decisions that were pronounced in the joint property's favour and over the co-owners that hadn't figured as parties in the process. The juridical decisions that are adverse for one joint owner, they wouldn't be opposable to the others co-owners.

The solution of the possibility of entering the actions concerning the good by one co-owner, they could have opened the road of abuse of right, consisting in repeated actions, successively formulated by the joint owners, if the previous ones have been rejected by the instance. In order to avoid such situations, article 643 paragraph 1 first thesis makes reference to the provisions of the Code of Civil procedure that regulates the bringing in justice of other persons. Thus, the defendant brought in

[1]This solution is still criticized by ones of the doctrinarians exactly on the reason that the revendicating action is a petitory action and not a decisional juridical act. To be seen I. Sferdian, *op. cit*., pp. 346-347.

justice by one or by ones from the joint owners could request the instance the others joint owners' bringing in case too, as persons that could claim the same rights as the plaintiff, the provisions of article 68 of the new Code of civil procedure become enforceable.

7. **CONCLUSIONS**

The ensuring of the social order, as a law's specific function, it cannot be complete without the guarantee and protection of the subjective civil rights. The essential tool for protecting the subjective civil rights against the usurpings is the possibility conferred to the titular or to the titulars to bring a legal action. The theoretical debates concerning the juridical nature and the content of the respective right doesn't have to materialize in the blocking of access to a tribunal for the infringed right titular's.

Exactly to this blocking it has got because the excessive attention which was given to the juridical nature of the revendicating action and to the peculiarly of that modality of property, which is the joint property, of fractionizing the right between the titulars. Thus, it was ignored the necessity of finding a practical solution that could allow to each co-owner and not only to all them together, to defend his right.

Despite the criticisms brought by an important part of the doctrine to this solution, the tribunals remained inflexible. It was necessary the intervention of the European Court of Human Rights in order that the case law should be partially revised.

The coming into force of the new civil Code which expressly regulated the possibility of entering the legal action by one of the joint owners, it definitively removed this obstacle.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

ROMANIAN IDENTITY, MAJOR FACTOR BETWEEN REPUBLIC OF MOLDOVA AND ROMANIA

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Abstract:
The affirmation and development of the Romanian identity, ethnic, linguistic, cultural and religious services in the Republic of Moldova, as a major goal, considering not only the historical considerations that we tie the ideological, cultural and historical value, but also the European Community national in which we exist

Keywords: *national identity, culture, legislation, citizens*

INTRODUCTION

Broken part of Romania, not only as territory but as meanings and experiences company, Republic of Moldova, represents the Romanian identity, space, culture and history. This identity must not be lost in time, it should be continuously supported by the makers of Romania.

Romania's relations with Romanians abroad, with those from the Republic of Moldova, after 1990, have seen a significant evolution, their identity efforts benefiting from support and constant support of the Bucharest authorities, appreciating that there is a constitutional duty and a priority objective, on a permanent basis, of Romanian foreign policy. The interest of the Romanian State against the Romanian communities abroad is a legitimate one and, as a political objective, is as old as its projection of Romania's foreign policy.[1]

[1] Milca M., *Identitate românească şi europeană*, The Publishing House Ager, Bucharest, 2005, p.74

Romanians from abroad, the Romanians from Moldova, are an integral part of the Romanian people and spirituality. The preservation, development and affirmation of the identity of ethnic, cultural, linguistic and religious groups in the neighboring States of emigration and strengthening links between Romania and the Romanian communities abroad.

EVOLUTIONARY ASPECTS

Since the advent of the modern Romanian State, Romania managed to sketching, in the historical conditions very difficult, powerful messages for all persons belonging to the Romanian culture from all regions inhabited by Romanians. You can appreciate that, in addition to political and economic efforts, and the consequences of World War I, the creation of greater Romania and viability as a major national political project was due to steady and pragmatic interests and against the inhabitants of the Romanian ethnics in the territories the territories were not part of the Romanian State.

Before the creation of a unitary State in 1918, Romania was able to become the conscience of all ethnic Romanians from the surrounding States "mother country". Thus, through the efforts of the Romanian diplomacy and of many intellectuals make directly involved in this project, the Romanians in Bessarabia, Austro-Hungarian Empire or the Romanians in the Ottoman Empire, Bulgaria and Serbia have perceived and expressed publicly and constantly reporting to Romania as "parent State", this being a political element of paramount importance for the legal and political reasoning, after 1918the historical legitimacy of greater Romania.

The Romanian State has continued to develop towards minorities related interests on the same principles, namely to encourage pragmatic elites, financing the functioning of Romanian-language schools, the salaries of teachers and Romanian-speaking priests, multiple cultural ties with the mother country Support for Romanian communities from outside the borders of the highly pragmatic basis had in the past: the construction of schools, churches, offering scholarships, support for leaders of organizations in Romanian communities. This has led to the creation, in a very short period, a political and cultural elite, capable of sustaining its own interests in citizenship and credible State in relation to

all relevant political factors. These forms of support have continued, in different historical and political conditions, and after 1918. Was no longer needed to support the interests of Romanians in Bessarabia and Transylvania because these territories were part of the Kingdom of Romania. The success of these policies was reflected in practically instantaneous integration of these territories and their inhabitants in social life and the State of Romania.[1]

Emigration of ideological or political nature was a marginal phenomenon, originally characterized all of the time limitation (to solving the specific political objectives). Obviously, after 1940-1944, this phenomenon was accentuated, political exile and is an element common to all the Nations of East Europe captive. And from this point of view, Romania presents particular characteristics: while Hungary, Czechoslovakia or Poland have sought to maintain the bridges of dialogue with leaders of political exile from their own countries, Communist Romania has sought only to discredit or to annihilate its political exile, which had long-term consequences. The Republic of Moldova, under the influence of Russia (USSR), gradually loses its national identity and are trying by means of intimidation and terror, the Russification of the country. This political-diplomatic tradition was abruptly interrupted in 1946-1947, both because of major political changes in Bucharest, as well as the situation in the region. Let us not forget that this period has been characterized by strong terror in the country, through persecution and establish a reign of terror. Have been abolished, thus, Romanian schools and churches from all over Europe and the Republic of Moldova, which had a tradition for almost a century. Throughout the period of the Communist regime, the Romanian State had no policy to support these communities. Note that, throughout this period (1860-1947), emigration as a phenomenon was characterized by streams toward the U.S. and Western Europe due to well-defined reasons, in particular the economic and educational. The character of this phenomenon was deeply temporarily, most of those who chose to leave the territories inhabited by Romanians did for limited periods, their return being natural and unrestrained.

After 1990, relations with Romanians from everywhere, and with those of the Republic of Moldova, have become a constant concern of the

[1] Thiesse A.M., *Crearea identităţilor naţionale în Europa*, The Publishing House Polirom, Iaşi, 2000, p.88

Romanian authorities, both in the context of deepening bilateral relations with the countries in whose territory there are Romanian communities, as well as the protection of the rights of persons belonging to national minorities has been established as one of the priorities of the Governments of the post-December and of the European institutions. Thus, maintaining, developing and affirming the identity of ethnic, linguistic, cultural and religious beliefs of the Romanians in the vicinity and emigration was in the last two decades, one of the strategic objectives of Romania's foreign policy.

Balance sheet management of relations with Romanians from everywhere, with Romanians from Moldova, but also current status of Romania within the European Community are, at present, certain objectives to fulfill not just seen as moral obligations but also loads resulting from the debt of the country and nation. Relations between Romania and the Romanian communities in the neighborhood and have always been based on the provisions of the Constitution of Romania[1], as well as those of Law 299/2007[2] on support to Romanians from everywhere[3].

Also, it is desirable to ensure that both the Moldavians rights enshrined in European documents, as well as those arising from the application of the principle of reciprocity. Thus, it is necessary to establish a partnership with Romanian organizations in the neighborhood and have always been, which is why it is necessary to support the efforts to strengthen the European status of our country. The need for institutional support of the Romanians outside the borders in order to preserve their ethnic identity and affirmation, linguistic, cultural and religious is more stringent. There have been growing signals from them that the problems faced were much more quickly resolved with the support of the Romanian authorities. The importance that the European institutions attach to the problem of respect for human rights and, in

[1] Article 7 of the Constitution of Romanian.
[2] Published in Official Gazette No. 261 of 22.04.2009.
[3] In the assumption of Law 299/2007, the phrase "people everywhere" includes people of Romanian origin and belonging to Romanian linguistic and cultural folklore was back that assumes freely Romanian cultural identity: persons belonging to national minorities, linguistic minorities or indigenous ethnic groups living in the vicinity of Romania, regardless of use, as members of the Romanian communities/the emigration originating in Romania, Romanian citizens domiciled or resident abroad.

particular, respect for the rights of persons belonging to the ethnic communities is very important.

Thus, the Romanian State deals with matters relating to the preservation, development and ethnic identity affirmation, linguistic, cultural and religious beliefs of the Romanians from neighboring States and emigration. Republic of Moldova occupies a special place on the aforementioned aspects.

MECHANISMS, INTERNAL AUTHORITY AND PRINCIPLES OF ACTION

Romania shall have, at present, all the European and international context, a situation to assist the Romanians outside the borders in order to preserve their ethnic identity and affirmation, linguistic, cultural and religious[1].

At the same time, concern for the situation of ethnic Romanians in Moldova has driven, internally, to the continuance of the debate on the rights of persons belonging to national minorities. The governmental structure created in 1995 has undergone changes over the years, Romania seeking to adapt the institutional dynamics model of the Romanian communities abroad and taking account of the models of other countries, which have communities living abroad The creation, in 1995, of the Council for the problems of Romanians everywhere subordinated to the Romanian Prime Minister has tried to meet the needs of organic support from the Romanian Government for the Romanian communities abroad. Through specific policies, Romania, and vocally affirmed State related condition for all persons belonging to the Romanian minority and openness of political emigration and exile as a form of embracing democratic values that underlie the Romanian institutional construction in 1990. A Romanian modern European State which assumes Romanian minority policy of the neighboring States and with steadily growing cane emigration or lessons from Romania, regardless of their political options, is stronger and more visible in its foreign policy.

In 1998, has been set up Especially for Romanians from everywhere, converted in 1999 in the Department for relations with

[1] Dungaciu D., *Naţiunea şi provocările postmodernităţii*, The Publishing House Tritonic, Bucureşti, 2004, p.39.

Romanians from abroad. Since January 2001, the Department was renamed the Department for Romanians from everywhere, and entered the Ministry of public information, where he worked until 2003, when he was transferred to the General Secretariat of the Government, and in March 2004, under the Prime Minister's Chancellery. A Department of the Romanians from everywhere, coordinated at the level of the State, secreted functioned under the MINISTRY of FOREIGN AFFAIRS in the period 2005-2009. In the period 2009-2012, the Department for Romanians from everywhere has operated as an institution with its own legal personality, in the direct coordination of the Prime Minister's Office.

Currently, the Ministry of Foreign Affairs works Minister delegate for Romanians from everywhere, which coordinates, according to the Government Decision No. 8 of 09.01.2013[1], activities in the field of relations with Romanians from everywhere, in implementing its tasks with the assistance of the Department of policy for relations with Romanians from everywhere, led by a Secretary of State since the establishment of the first Government structures and so far, in parallel with the efforts to improve the legislative framework through the adoption of a specific law and diversification instruments for implementing normative acts in force, there were difficulties in the consistent application of an integrated political concept which is the basis of public inquiries regarding relations with Romanians from everywhere. The programs of all political parties which have been in Government have been applied in a manner which generates quantifiable results in relation to the national interest, the efforts of the Romanian State, the real needs of communities and budgetary resources allocated and the need for a national strategy for relations with Romanians from everywhere.

The laws and regulations relating to support of the Romanians from everywhere shall apply on the basis of agreements and programs signed by Romania with the States on whose territory there are Romanian communities or mixed commissions bi-lateral Protocol and taking into account the following fundamental principles:

- The principle of national sovereignty[2]

[1]The decision of the Government no. 8 of 9 January 2013 on the organisation and functioning of the MINISTRY of FOREIGN AFFAIRS, published in Official Gazette no. 34 from 15 January 2013.
[2] The national sovereignty of States may not be infringed.

- The principle of good neighborly relations[1]
- The principle of reciprocity[2]
- The principle of respect for fundamental rights and freedoms of man[3]

Objectives aimed at preserving, development and affirmation, promotion of the image of Romania in the European and international level and to promote the image of all Romanians and Romanian community in the States in which they live. Also, it is very important to promote the cultural and spiritual values in the Romanian public opinion in countries where there are Romanian community and strengthening the Romanian communities and to support the actions of affirmation of identity values. For this it is necessary to strengthen the links between Romanian authorities and the Romanian personalities who live abroad.

You must use the potential political, economic, social and cultural, and strengthened partnerships with organizations and authorities abroad in order to find appropriate solutions to the problems facing Romanians in the States in which they live. Such is the potential of Romanian communities in the development of bilateral relations and are used the opportunities arising from the status of Romania's full membership of the European Union in order to promote Romanian cultural values and consolidation of Romanian communities in the vicinity and emigration[4]. It encouraged the initiative of Romanian communities aimed at the expression of free and unconditional belonging to Romania.

[1] Bilateral relations between Romania and the Republic of Moldova and other neighboring countries will consider keeping such good relations.

[2] The proper application of European rules on the treatment of national minorities on the territory of a State, as well as a balance between the rights provided in this area of national minorities by the Romanian State and those provided for Romanian minority in the territory. It will track and apply in good faith the provisions of the international agreements to which Romania and the partner are part of the governmental bilateral agreements concerning this problematic.

[3] It's necessary to respect human rights and fundamental freedoms and non-discrimination by the administrations of the States in which they live.

[4] Duţu A., *Ideea de Europa şi evoluţia conştiinţei europene*, Editura All, Bucureşti, 1999, p.102

NATIONAL CONSIDERATIONS IN REPUBLIC OF MOLDOVA

The preservation and affirmation of the cultural identity of the Romanians [1] in Moldova is felt. Through various events, the promotion of cultural and spiritual values in the Romanian public opinion, preserving, enriching and Romanian cultural heritage in Moldova. The links between artists and cultural personalities in Romania are tight, organizing cultural events in Moldova, in collaboration with the Romanian organization's or local authorities.

Are protected, supported and revitalized the local customs and traditions, promoting Romanian elites, publishing the works of outstanding personalities of the Romanian culture. Were established and supported libraries with books in Romanian and in addition have Scholarships to Moldovan youths in schools and universities in Romania. In the Republic of Moldova radio and television broadcasts are in Romanian language, so that, from this point of access to information in Romanian language, is provided. The reality in the country is played, even if not always in the way. The online environment also plays a role, as access is possible, you can contact directly and immediately with the events, circumstances and information available.

The authorities have established administrative-level collaborative relationships, partnerships and joint projects. Also, various institutes of education or culture, their ties are growing from year to year through various actions commune.. Romanian diplomacy efforts, in support of Romanians in Moldova, not only internally but also with regard to the integration in the European structures in European free movement and freedom of the European labor market.

CONCLUSIONS

Fortunately, the Romanian language is recognized as an official language, Moldovan language, and an important role in it have had their power through the Moldovan elites of dedication, fighting through his own love of truth and elements of identity. Romanian citizens, regardless of their historical or social considerations which have outlying country,

[1] Gellner E., *Cultură, identitate şi politică*, Editura Institutul European, Iaşi, 1997, p.45

or of recitals which were broken into and had limited otherwise, borders are an integral part of the Romanian people. They must be supported, protected, existing links should be strengthened and promoted the interests of Romanian identity. In the Republic of Moldova, in the present context when Russia's position towards the Crimea was a particular invoice, it requires more protection of your identity. We live in an unsettled period, during which conflicts no longer carries with gun in hand but with diplomatic weapons, but that can change not only the borders of a State but also its national identity and its citizens. Let us not forget the fight carried out in Moldova with the official State language. Fortunately, the Romanian language is recognized as an official language, not the Moldovan language, and an important role in it have had their power through the Moldovan elites of dedication, fighting through his own love of truth and elements of identity.

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Pitesti, 23 - 24 May 2014

THE PLEDGE IN THE NEW CIVIL CODE. A FEW REMARKS

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Abstract:

In the civil law, for the topic of civil pledge, the provisions of art. 1685 – 1696 regarding the pawn, abrogated by the New Civil Code, used to be applied. Art. 478 – 489 in the Commercial Code regarding the commercial pledge, abrogated when Title VI of the Law no 99/1999 regarding the legal regime of security interests entered into force [1], were also general provisions. This normative act did not expressly abrogated art. 1685 - 1696 in the 1864 Civil Code, but, according to art. 1 in the Law 99/1999, these articles were applicable only to the extent to which they did not violate the Law of guarantees (99/1999), regarding the civil pledge with dispossession[2].

When the new Civil Code entered into force, we had a regulation regarding the pledge with dispossession (included in the 1864 Civil Code) and another regulation, regarding the pledge without dispossession , included in the Law 99/1999 regarding the legal regime of security interests; both were abrogated on 1 October 2011, according to art. 230 letters a and u in the Law no 71/2011[3] for the enforcement of the Law no 287/2009 regarding the Civil Code.

Key-words: *New Civil Code, civil pledge, security interests.*

1. DEFINITION OF THE PLEDGE

The new Romanian Civil Code does not include a definition of the pledge, but according to art. 2481 para. 1, the pledge shall be constituted through submittal of the asset or of the negotiable instrument to the creditor or, as the case may be, through the creditor's keeping this

[1] Law no 99/1999 regarding measures to speed up economic reform, published in the Romanain Oficial Gazette no 236 of 27 May 1999, with further modifications.
[2] In this respect, see Mona – Lisa Belu Magdo "Garanţiile comerciale" in "Contracte comerciale" – professional guide, Tribuna Economică Publishing House, Bucharest, 2004, pag. 369.
[3] Published in the Romanian Official Gazette no 409 of 10 June 2011.

negotiable instrument, with the consent of the debtor, in order to secure the debt.

Regarding the simplicity of the definition given in the previous regulation[1], understanding that the law-maker of the new Civil Code intended to summarize two cases: the case of the security over a tangible asset (where the submittal to the creditor is mandatory) and the case of ensuring the security by a negotiable instrument (registered share, or bearer share), a case where the creditor's keeping them is not the rule (except for the bearer share); in the other cases, the guarantee can be constituted through endorsement (for registered shares) or through their registering in the register of the issuing company (for registered shares). While these cases were expressly stipulated in the 1887 Commercial Code in 3 paragraphs of art. 479, the 2011 Romanian law-maker tries to put them in a single paragraph. For more accuracy, paragraph 2 of art. 2481 listed the 3 varieties of materialized negotiable instruments; however, we regret that, in the new regulation, the extension of the submittal over the registered shares does not comply with their legal regime. The act of giving them over is not efficient, without registering them in the share register of the company that has issued the registered shares, the effect of constituting the guarantee to the creditor – transferee does not take place[2].

The term pledge designates, on the one hand, the pledge agreement, and the pledge right arising from this agreement, as well as the asset representing the object of this right[3].

[1] Under art. 1685 in the 1864 Civil Code „The pawn is an agreement by which the debtor owes to his creditor a movable asset to secure the debt" (ROM. "Amanetul este un contract prin care datornicul remite creditorului său un lucru mobil spre siguranţa datoriei").

[2] The legal regime of the constituting of the guarantee is taken from the debt transfer mechanism between debtor- transferor and creditor - transferee.

[3] See in this respect C. Stătescu and C. Bârsan ''Tratat de drept civil – teoria generală a obligaţiilor'', Academiei Publishing House, 1981, pag. 410; the phrase ''real security interests" (ROM. garanţie reală mobiliară'') was introduced and generalized by the Law no 99/1999 regarding measures to speed up reform, in Title VI "Regimul juridic al garanţiilor reale mobiliare", published in the Romanian Official Gazette no 236 of 27 May 1999.

2. THE FIDUCIARY DUTY IN THE NEW ROMANIAN CIVIL CODE[1]

According to art. 773 of the Law no 287/2009 the fiduciary is the legal operation by which one or several constitutors transfer real rights, debt rights, guarantees or other patrimonial rights, or a set of such rights, either current or future, to one or several fiduciaries who manage them with a determined purpose, on behalf of one or several beneficiaries**.** These rights make up autonomous patrimonial assets that are separate from other rights and obligations included in the patrimony of the fiduciaries.

I have tried to match this notion with the concrete case of a patrimony of affectation constituted under the Governmental Emergency Ordinance 44/2008[2], stipulating that this patrimony is the totality of assets, rights and obligations of the authorized physical person, holder of the sole proprietorship or members of the family-owned business, with the purpose of carrying our an economic activity, made up as a distinct part of the patrimony of the authorized physical person, holder of the sole proprietorship or members of the family-owned business, separate from the general pledge of their personal creditors (art. 2 letter j).

I have imagined the case where an authorized physical person would want to limit one's liability for commercial debts with the list of personal assets used for commerce, thus separating one's commercial patrimony from the civil patrimony[3] and, in order to manage this patrimony, the authorized physical person finds a loan institution (a bank) mandated as fiduciary.

The goal of the fiduciary is in this case to manage the patrimony of affectation, and for the case to be of interest for the fiduciary – bank, we considered that the fiduciary – bank could be designated in this capacity as legal person that grants loans to the constitutor, therefore aware of the conditions in which the constitutor carries out its activity.

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[1] Published in the Romanian Official Gazette no 511 of 24 July 2009,republished in the Romanian Official Gazette no 505 of 15 July 2011.

[2] Regarding the economic activities of authorized physical persons, sole proprietorships and family-owned businesses, published in the Romanian Official Gazette no 328 of 25 April 2008.

3 See Lucia Herovanu, „Dreptul român şi patrimoniul de afectaţiune", in RDC no. 6/2009, pg. 67 – 68.

I have continued the hypothesis and I designated the constitutor to be the beneficiary of the fiduciary who accepts this legal operation under the art. 777 of the new Civil Code.

The fiduciary's undertaking the capacity of beneficiary would have been also possible (especially if we assume that the authorized physical person guaranteed its loans with personal assets, and in this case the bank could be interested in managing diligently the patrimony of affectation as long as the problem of loan reimbursement), under the same art. 777 of the new Civil Code.

After analyzing the rights and the obligations of the parties in the new Civil Code, I have identified:

a) Obligations of the constitutor:

- To authenticate the agreement, under sanction of absolute nullity (under art. 774 para.1);
- To stipulate in the agreement the rights, obligations, assets of the patrimony of affectation[1], according to the statement submitted to the Trade Register, according to the Law 26/90 regarding the Trade Register[2], the duration of the transfer, the identity of the constitutor, of the fiduciary and of the beneficiary, as well as the purpose of the fiduciary and the coverage of the management powers, under sanction of absolute nullity, under art. 779 letter a – f, if one of these stipulation is missing;
- The obligation to remunerate the fiduciary, although the onerous nature of the agreement is not expressly stipulated, we believe that the list under art. 776 para.2 and 3 does not allow a contrary conclusion; all fiduciaries shall request a pay, irrespective if this pay is called commission or fee; moreover, if the remuneration is not expressly stipulated, the provisions of the chapter on the managing of someone else's assets shall apply (art. 784 in the new Civil Code corroborated with art. 793 in the new Code);
- The obligation regarding the registration of the fiduciary in the Fiduciary National Registry shall be solved after the adoption of

[1] Published in the Romanian Official Gazette no 121 of 7 March 1990,republished in the Romanian Official Gazette no 49 of 4 February 1998, with further modifications and completions.

[2] Liviu Narcis Pârvu and Ioan Florin Simon,,Legea privind registrul comertului-comentarii si explicatii", CH Beck Publishing House,Bucharest,2009, pg.111.

a Governmental Decision under art. 781 para.1 in the new Civil Code;

- The obligation to register with the Land Register the rights in rem in immovable property that are the object of the agreement may belong to the constitutor or to the fiduciary (art. 781 para.3 in the new Civil Code).

b) Obligation of the fiduciary:

- Registration of the fiduciary, under sanction of absolute nullity, with the fiscal body that has competence to manage the amounts owed by the fiduciary to the consolidated general budget (under art. 780 para. 1 in the new Civil Code) and of the rights in rem in immovable property to the specialized department of the local public administration where the real estate is located (art. 780 para.2 in the new Civil Code).

Regarding the obligation included in art. 780 para.1, we are wondering what is reason for which the law-maker stipulated that the fiduciary should be registered with the fiscal administration. We consider that the sole argument is the French Civil Code which includes this provision, but the arguments of the French law are clear; as long as, in the French law, the constitutor **can be only** a legal person that is compulsory or, through the option of tax on companies, it is natural that the fiduciary should be registered with the fiscal administrator, which is also the tax collector.

In the new Civil Code, any physical or legal person can be a constitutor (under art. 776 para. 1), and we believe that the obligation to register with the fiscal administration is not the best solution! If there is a Fiduciary National Register, this registration is sufficient for the validity of the fiduciary[1].

- To stipulate the capacity of fiduciary whenever it acts on behalf of the fiduciary patrimonial assets (under art. 782 para.1); the same express request to stipulate this capacity when notifications that must be written in an advertising register are made (art. 782 para.2);

[1] We believe that the registration form imposed by the Romanian law for movable and immovable assets was sufficient. We interpret this registration with the fiscal body as a burden on the legal regime of the fiduciary duty.

- To be accountable in front of the constitutor, beneficiaries and representative of the tax payer, upon their request, under art. 783 in the new Civil Code.

Regarding the liability of the fiduciary, we consider that the solution for the limitation of liability given by the Romanian law is more appropriate than the solution given by the French law. Thus, according to art. 786 in the new Civil Code, unless otherwise stipulated, for the debt of the fiduciary, only the assets included in the fiduciary duty patrimonial assets can be executed; the personal assets of the fiduciary and the assets of the contributor are protected. Even if the contrary situation is stipulated, the fiduciary patrimonial assets shall be executed first, and then, if necessary, the assets of the fiduciary or / and of the constitutor, to the extent and in the order stipulated in the fiduciary agreement (art. 786 para.2 in the new Civil Code). The wording in art. 787 in the new Civil Code shall be interpreted in the sense that, for prejudice caused during the managing of the fiduciary patrimony, the fiduciary shall be liable with one's own personal assets[1].

3. COMPARISON WITH OTHER ROMANIAN LEGAL INSTITUTIONS

3.1. COMPARISON WITH THE PLEDGE

The pledge is the guarantee given by the debtor regarding an asset of one's own, in order that, upon due date, if the debt is not paid, the creditor may recover the debt from the assets given as a pledge or by selling it[2].

In terms of **object** we notice that, although the pledge and the fiduciary are similar because they refer to tangible or intangible assets, the fiduciary duty, in addition, can cover immovable assets, and guarantees such as autonomous, distinct patrimonial assets. On the one hand, the pledge regards a specific asset, while the fiduciary can cover a variety of assets and, on the other hand, the fiduciary can refer to several guarantees (several pledge agreements, or both pledge agreements and

[1] The regulations of the French Civil Code were taken over from Florence Deboissy and Guillaume Wicker, „Code des sociétés – Autres groupements de droit commun", Publishing House.,

[2] In this respect, see S. Angheni, M. Volonciu and C. Stoica „Drept comercial", 4th edition, C.H. Beck Publishing House, Bucharest, 2008, pp. 66.

mortgage agreements). So the fiduciary can include the pledge, but not the other way round.

While the pledge can be concluded with or without **dispossession of the** debtor of the assets he guaranteed with, the new Civil Code does not stipulate anything in this respect regarding the fiduciary, although the model, the French Civil Code, expressly stipulates the possibility to use the business when it is the object of the fiduciary[1].

In terms of manner of **constituting**, while the pledge can be conventional, legal or decided by court, we consider that the fiduciary can only be the result of the convention between the constitutor and the fiduciary[2].

In terms of the **character of the agreement,** there are hugedifferences: while the pledge has a unilateral character and imposes obligation only on one party[3], the fiduciary has a bilateral character; both the constitutor and the fiduciary undertakes obligations. Both the pledge and the fiduciary are onerous agreements.

In terms of the character of the agreement, while the fiduciary is a principal agreement, the pledge is an accessory agreement. However, the nature of the object of the fiduciary requests some clarifications. If the fiduciary manages debt rights, separate patrimonies (such as the patrimony of affectation) or guarantees, we are wondering what is the destiny of the fiduciary duty if the object of the transfer disappears: if the debt right ends, the guarantee or the patrimony are no longer executed? Do these effects have an impact on the main nature of the fiduciary, does the fiduciary become an accessory agreement?

In terms of the **form**, while the pledge agreement can be under private signature or authentic signature, the fiduciary agreement, under sanction of absolute nullity, shall be authenticated.

In terms of **people** who can conclude the pledge agreement, the civil code does not stipulate any constraint, while for the fiduciary duty,

[1]See below section no 3.1 dedicated to differences between Romanian and French law regulations.

[2]Although, as you can see in section no 3.2, American law regulates the legal or judicial version of the trust.

[3]We consider that, from the „per a contrario" interpretation of art. 775 in the new Civil Code, the fiduciary always has an onerous character. Thus, under art. 775, „The fiduciary agreement shall be null if it is the means to perform an indirect liberality to the benefit of the beneficiary"(ROM. „Contractul de fiducie este lovit de nulitate absolută dacă prin el se realizează o liberalitate indirectă în folosul beneficiarului").

not any person can have the capacity of fiduciary, and the new Civil Code imposes a set of restrictions[1].

Advertising and preference are solved in two different ways: in the case of the pledge, according to the Law no 99/1999[2] , the real security interests shall be registered with the Guarantee Electronic Archive, and the creditor can thus take possession peacefully of the secured asset, while, if the creditor cannot take possession peacefully, he can turn to court executors or other enforcement bodies, or he can sell the asset; in the case of the fiduciary, the new Civil Code stipulates registration with the Fiduciary National Registry, and with the competent fiscal body where the fiduciary pays taxes to the consolidated general budget.

3.2. COMPARISON WITH THE MORTGAGE

The mortgage is a real right over real estate affected by payment of an obligation[3].

In terms of **object,** we notice that both have immovable assets as object, but only the fiduciary can have other patrimonial rights such as rights in rem in movable property, debt rights, and distinct patrimonial assets. Only the fiduciary can have future assets as object, the mortgage cannot have. The mortgage is constituted without **dispossession**, while the new Civil Code does not include express provisions for the fiduciary.

In terms of the opposition between the unilateral/bilateral character and principal/accessory character, and free of charge / onerous character, the remarks included in the pledge section remain valid.

The form of the agreement is identical: both the fiduciary and the mortgage shall be written in authenticated form, under sanction of absolute nullity; in terms of **registration** with the Fiduciary National Registry**,** the new Civil Code stipulates that it is mandatory to register the rights in rem in immovable property that are the object of the fiduciary with the specialized department of the local public administration where the real estate is located; the provisions regarding

[1]See section no 4 of the article.
[2] Published in the Romanian Official Gazette no 236 of 27 May 1999.
[3]See the team of the Law Chair – A.S.E.- Academy of Economic Studies, „Drept civil – pentru învățământul superior economic", Lumina Lex Publishing House, Bucharest, 2003, pp. 388-391.

the registration with the Land Register apply for the fiduciary like in the case of the mortgage.

In addition, in the case of the fiduciary, it is mandatory to register it with the competent fiscal body in order to manage the amounts owed by the fiduciary to the consolidated general budget.

3.3. CONCLUSION ON THE COMPARISON BETWEEN THE TWO TYPES OF GUARANTEES

Although the new Civil Code does not list the fiduciary as a form of guarantee, and from its own definition, we can see that it can have guarantees as object, we consider it useful to analyze the usefulness of the fiduciary as a form of bank guarantee.

Although the bank takes the capacity of fiduciary in relation with a constitutor customer and it is designated as beneficiary as well, the advantages are the following :

- if the constitutor sent it a distinct, autonomous patrimony to manage it, and the contributor is also a debtor – borrower of the bank, we consider that the fiduciary is a form of guarantee since the good management of the patrimony shall increase the chances of the creditor bank to cash in the loan of the contributor upon the due date. We believe that it is possible for the bank guarantee to be dual: on the one hand, the borrower shall guarantee the fulfilment of the obligation with a real right over an asset of the patrimony (pledge or mortgage), on the other hand, the patrimony sent to the fiduciary bank shall consist not only of assets that have been used as guarantees but also of other assets, as listed in the fiduciary agreement ;
- if, upon due date, the borrower – constitutor does not return the loan, apart from the enforcement right given by the loan agreement, the bank shall have the capacity of administrator of the fiduciary and especially, of beneficiary of the fiduciary; the enforcement shall be done by the bank (in capacity of administrator) for its use (in capacity of beneficiary). In addition, the bank shall receive a pay (commission) for services provided as fiduciary.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

A FEW REFLECTIONS ON THE CAPACITY RELATED TO WILL

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Abstract:

The 1864 Civil Code, particularly in terms of its provisions 800 and 802, overlapped two different legal institutions, namely will and legacy, ignoring the fact that will represents a totality, whereas legacy only one of the latter's provisions. Consequently, the Civil Code currently abrogated was establishing unitary rules on the necessary capacity for leaving a will, irrespective of its content. Thus, according to the provisions of articles 806-812 of the 1864 Civil Code, will represented a disposition act and the testator needed to have full capacity of exercise. During the long time when this Civil Code was in force, specialized literature pointed out that a will could also contain, apart from legacies (those testamentary provisions related to patrimony or hereditary assets) or even in their absence, some other last will provisions. Yet, the new Civil Code, through its provisions (such as articles 986-988 or 1034-1035) makes the long-awaited distinction between legacy and will. Consequently, some assessments should be done particularly in terms of the capacity which the testator must have, in accordance with the types of provisions that his last will act will contain. These are the main aspects which the current work aims to analyse.

Keywords: *will, legacy, capacity.*

1. INTRODUCTION

Will is a complex legal act, which can contain different provisions, among which legacies too. Luckily, the current Civil Code reflects this aspect, by means of its article 1035, becoming distinct from its predecessor, which at article 802[1] (a legal text which has been long

[1] According to that legal text, "Will is a revocable document by means of which the testator disposes of the whole or a part from his fortune, for the moment when he is no longer alive." It would therefore emerge, after the literal interpretation of this legal test, that provisions are made regarding succession assets, by means of will. But we can speak about such a provision only in what legacy is concerned. A will can also contain

criticized by the specialized literature) was saying that will and legacy were one and the same thing, overlapping the two notions. Yet, legacy is only one testamentary provision (admittedly, a main one, which refers to hereditary assets) and must not be mistaken with the will, the latter representing the whole. A last will act can also contain, apart from the will or even in its absence, many other provisions, some of them being listed at article 1035 of the Civil Code.[1]

In our opinion, it is useful to mention that, in this context, the expression "inheritance *ab intestat*", translated as "inheritance without will" and used, under the incidence of the former Civil Code, as a synonymous for the legal inheritance, must now be considered by taking into account the new (and after all just) orientation of the Civil Code currently in force. In consequence, one can encounter a will which does not contain legacies and speak not about a testamentary inheritance, but exclusively about a legal one. Thus, the inheritance is legal (but not *ab intestat* too), even when there is a will and that will does not contain legacies. The presence of the will does not inevitably trigger the existence of testamentary inheritance. Even when speaking about the will which does not contain legacies, the inheritance will be exclusively legal. So could it also be stated, without making any other mention to the statement, that the legal inheritance is the inheritance *ab intestat?*[2]

Taking into account all that has been stated above, we consider that the distinction between the will and legacy also has consequences upon the capacity in the field of will. In our opinion, there should be made a distinction between the rules governing the capacity in the field of legacy (which, together with the donation, constitutes the category of liberalities and, thus, provision acts by free title) and the strict norms

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other last will provisions, such as the appointment of a testamentary executor, the disinheritance of a legal heir, the recognition of filiation and so on.

[1] According to article 1035 of the Civil Code, "A will contains provisions regarding the hereditary patrimony or the assets which are part of it, but also regarding the direct or indirect appointment of the legatee. Together with these provisions or even in their absence, the will can also contain other provisions regarding partition, the revocation of previous testamentary provisions, disinheritance, appointment of testamentary executors, duties imposed to legatees or legal heirs and any other provision producing effects after the death of the testator".

[2] See also B. Pătraşcu, I. Genoiu, *Consideraţii cu privire la testament în general,* in "Noul Cod civil. Studii şi comentarii", volume II, coordinator M. Uliescu, Universul Juridic Publ. House, Bucharest, 2013, p. 762.

regulating capacity when the will contains also other provisions than legacy[1]. This distinction becomes necessary due to the fact that the current Civil Code institutes, through the provisions of article 987 and the following, special rules regarding the capacity to make provisions and receive liberalities (by means of legacy – as this is the only liberality in which we are interested at this point)[2].

Moreover, we also consider that it would be interesting a discussion about the relation existing between the hereditary capacity[3] – a general condition of the right to inherit (together with hereditary unworthiness and hereditary vocation) – and the capacity in the field of will.

According to article 957 of the Civil Code (having the indicative title "The capacity to inherit"), "(1) A person can inherit if he or she exists when the inheritance is opened. The provisions of articles 36, 53 and 208 are applicable. (2) If, when more persons die, it cannot be established who survived after whom, then the persons involved do not have the capacity to inherit one another". These rules are applicable to both types of inheritance, on the basis of the degree of hereditary capacity, seen as a general condition of the right to inherit. Nonetheless, the field of testamentary inheritance also includes some other rules regarding capacity. We consider that the choice made by the lawmaker is just, so that the legal source of testamentary inheritance is represented also by the will, which is a civil legal act *mortis causa* (producing therefore effects when the testator dies) and not exclusively by an event – for instance the death of the physical person – as it happens when a legal inheritance is involved. Consequently, when speaking about the testamentary inheritance, it must also be differently discussed the capacity of the testator, in accordance with the types of provisions which his last will act contains. Moreover, the specificity of this type of inheritance also makes necessary that the lawmaker considers some special incapacities regarding the legatee (which in fact happened).

[1] This distinction is correctly done by D. Negrilă, *Testamentul în noul Cod civil. Studii teoretice şi practice*, Universul Juridic Publ. House, Bucharest, 2013, p. 63 and the following.

[2] See also I. Genoiu, *Dreptul la moştenire în Codul civil*a, 2nd edition, Ed. C.H. Beck Publ. House, Bucharest, 2013, pp. 115-119.

[3] For a discussion regarding the relation existing between the hereditary capacity and the use capacity, see B. Pătraşcu, I. Genoiu, *op.cit.*, pp. 597-598.

2.THE CAPACITY IN THE FIELD OF THE WILL NOT CONTAINING LEGACIES

According to the provisions of article 1038 paragraph (1) of the Civil Code, "*A will is valid only if the testator had discernment and his consent was not vitiated*". It would therefore emerge that any person having discernment (which constitutes the premise for the full capacity of exercise) can leave a will which does not contain legacies (regarding these testamentary provisions, the Civil Code clearly provides for the interdiction of the minor to decide on his assets due to the death cause, as it will be pointed out by the next point of the current work). It must be also taken into account the fact that the will has a personal character, which means that the testator cannot leave his last will act, irrespective of the provisions it contains, by means of his legal representative or, as the case may be, with the assent of the latter and the authorization of the court establishing the tutelage.

Given all these aspects, it results that the will of a person under age cannot contain provisions regarding his or her hereditary assets (in the broad meaning of the notion, legacies and other provisions with patrimonial character), as it would be annulled for the lack of capacity; the forbidden provisions in question also regard partition, the revocation of previous testamentary provisions, disinheritance, appointment of executors, duties, the choice of the law applicable to the inheritance. Moreover, a minor cannot set up a foundation by will, cannot forbid the alienation of an asset, cannot empower someone to manage one or several assets, a patrimonial estate or a patrimony that does not belong to him[1]. All this is justified by the fact that the legal acts in question represent provision acts, so that their conclusion, according to law (that is

[1] In our opinion, the Civil Code erroneously states at article 792 that such an empowerment could be made by legacy. The latter represents, according to the provisions of article 986 of the Civil Code, "…the testamentary provision by means of which the testator stipulates that, upon his death, one or several legates will obtain his entire patrimony, a fraction from it or only certain determined assets". Consequently, the empowerment of a person so as to manage one or several assets, a patrimonial estate or a patrimony that do not belong to him cannot be made by legacy, but by will. We consider this to be an uninspired error made by the lawmaker, probably originating in the overlapping which the 1864 Civil Code, currently abrogated, was making between will and legacy.

by representation or, as the case may be, by assisting the legal representative and with the approval of the tutelage court) would contradict the personal character of will, as pointed before.

It seems to result that a person under age could insert in his or her will clauses which are not provision acts, such as the recognition of a child, provisions on personal funerals or body after death or provisions on the sampling of organs, tissues and human cells, for therapeutic or scientific purpose, enforced after the person in question is no longer alive. In order to uphold what it has been said, we will render the legal texts which regulate the possibility of the minor to insert such testamentary provisions in his last will act.

Regarding the recognition of a child by the minor who is not married, the Civil Code states the following at article 417: "*The unmarried minor can recognize his child alone, if he has discernment at the moment of recognition*". Consequently, the person under age can recognize his child by means of will and without transgressing the personal character of the latter.

Then, according to article 80 paragraph (1) of the Civil Code, *"Any person can determine the type of his own funerals and can decide on what will happen to his body after death. Regarding the persons lacking power of exercise or only enjoying a limited one, the written consent of the parents is also required, or of the tutor, according to the case"*. Following this succession of ideas, we consider that the agreement of the legal representative must be provided by a written document, separated from will, in order to preserve the personal character of the last will act.

Finally, we would also like to mention the provisions of article 81 of the Civil Code, according to which: "*The sampling of tissues and human cells, for therapeutic or scientific purposes, is done only according to the conditions provided for by law and with the written assent of the person involved, given while he was alive*….". The minor could also give his agreement on the aspect previously mentioned.

From what it has been said above, it emerges that a person under age does not have so many chances to leave a will. In most of the cases, the testator decides on his assets by means of his last will act, so he therefore institutes legatees; this act can only be performed by the persons with full capacity of exercise.

3.CAPACITY IN THE FIELD OF LEGACY

According to the provisions of article 987 paragraph (1) of the Civil Code, "*any person can leave or receive liberalities, by observing the rules on this capacity*". At the same time, any person conceived when the person leaving the liberality died can receive something from the latter by means of a legacy, according to the provisions of article 36 of the Civil Code: "*The rights of a child are acknowledged from the moment of his conception, but only if that child is born alive…*"

As a result, the rule is represented by the capacity, whereas the incapacity represents the exception. As they constitute the exception, incapacities should be clearly provided for by law and are to be strictly interpreted.

A) THE CAPACITY TO MAKE PROVISIONS BY MEANS OF A LEGACY

The condition to make provisions by means of a legacy must be met at the moment when the person leaving the legacy expresses his consent [article 987 paragraph (2) of the Civil Code].

The person having the capacity to make provisions by means of a legacy is represented by the individual legal subject who has turned 18, by the 16 year married minor and by the minor who has acquired the anticipated capacity of exercise.

It should be consequently mentioned that the current Civil Code allows for obtaining the full capacity of exercise by the 16 year old minor getting married [article 39 paragraph (1) of the Civil Code]. At the same time, the Civil Code currently in force provides for the possibility of the tutelage court to acknowledge the full capacity of exercise to the minor who has turned 16 (article 40)[1]. We can speak in this case about the anticipated capacity of exercise.

It can be therefore noticed that the current Civil Code brings innovations in terms of the capacity to make provisions by means of a legacy, by allowing the tutelage court to provide anticipated power of

[1] For this purpose, the parents or the tutor of the minor will also be heard, there being obtained the approval of the family council, when the situation requires it. The family council can be set up, according to the provisions of article 124 paragraph (1) of the Civil Code, for supervising the way in which the tutor exerts his rights and comply with his duties regarding the person and the assets of the minor.

exercise to the minor turning 16. Thus, on this way, the minor acquires full power of exercise and can make provisions by means of legacy.

As for the incapacity to make provisions by means of legacy, the Civil Code, through the provisions of article 988 paragraph (1), shows that the person deprived of power of exercise (namely the minor that has not turned 14 and the person under court restriction) or the person with a limited power of exercise (the minor with an age between 14 and 18 years) cannot make provisions regarding his assets, by means of legacy.

Moreover, *"…not even after acquiring full capacity of exercise can the person in question make provisions by means of liberalities on behalf of the one who has had the quality of his representative or legal protector, before the latter has received an exemption for his management duties from the tutelage court…"* [article 988 paragraph (2) first thesis of the Civil Code]. Yet, by exception, the person off age can reward his legal protector or representative, on the death cause, even before the latter has been exempted from his management duties by the court, if that legal protector or representative is an ascendant of the person leaving the provisions [article 988 paragraph (2) thesis two of the Civil Code].

If the incapacity previously mentioned is not taken into account, then the legacy is subject to relative nullity.

B) THE CAPACITY TO RECEIVE BY MEANS OF A LEGACY

According to the provisions of article 987 paragraph (1) of the Civil Code, any person can receive something by means of a legacy. The condition for this capacity to apply must be met when the inheritance of the person leaving the provisions is opened [article 987 paragraph (4) of the Civil Code]. As a consequence, a physical person can be rewarded by means of a legacy if is conceived at the moment when the inheritance is opened and born alive afterwards (article 36 of the Civil Code). The legal person acquires this capacity from the date when it is set up in acts or, in what testamentary foundations are concerned, from the moment the inheritance of the person making provisions is opened, even when legacies are not necessary, in order for the collective legal subject to be legally created (article 208 of the Civil Code).

A legal person can acquire any duties and rights by means of liberalities, except for those which, due to their nature or according to law, can only belong to a physical person [article 206 paragraph (1) of

the Civil Code]. Moreover, non-profit legal persons can acquire by means of e legacy only those rights and civil obligations which are necessary to accomplish their purpose established by law, the set up or statute document [article 206 paragraph (2) of the Civil Code].

As for the special incapacities to receive something by means of a legacy, the Civil Code makes a distinction between the special incapacities in the field of liberalities (therefore those which are common to donation and legacy) and special incapacities in the field of legacies.

The following types of incapacity are considered special and have incidence both in the field of donations and legacy:

a) the incapacity regarding doctors, pharmacists or other persons who, directly or indirectly, provided special treatment to the person leaving the legacy, for the disease causing his death [article 990 paragraph (1) of the Civil Code].

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

- the legacies ordered on favour of the spouse, straight line relatives or privileged collaterals, even if the latter provided specialized assistance to the person who was drafting his liberality *mortis causa,* for the disease which later on caused his death;

- the legacies left on favour of other relatives until the fourth degree included, if at the moment when the liberality *mortis causa* was drafted the person leaving it did not have either a spouse, straight line relatives or privileged collaterals.

b) the incapacity regarding priests or other persons who offered religious assistance to the person leaving the liberality, for the disease which was the cause of his death. Just like in the case of doctors, pharmacists and persons assimilated by law to them, the legacy left on favour of the priest or the persons assimilated to him is valid, if they have the quality of spouse, straight line relative or privileged collaterals of the deceased, or, if such persons do not exist, if they are relatives until the fourth degree included [article 990 paragraph (3) of the Civil Code].

The lack of observance of this special incapacity determines the legacy to become void. If the person leaving the legacy died due to the disease, the statute of limitations term for the action to trigger the nullity of the legacy starts to elapse from the moment when the heirs took notice of the existence of the legacy [article 990 paragraph (4) of the Civil

Code], whereas if the person leaving the legacy has been restored, then the legacy becomes valid [article 990 paragraph (5) of the Civil Code].

The following constitute special incapacities in the field of legacies, according to the provisions of article 991 of the Civil Code:

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

b) the incapacity to receive of the interpreter who took part to the authentication procedure;

c) the incapacity to receive of the witnesses assisting the testator on the occasion of authenticating the will, and of the witnesses who must sign the privileged wills;

d) the incapacity to receive of the agents dealing with privileged wills (the competent civil servant of the local civil authority, in case of diseases, disasters, wars or other such exceptional circumstances; the captain of the ship or the plane or the person replacing him; the captain of the military unit or the person replacing him; the manager, chief doctor of the sanitary institution, the chief doctor of the service or the doctor on duty);

e) the incapacity to receive of the person who legally offered legal assistance when the will was drafted.

In all the cases above, we have taken into account the will containing legacies. The transgression of the incapacities already mentioned makes so that the legacy becomes void.

CONCLUSIONS

The necessity to make a distinction, from the perspective of capacity, between the will containing legacies and the will comprising other last will provisions has been generated by the entry in force of the 2009 Civil Code. This normative act has fixed a great flaw of its predecessor, by making the just distinction between will, as a whole, and legacy, as a part. In consequence, we can no longer speak at present, without making the necessary clarifications, about the incapacity of minors of drafting last will acts. They can draft acts for the death cause (which also have a personal character), only if such acts do not contain provisions (with patrimonial character) which represent provision acts, as the latter can only be made by persons with full capacity of exercise (being it anticipated). As most of the provisions of a will are provision

acts, it results that minors can resort quite rarely to the last will act. At any rate, the provisions which minors can insert in a will can also be made in the form of other written documents. In no case can they dispose of their fortune or make provisions, for the death cause, regarding their patrimony and assets.

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THE INTERNATIONAL CONFERENCE
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Pitesti, 23 - 24 May 2014

SHORT HISTORY OF THE TEACHING PROFESSION IN ROMANIA

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Abstract

The evolution of policy and law school over time. Education, school education constituted and we, as elsewhere, an object of research and appreciation. Numerous pens, school people and great scholars were carefully bent on such a topic with implications for the development of society of all time. In the broadest sense of the word, education is a phenomenon that includes the company's genesis, evolving into the most closely related to it. Therefore, we can say that various forms, learning occurs with human society, the opportunities and aspirations that can not be broken.

Key words*: teacher, education, school.*

1. THE EVOLUTION OF THE POLITICS AND OF THE EDUCATIONAL LAW IN TIME

The education, school and teaching have formed for us, as for everyone else, a research and valuation object. A number of pens, school people and great scholars have carefully oriented to such a subject with implications in all-time society development.[1]

In the widest sense of the word, education is a[2] phenomenon included in the society's genesis, evolving in the closest connection with it. This is why we can say that, under various forms, education appears

[1] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.9.

[2] Precent where we can deduct a manner of acting, thinking; training, study, discipleship; the field and the activity of training and education (in schools), according to the *Explanatory Dictionary of Romanian Language*, Editura Universul enciclopedic, Bucureşti, 1998, p.542.

once with the human society, from which possibilities and aspirations it cannot be broken.[1]

Education starts since the time of the primitive commune, by oral transmission, from generation to generation, of knowledge and techniques related to food procurement, hunting, fishing, agriculture and animal breeding, living and coating, ornaments and tools of defense against enemies, which means that the human progress is closely related with the surrounding environment.

Therefore, the education in our country, sensitive since its beginning, in the ideological and cultural processes and developments, will bear the general stamp of the time, the one of an important instrument in the consolidation and development of the society, satisfying its imperatives and exigencies [2].

Since the constitution of the Romanian feudal nations (14th - 16th century), there was a preoccupation for school development. Clerics and other literates were needed for the political - administrative institutions.

Supporter of the feudal state, the church has played an important role in the development of the culture from that time, and also in the development of education and teaching. It is explainable that the first schools will be organized near monasteries, episcopacies, cathedrals. The priests and monks, fulfilling the mission of teachers, have learnt the children to write, read, make calculations and memorize prayers.

Starting with the 14th century, the churches and monasteries will become the most significant centers of scholar activity, the most favorable environments for the development of the culture in that time[3].

In monastery schools, there were teachers, instructors, professors, named at that time "năstavnici" and "grămătici"[4], as also assistant

[1] Gheorghe Iscru, *Contribuţii privind învăţământul la sate în Ţara Românească până la jumătatea sec. al XIX-lea*, Editura Didactică şi Pedagogică, Bucureşti, 1975, p.11.

[2] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.76.

[3] Proofs on the existence of monastery schools in that times also offer some iconographic representations. For example, on one of the walls of the church *Sf. Nicolae Domnesc* from Curtea de Argeş, in a composition, are depicted three schoolchildren with their teacher, during the training, Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.77.

[4] The term „grămătic" (greek.-gramatikos and lat.-gramaticus) assigned, on origin, the elementary school teachger for learning to write and read, Ştefan Bârsănescu, *Pagini nescrise din istoria culturii româneşti (sec.X-XVI)*, Editura Academiei, Bucureşti, 1971, p.140.

instructors, named "vătaji". Their mentioning in a number of documents shows a certain teaching activity[1].

In the monastery school, education was generally basic. The teachers were teaching the young who were preparing for cure or for copying religious texts, to become copyists, clerks, "gramatici".[2]

In the 17th century, although the educational forms are maintained, the Romanian education comes out from its patriarchal meanings, targeting higher purposes We find teachers, writers, clerks, in villages, like Toader from Stoiceştii Focşanilor, Gheorghe from Odobeşti, etc..

The word school[3] appears for the first time in our old literature in the work *Octoihul românesc* (1570) written by Diaconul Coresi: "aşişderea în şcoală meşterii şi dascălii să înveţe mai vârtos româneşte"

[1] Hence, in the March 1415 charter, issued by Mircea cel Bătrân, the năstavnic Sofronie is mentioned, also reminded in a document from 1467. Also, *the document from 3 April 1480*. refers to the nastavnic from Tismana monastery. In a document from Moldova, from the 15th century, it is talked about a grămătic from Neamt monastery. Some muntenian documents say about Radu, the grămătic from Tismana, or Stan, the grămătic from Ramnic, etc. The Moldavian chronicler Macarius (sixteenth century) recalls that Theoctistus II, before being Bishop of Moldavia, in the middle of the sixteenth century, when he was abbot of the monastery Neamt, hav served as năstavnic and teacher, in Ştefan Bârsănescu, *Pagini nescrise din istoria culturii româneşti*, Editura Academiei, Bucureşti, 1971, p.130;
The documents also certify the existence of other monastery schools. For the 18 clerks, gramatici and chancellors documentarily certified in Teleorman, it is possible for a sloveni school to have existed in Măniceşti or near Ţigănia-Drăghiceşti monastery, near Ruşii-de-Vede, in A. Manolache, Gh. Pârnuţă, *Contribuţii la istoria culturii şi învăţământului în Teleorman*, Bucureşti, 1979, p.47.

[2] Teaching in Slavonian (and probably in Romania) the writing, reading, church songs, were making exercises to draw the lordly initials and monograms, to know and practice the ritual of the religious service. Also, the teachers were teaching the interpretation of religious dogma, texts with phylosophical contents, religious code of laws. It was also teached Greek, chronology, astronomy (particularly in the perspectivel of understanding the religious calendar), rhetoric, music, elementary notions of arithmetics necessary to account the monastery revenue. Among all these disciplines, the first education object was the Slavonian grammar, in Ştefan Bârsănescu, *Pagini nescrise din istoria culturii româneşti*, Editura Academiei, Bucureşti, 1971, p.212.

[3] The first Romanian school known as – *The School from Şcheii Braşovului* - was constituted in 1459 (from wood) and in 1597 (from stone), as Sextil Puşcariu, brasovean literate, sais. The teachers teach in this school reading, writing, religious songs, Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.114.

(en. School masters and teachers should learn Romanian with more dedication)[1].

In his work, *Statutele şcolii din Şchei*, Johannes Honterus (1498-1549), famous educator who opened new paths for education and culture, referring to the attempts to remedy a set-back of the education[2], the lack of qualified teachers and inappropriate retribution of the existing ones, was arguing that: "...the employment of teaching personnel fell upon the secular authorities, who, together with the clerical counterparts, will have both the obligation to remunerate and to control the teachers' activity. ...Each commune would have to ensure the required material conditions for the teachers".

Nicolaus Olahus (1493-1568) has supported and renovated education and teaching, being the first organizer of the primary and higher education from Transilvania.

In this respect, in 1560, in the Tyrnavia Synod, he decides the employment of one teacher for children's education near every urban or rural congregation (therefore setting the foundation of primary education), democratic initiative, if we consider that the school was, until then, a privilege of the nobility.

For a good performance of the higher education (meant for training clerics), he ordered the creation, for teachers, aside a substantial salary, of a stăipt, meant to defend them from the abuses of the nobility.

Olahus believed so much in the role of education that, by his will (1562), he left a part of his assets to the schools founded by him.[3]

In Moldova, Vasile Lupu (1634-1653), a lover of culture, granted special attention to the role that the professor had in the school.[4]

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[1] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.109.

[2] Making reference to the education from Transilvania, criticizing the bad condition thereof, was assuring that efforts have been made for the desirious-learning youth to have, in the cities, a sufficient number of teachers and professors, and for the latter to be remunerated, so as no scholar to be without education due to his/ her poverty ..., Johannes Honterus, *Statutele Şcolii din Braşov*.

[3] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.129.

[4] The school founded by him, the Higher Grade College from Iasi, needed famous teachers. Hence, seeing the lack of good teachers in Moldavia, he brought good and zealous teachers from Kiev, A. D. Xenopol, *Istoria românilor din Dacia Traiană*, VII, Iaşi, 1898, p.60.

In the last quarter of the 18th century, the Lordly Academy form Bucharest, higher education institution, was inaugurated.

In 1707, Brancoveanu reorganizes the Lordly Academy, by the act entitled *Rânduiala dascălilor*[1], whereby he sets the number of professors, the disciplines that every professor was to teach, the schedule etc.

Also, Brancoveanu makes efforts to ensure sufficient income for the payment of the teachers and the school, typography and librari for the development of the educational process.

To train the necessary teachers for the Academy, Brancoveanu granted scholarships to one of the graduates from Bucharest, to continue the studied in Italy.

Also in the 17th century, it is talked about the family teachers who teach Greek, Slavonian, Latin and Romanian, literature, history, art etc.

The 18th century is characterized by the development of a modern education. The content of education, generally, is no longer predominantly religious, and the teachers and their disciples were mostly secular.

For the first time, the idea of educational system appears in the Charter of Alexandru Ipsilanti from 1776, the most comprehensive act of school legislation from that time in Romania.[2].

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[1] The first teacher was teaching seven disciplines: logic, rhetoric, physics, about sky, birth and death, about soul and metaphysics. The second teacher was translating various works of the Greek clasicism authors (*Isocrate's lectures*, *Demostene' lectures*). the third teacher would have to translate the *Thoughts* of Chrisoloras and Caton, Fochilide and Pitagora, Esop, Homer. In adition, the grammar of Lascaris should have been tought, but the students should have been explained, in Eudoxiu Hurmuzachi, Nicolae Iorga, *Documente privitoare la istoria românilor*, vol.XIV, Bucureşti, 1915, p.392-394..

[2] The educational system was conceived in 4 steps:

1) the beginner cycle (3 years), where grammar was teached;
2) the advanced cycle (3 years), where Greek and Latin was teached;
3) the 3-year cycle, where rhetoric, poetic, the Aristotel moral, Italian and French was teached;
4) the upper grade, where arithmetics, geometry, history, geography, Aristotle phylosophy, astronomy were teached.

The elementary education was tought in schools of Slavonian and Romanian language, founded within the county capitals.

Middle schools (with two grades) were operating in Bucharest, Craiova and Buzau.

The higher education was ensured by the Lordly Academy, in Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.233.

The state manifests a higher and higher preoccupation for school, for the necessary funds, to select the professors, for an effective control on the performance of the instructive - educative process.

All these measures can be considered the first measures of school policy met in the Romanian Countries.[1]

School development will keep pace with society development, serving in particular to the interests of the dominant class.

By the *1814 Charter*, dedicated to the organization of the Bucharest school, the lord of the Romanian Country, Ion Caragea, introduces the concept of responsibility of the officials in ensuring the conditions for the good performance of the instructive - educative process. Instruction preservation was primarily ensured by providing budget funds allocated regularly.[2]

Nicolae Mavrocordat (1711-1716) provided for the payment of such amounts from the lordly revenue.

Also to this respect, Grigore Ghica, considering the schools as the fountain supplying the extracurricular crowd with the wealth of education and wisdom [3] and being aware of the fact that for such institutions to operate, necessary funds were needed, by the *1743 Charter* he introduced the payment of 1-coin tax for each priest[4].

The fluctuation of measures on the necessary funds to maintain the schools was due to the instability of the Fanariot lords, switched by the Turkish between the two Princedoms.

It is to retain their preoccupation in this matter. The payment of the teachers' wages, although with high differences[5], but made with priority

[1] Ştefan Bârsănescu, *Istoria pedagogiei româneşti*, Bucureşti, 1941, p.47.

[2] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.230-231.

[3] V.A. Urechia, *Istoria şcoalelor de la 1800-1864*, I-IV, Bucureşti, 1892, p.17-18.

[4] PReviously, Constantin Mavrocordat decommissioned, by the *1734 Charter*, the school tax charged from priests, deciding for the teachers to be paid from the treasury funds, in A. D. Xenopol, *Epoca fanariotă, 1711-1821*, Iaşi, 1892, p.618-619.

[5] By the *1766 School reorganization charter*, issued by Grigore Alexandru Ghica (Moldova), a large differentiation was created with regard to the wage for teachers. Hence, the Greek teacher in Galati was receiving 250 Lei, the Romanian teacher from Iasi 120 lei, the same amount was receiving the Greek teacher from Botosani and 60 lei each for the Romanian teachers in the lands, in V.A. Urechia, *Istoria şcoalelor de la 1800-1864*, I-IV, Bucureşti, 1892, p.52. The differentiation was even higher when comparing the payment of these teachers with the one of the Greek teachers from the Iasi Academy. Thus, the higher teacher was receiving 1500 lei and the first teacher of

against other working people, certifies the role of the school in state and the consideration that the teachers begun to enjoy[1].

School development was closely related to the existence of an institution aiming at controlling teachers' activity and recording the progress made by the scholars[2].

With regard to Transilvania, the first school law on the elementary education, was drafted in 1774, sanctioned by Maria Tereza, under the name of directive rules for the improvement of education from elementary or Serbian and Romanian non-united trivial schools. The modernist highlights come out from the following passage, particularly significant: "... for the training of the young to the made under good conditions, capable teachers were needed, therefore it was provided not to employ and not to entrust the position of a teacher to anyone if such person was not appropriately certified by a detailed exam, which to show that he or she is prepared to teach students..." .

By the *1776 School Patent* (Schul-Patent)[3] some specifications are made in connnection with the preparation, employment and duties of the teachers; with regard to their payment, it was stipulated that this will be regulated by the contract made between the communal authorities and the respective teacher.

A special place in the school legislation was taken by *Ratio educationes* (1777) and *Ratio educations publicae* (1806) which dealt with all the issues of the education[4].

But, irrespective of the corner of the country where they performed, a thing is certain: "...although highly oppressed[5], one should underline

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Greek grammar was receiving 600 lei, in Radu Iacob, *Istoria vicariatului Haţegului*, Lugoj, 1913, p.293.

[1] This fact explains the *1801 Resolution* of Alexandru Moruzi, lord in the Romanian Country, whereby it was ordered for the Facoianu High Stward to pay the teachers first.

[2] Hence, Grigore Ghica in the *1743 Charter* was arguing about the control of the teaching activity and the results thereof: *... and to check the schools, the teachers, twice per year, what kind of dedication they have...* in Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.232.

[3] whereby it was regulated the orthodox elementary education from Banat, which continued to remain under the control of the church and civil authorities.

[4] and namely: the structure and objectives of education, education plans, selection of teachers and professors, principals, inspectors, their duties, origin of funds, ... in Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.241.

[5] as asserted in a *1813 anaphora*.

the devotion that the teachers had, they did not stop to bring efforts in training the students"[1].

From the second half of the 18th century, it is noticed the preocupcation for stability and continuity in education. To this respect, the teachers who demonstrated competence and endeavor in education were appointed irreplaceable teachers (inamovibili)[2].

A step forward in school organization was made by the *School regulations*, applied in 1833 in the Romanian Country and 1835 in Moldavia, whereby the orientation and the basic principles of education were set: "...good education is the primary concern of a nation". A valuable idea of the *Regulations* was with regard to the proclamation of the priority of merit and talent of the teachers[3], who were having, on their turn, the obligation to improve continuously.

School regulations are appreciated as the first school laws, in the modern sense of the word, including similar provisions along the 258/234 articles.

Hence, the teacher – central figure of the *Regulations*- was proposed in position, by the *Eforia şcoalelor,* consolidated by the lord and it remained inamovible, except for serious cases.

The duties of the teachers were numerous and not easy: they should have direct the scholars towards the holy, respect for codices and control,

[1] To this respect, the budgets with the remuneration of the teachers from the Academy with teaching in Greek from Sf. Sava prove even more their work in sacrifice. The first teacher from Sf. Gheorghe-Vechi was remunerated 4 times less than the one from Sf. Sava.
In 1775, in order to help them, the teachers from the Greek and Hellenic school from Slatina were granted exemptions in the years 1775 and 1797.
Also, for the effort made in educating children, the teacher Chiru from the Râmnicul-Vâlcea school was exempted by Al. C. Moruzi, from all the burdens after 1798, in Ştefan Pascu, *Istoria învăţământului din România*, Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.246.

[2] The same was with the teacher Chiriţă from the School Sf. Gheorghe-Vechi from Bucharest, in Ştefan Pascu, *Istoria învăţământului din România,* Vol.I, Editura Didactică şi Pedagogică, Bucureşti, 1983, p.335.

[3] Ion Popescu-Teiuşanu, *Legislaţia şcolară feudală în Ţările Române*, in *Contribuţii la istoria învăţământului românesc*, Editura Didactică şi Pedagogică, Bucureşti, 1970, p.68.

love for a good trim and love for country and to transform them in honest and working people before making them educated, etc..[1]

In Transilvania and Banat, the 1854 school law brings important changes in connection to the teachers. Therefore, the teachers were divided in three categories: ordinary[2], secondary[3], assistants[4], the payments being made depending on the group where the teacher was falling.[5]

After the defeat of the 1848 Revolution, the schools were closed for more than two years, all the teachers were decommissioned, a lot of them being imprisoned of pursued.

The new school legislation made of: *The new study curriculum from the Romanian Country* (1850) and *The settlement for the reorganization of public teaching in the Principality of Moldavia* (1851) were providing that the professors will teach in a system of schools according to the nation's demands, with the needs of the various classes of people and with a national character. Also, it was decided to increase the expenses for education, to ensure at least one part of the material basis, one of the primary conditions to develop the all-grade education, neglected after 1848.

The formation of the Romanian national unitary state in 1859 has opened new perspectives for education.

Thus, by the *Law of public instruction* from 1864, it was created an appropriate framework for the operation and development of school (it was constituted an education system with three levels: elementary, middle, higher), institution that acquired the appropriate statute for the role and tasks incumbent to it in the social life of the Romanian state.

The law of public instruction proclaimed two modern principles on the popular instruction (elementary education): gratuity and obligation,

[1] Anghel Manolache, Gheorghe Pârnuţă (coordinators), *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.16.
[2] Professors who graduated a higher education institute and having passed a teaching qualification exam.
[3] Professors teaching technical objects or without a qualification exam.
[4] Temporarily employed professors.
[5] Anghel Manolache, Gheorghe Pârnuţă (coordinators), *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.159.

Romania becoming one of the first countries from the world with taking such measures[1].

With regard to the professional training of the teachers, differences were between the rural and urban life.[2].

Also, by this law it was opened the road for democratic education, because one of the highest ideological positions of this law was the recognition of a full equality of the girls with boys in matter of education.

[1] In 1864, school obligation was only included in the laws of a few countries from Europe: The Scandinavian Countries and Prussia and only in two states from S.U.A.- Massachusetts (1852) and New York (1853). In Italy, although proclaimed in 1859, school obligation was only achieved later, in 1877. In France, towards which schools the Romanians directed their aspirations, the obligation for elementary training was only acknowledged by the *Law of 28 March 1882* (Jules Ferry). England never had a law that would acknowledge the school incumbency, only in 1870, in Scotland in 1872. Switzerland acknowledges on its turn the incumbency of education by the *Federal Constitution* from 1874. Among the neighbour countries, Bulgaria recorded this principle in 1879, and Serbia in 1882. In Transilvania, Romanian land, the Austrian comination - pursuing propaganda purposes and the consolidation of the absolutist power, introduced school incumbency in 1857. The measure was reinforced after the creation of the Austrian-Hungarian dualism, by the Law XXXVIII/1868.
With regard to the gratuity of elementary education, this was acknowledged generally once with proclaiming incumbency. The first states that granted gratuity were Italy, Norway, Switzerland, USA, Austria, Denmark, Prussia, England, in Constantin C. Giurescu, *Istoria învăţământului din România*, Editura Didactică şi Pedagogică, Bucureşti, 1971, p.118.

[2] If for cities, the teachers were trained in an urban elementary school, transformed in a primary special school, for villages, it was provided that any person who justifies the promotion of the course equivalent to the rural primary school could be a teacher. Twice per year, the training was organized on commune centers, where a short course of teaching was held.
The lack of precise provisions for the training of teachers, in a stage when the primary school was fixed with major objectives and the generalization of the first level of the education system was introduced, constitutes one of the boundaries of this law.
The professors for the urban area education were trained in normal higher schools provided in Bucharest and Iasi. The introduction of this provision in the law underlines that in order to increase efficiency of the middle education, a professional higher education was needed. IT was in fact a step forwards with regard to the teaching training of the teachers, in transforming them in youth educators.
Also, the teaching body of the universities was to be recruited among the personalities from that field, good specialists, in Anghel Manolache, Gheorghe Pârnuţă (coordinators), *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.223-225.

After the *1864 Law on public instruction*[1], it is intensified the activity to find forms to train the teachers, appropriate to the school development objectives and for the mission to be fulfilled.[2]. In this respect, in 1901 any difference is removed between the training of teachers and elementary teachers, creating a normal *unique* school.

At the end of the century, *The law f public instruction, 1864* was replaced with *The law on primary education and normal-primary education* from 1893 (The Take Ionescu Law). Although modern[3], it is particularly characterized by the difference made between the urban and rural education.

The law on primary and normal-primary education from 1896[4] (Poni Law) highlights even more the part that falls on the state in the material support ensured to schools.

The law on secondary and higher education from 1898 was the fruit of an ample consultation of the teaching body and of the activities of a commission managed directly by Spiru-Haret, the minister of public instruction at that time, and it provided among others that[5] a teaching seminary will be organized near each university, meant to prepare the teaching personnel for secondary education.[6]

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[1] With regard to the training of teachers for the middle education, the provisions of the 1864 law will only be applied starting with 1880.

[2] The school people criticized the idea to leave education and training on the priests. Constanţa Dunca was writing in this regard: „If you don't want for Romania to be lost, do not give the future generation on the hands of priests"; she saw the solution of this issue in the formation of a high number of normal schools, article written in the magazine *Amicul familiei*, year II, 1864, no. 1 (15 March).

[3] In the meaning that it had teaching orientations towards practical activities (the introduction of labour, with the construction of workshops). School incumbency is established for the ages between 7 and 14 years. In the first chapter it was argued about the fines that the parents who failed to enroll their children in the schools would have to bear and it was provided that the obligation will be primarily applied to boys. Primary education was divided in: village schools, lower primary schools, higher primary schools and supplementary and repetition primary courses. The duration of courses in the normal teacher schools was established to 5 years, the same for normal elementary teacher schools, in *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.344.

[4] It was modified in the next decade: in 1897, 1903, 1908, 1909. The amendment from 1897 introduced the organization of the 5 rural classes on divisions.

[5] It included 114 articles, divided in 5 chapters. In the 2nd section, the conditions for appointment of principles were provided.

[6] Marin Niculescu, *Spiru-Haret, pedagog naţional*, Bucureşti, 1932, p.121.

The law on higher education from 1912 (C.C. Arion) provided for the increase oif the university autonomy and it specified the rights of the management bodies, the organization of faculties, managed based on their own regulations, which were previously approved by the Parliament etc. .

From 1912 and until 1918[1] no significant school law drafts were recorded.

In Transilvania, *the law on education* from 1868 made the foundation for the people's education organization (until 1918), which stood under the supreme state control. [2] The teachers had the right to organize in corporations (associations). Also, the law provided the control bodies of education and the scope of their duties. In connection with the training of teachers, it was provided the formation of *Preparandii*[3] with a teaching period of 3 years. The law stipulated, aside these Preparandii, an elementary school, as application school.[4]

On its turn, *The law from1893* was regulating the salaries of the teachers, in the meaning that, if in the church commune, due to poverty - determined by the state bodies - cannot ensure the legal wage of the teacher, he can call for the state aid, but in this case, the state will be entitled to intervene more deeply in the administration and operation of the school.[5]

[1] In 1918, within the project *Education for the villages*, Simion Mehedinţi drafted a legislation made of: *Legea Eforiilor şcolare and Legea pentru şcoala pregătitoare şi seminariile moderne*.

[2] Whi have had an important contribution in the development of elementary school from Transilvania and Banat, have fulfilled a multiple social functionality: they trained the youth, formed and developed national conscience of the young generations, made a science distribution activity, etc., in *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.308.

[3] E.g.: Preparandia from Arad, Preparandia from Oradea, Preparandia from Sibiu, Preparandia from Năsăud, Preparandia from Gherla, etc.

[4] Following the application of the *Law on education 1868* the number of elementary schools increase, the competence of the teachers was improved, the level of the elementary education increase, teaching associations were formed.

[5] *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.347.

2. PROFESSIONAL ORGANIZATIONS OF THE TEACHERS

There is no teacher in Romania - irrespective of the grade - not acknowledging that the Romanian school from 1859 and particularly in 1866, not yet has a well-delimited direction, a purpose, an ideal, towards which to direct the public concerns.[1]

The gradual procurement of the feeling of professional solidarity, the association in professional organizations of the teaching staff, become possible in the social-historical context of evolution on multiple plans that the Romanian society sees especially after the *Law of public instruction* from 1864.

As a preliminary form, the teaching conferences repesented the framework for periodical meeting where the feeling that the meeting of educators is required was formed.

In 1877, it was formed the The society of institutors from Bucharest which had among its objectives the widening of the scope of cultural and teaching knowledge for a professional improvement.[2]

In 1878, by the initiative of several teachers from Bucharest, was constituted the Society of the Teaching Staff from Romania, with the following purposes: lighting heads of families, the state body, all Romanians, about capital importance of education; closening relations between teachers of any grade and their grouping on the basis of solidarity, in an intelligent body; defending the rights and stimulation of the teaching staff activity; improving the organization, staff and indispensable material of a solid instruction.[3]

The Society develops its activity by organizing in Bucharest the First Congress of the Teaching Staff from Romania in 1884[4]. 14 more congresses followed.

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[1] *The First Congress of the Teaching Staff from Romania*, the session from 2,3-4 April 1884, Tipografia Modernă, Bucharest, 1885, p.6.

[2] *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.426.

[3] *the First Congress of the Teaching Staff from Romania*, the session from 2,3-4 April 1884, Tipografia Modernă, Bucharest, 1885, p.6.

[4] The purposes of the Congress were:

1) to study the existing lacks in the organization and performance of education;
2) to propose means for improvement and measures to be taken to mitigate any determined deficiencies;

In 1894, the Association of Buzau teachers and The Putna County Association are formed.

In 1902 it is formed the Association of teachers from Romania aiming at creating a pension and aid center, to support all their members.

In 1910, the Association affiliates to the International federation of the teacher associations and sends a delegation to the 2nd Congress of the Federation (Paris, July 1910).

In 1916 it is constituted the General association of the members of the Romanian primary teaching staff.[1]

All these professional associations (and more others) aimed at improving the statute of the teaching staff and the educational process.

The congresses of the teaching body represented real insights on the school situation at that time and also, horizon openings with regard to the united action of the teachers to contribute to the escalation of the prestige of their profession, in school, thinking and teaching practice progress.

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3) to give the legislators, governments and state institutions the concurrence of the experience of the education members;
4) to join the relations of collegiality between all the education members in a compact and smart body, in the *First Congress of the Teaching Staff from Romania*, Ssession from 2,3-4 April 1884, Tipografia Modernă, Bucharest, 1885, p.2.

[1] Due to the low number, secondary teachers could not constitute in a mass movement, as with their colleagues, from the primary education, their activity taking place in circles on cities, in *Istoria învăţământului din România* (1821-1918), vol.II, Editura Didactică şi Pedagogică, R.A.-Bucureşti, 1993, p.427.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE FORM OF THE TENANCY AGREEMENT

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Abstract

The tenancy agreement is one of the most important contract forms, because it is often used in the legal practice for its reliability in guaranteeing the right of those unable to acquire a certain object to use it.

The form of the contract is likewise important so that the parties know the advantages of certain forms, for example the quality of executive title or the sanctions which could be imposed in case the contract form has been disregarded.

The parties also have a vested interest in ways of substantiating the contract in keeping with the rules of the New Code of Civil Procedure.

Key words**:** *tenancy agreement, form, consensus, home lease, land lease.*

1. THE TENANCY AGREEMENT FORM

The tenancy agreement is consensual. It does not require a certain form for it to be valid with the exception of a land lease.

Article 1781 from the New Civil Code states that lease shall be concluded once the parties have agreed on the goods and the price.

However, the parties have the possibility of concluding the contract in any form, either by deed under private signature or authentic document, which they then registers with the tax authorities (Article 1798 of the New Civil Code), without thereby harming the consensual nature of contract law common.

The formality of registering the contract with the tax authorities is stipulated Article 41 and Article 61 from the New Code of Civil

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Procedure[1] and it has no connection to the validity of the contract, being imposed for fiscal reasons. The Civil Code refers to this step in regulating the nature of the executive title for the payment of rent. In case of lease contracts concluded by the document under private signature and recorded with the tax authorities as well as for those in authentic form (Article 1798). Civil law does not impose declaring it to the tax authorities[2], given that the tax consequences and binding nature of the declaration of income result from the Fiscal Code[3], so that a contract for which this obligation was no fulfilled will retain its validity in civil

[1] Art. 61 – Defining the taxable revenues from leasing the use of property

(1) Revenues obtained from the use of property are revenues, in money and /or in kind, coming from the use of mobile or immovable property, by the usufructuary person, the owner or any other legal possessor , other revenues than those from independent endeavors.

(2) Natural persons that obtain revenues from the acquisition of the use of goods from the leasing of more than 5 tenancy agreements att he end of the fiscal year, starting from the following fiscal year, qualify as revenues from independent activities and are subject to rules for establishing the revenues from this category. In applying these regulations, an order will be issued by the president of the National Agency of Fiscal Administration.

(3) Revenues obtained from the use of properties by the owner, from the use of rooms located in his personal home, in the purpose of tourism, with the housing capacity between 1 and 5 rooms.

(4) In the category ofg revenues obtained from the use of property include also those obtained by tax-payers mentioned in paragraph (3) who, during the fiscal year, obtain revenues from leasing space of more than 5 rooms in their own homes for tourism purposes. From that moment on, i.e. from the moment more than 5 rooms have been leased, at the end of the fiscal year, determining the net revenue is done in the real system according to the rules established in the category of revenues obtained from independent activities.

(5) The revenue gained through leasing of rooms located in private homes for the purpose of tourism, with a larger housing capacity than 5 rooms, are qualified as revenue from independent activities for which the net annual income is determined base don the income norm or in the real system and is subjected to the stipulations in chapter II from the present title.

[2] In this sense it is also the solution of the Supreme Court which has rejected the appeal in which the invalidity of the tenancy agreement based on the fact that it was submitted to a fiscal authority C.S.J., s.com., dec nr. 54/1995, Right nr. 12/1995, p. 86-87.

[3] Article 62, 2 paragraph 5 from the Fiscal Code – „Contributing parties mentioned in article (1) have the obligation to make a statement concerning the declaring of revenue at the competent fiscal authority for each fiscal year, by the 25 May, also of the year following that of the said revenue."

matters between the parties, with the lessor possibly bearing the consequences arising out of legal ties to the fiscal authority.

This formality also has another consequence, i.e. the date of the lease is established at once it has been submitted to the territorial fiscal authorities, making the authority if the agreement certain (Article 278 paragraph 1, 2 from the New Code of Civil Procedure).[1]

Moreover, the burden of advertising forms in cases where the statutory requirements demand it, shall not affect the validity of the lease.

For example, according to Article 902 paragraph 2 section 6 of the New Civil Code, the tenancy agreement must be entered into the land registry[2], in order to become enforceable to third parties, unless it is proved that it was otherwise known.

This is especially the case, if given the losing of the lease property, should the parties not have agreed the termination of said lease due to alienation, the lessee may oppose the acquirer under the conditions of Article 1811 from the New Civil Code, namely: a) in the case of buildings entered into the land registry, should the lease not have been noted in the land registry; (...) c) in case of mobile property subject to certain formalities of publicity, if the tenant has fulfilled these formalities.

2. CONTRACTUAL EVIDENCE

In order to have proof of this contact, however, in case of legal disputes, under the rules of Article 309 from the New Code of Civil Procedure, relating to the value of the rent contract value, it follows that if it exceeds 250 RON, the parties may have proof of the act only through registration.

According to the previous Civil Code (Articles 1416 and 1417 form the Civil Code), in order to get proof of a tenancy agreement, it was subjected mainly to rules of common law for proving legal documents. Article 1416 of the Civil Code states that the distinction between tenancy agreements already in execution and those which have not yet been

[1] "Given the fact that the private signature can be contested against other people that those that mentioned in the law, namely (...) 2. since the day they presented themselves to a public authority or body, mentioning writs."

[2] Article 881 paragraph 2 from the New Civil Code – "recording refers to the registering of other rights, acts, facts, or legal reports connected to properties in the land registry."

applied must be made, given that the code deals with them differently the situation in which only the contract itself or the extent of the obligations agreed upon by the parties are contested, assuming in the latter case that the existence of the contract has been proved. Articles 1416-1417 from the Civil Code are aimed only at contracts the object of which is constituted by real estate because from a systematic point of view, it can be found in the second chapter - common rules for leasing buildings and rural funds, leasing of goods being proven by the rules of common law, irrespective of the distinction as to whether the contract was applied or not, or whether its existence or extent of the obligation are denied.

De lege lata, proof of a tenancy agreement can be given by any means if the value of the contract is less than 250 RON and only through a writ, authentic or under private signature for anything above this value.

Article 309 paragraph 2 from the New Code of Civil Procedure states that evidence of the existence of a legal act may not be brought through the testimony of witnesses, if its object value exceeds 250 RON but witnesses may be used regardless of the contact value against a professional if it was done in exercise of his profession, unless the law requires written evidence.

The fact that Article 101 paragraph 3 of the New Code of Civil Procedure relates to the annual land lease, in applications for absolute nullity, cancellation or termination of the lease, or those relating to the surrender or return of the property leased, does not necessarily lead to the conclusion that the contract value is determined by the annual rent. The text mentioned refers to court authority, establishing rules for determining the competent court in such a case, regardless of the subject of the demand, if it is framed between those listed, if the rules of evidence, the value of the lease being able to report both to the property and to the rent, thus defining the contract. However, in order to correctly apply the evidentiary provisions, the right protected in the request keeping in mind in all cases the fact that the tenancy agreement only gives the right to use the property. If the property value the refunding of which is request has no relevance in terms of competence, it means that in has no evidentiary importance either, exceeding in most cases the limit set by Article 309 paragraph 2 from New Code of Civil Procedure. Also, if the rent value determined for the time unit exceeds 250 RON, proof of this can only be given in written form, except for the cases provided by Article 309 paragraph 4 from the New Code of Civil Procedure. If it is

below this value, it will make the difference in relation to the annual report, applying by analogy the rule given by article 101 from the New Code of Civil Procedure.

In case of the tenancy agreement is concluded through a tacit relocation, the issue of consent indirectly expressed by the parties must be analyzed in terms of the expired contract. The consent equals an agreement[1], but being a tacit manifestation of will it is clear that in this case the written form will not exist, incompatible with the tacit form, so that evidence of the contract will be made by other forms of proof. If witnesses were accepted it would mean that the will of the parties can be proved in detriment to Article 309 of the New Code of Civil Procedure, although Article 1810 of the New Civil Code has no exceptions. If witness testimony is not accepted, the renewed contract cannot be proved at all. Given that in this case the contract is ongoing, the creation of contractual obligations incurred is sufficiently established by the fact that the tenant uses the property and the rent is collected by the lessor, as in the original contract.

Regarding the formality of the multiple copy of the document recording the tenancy, it shall be completed because the tenancy agreement has a sinalagmatic nature[2].

Consequently, evidence of the act will be influenced by respecting the legal requirements of the common law, relating to the admissibility of evidence from witnesses and to multiple copies.

[1] G. Baudry – Lacantinerie, *Precis de Droit civil – Exposé des principes et les questions de détail et les controverses*, Tome deuxieme, L. Larose et Forcel, Paris, 1885-1886, p. 425.

[2] The Court of Ialomiţa, decision from 07.02.1908, in the Legal Review issue 31/1908 – "if the act is signed privately which contains sinalagmatic considerations, they are not valid unless they are made in as many original copies as there are parties with opposite interests, it is no less true that such an act, although null and void in legal form, containing the essential elements of a convention may constitute a form of written evidence and according to article 1197 from the Civil Code, witnesses are admissible in completing the evidence and the presumptions and this principle can be applied in terms of the tenancy agreement when there is a start of written evidence."

3. THE FORM OF THE TENANCY AGREEMENT FOR RESIDENTIAL AREAS

Concerning the form of the contract, the current law does not include provisions derogating from the common law, when the object is a permanent residence but templates are indicated for special housing also.

Article 21 of L. no. 114/1996, repealed by the Civil Code in force states that the agreement between the parties shall be recorded in a written contract. The Methodological Norms of Law (GD no. 1275/2000[1]) stated in Annexes 4, 5 and 12 the contents of the framework contract for leasing social, service, intervention housing in the property of the state state-owned entities, in which all the stipulations were reproduced concerning the mandatory clauses in the contract[2]. As such, recording it in a "written" contract, as demanded by law, aimed to constitute of evidence in the event of a dispute. The very notion used of "recording" means writing a document stating the verbal understanding between parties.

The arguments in favor of imposing the required written form *ad probationem* and not *ad validitatem* came from the fact that renting means emphasizing the value of a building, without it having the effect of alienating it, as a concrete example of administrative acts, although in relation to the duration of the contract, the literature[3] has found that the act amends its nature, becoming a more seriously an act disposing. If letting a property is an administrative act, there is no justification for imposing an additional requirement concerning the form so that the document is valid. The reduced severity of the act cannot impose, but rather remove the need for *ad validitatem* form. The bottom line comes from the comparison of the text of Article 21 of L. no. 114/1996 with

[1] Published in the Official Gazette of Romania, part I, nr. 690 from 22 December 2000.
[2] Framework contract, template, annex I from H.G. nr. 446/1997.
[3] Fr. Deak, *Tratat de drept civil. Contracte speciale*, Ed. Actami, Bucureşti, 1999, p. 162; for the old specification in the former civil code: D. Alexandresco, *Principiile dreptului civil român*, Atelierele Grafice Socec & Co, Bucureşti, 1926, p. 310; C. Hamangiu, N. Georgean, *Codul civil adnotat*, Ed. Socec, Bucureşti, 1925, p. 561. M.B. Cantacuzino, *Elementele dreptului civil*, Ed. All Educational, Bucureşti, 1998, p. 652.

Article 6 of L. no. 16/1994 on the land lease, a solemn act, the lack of the form prescribed by the law affecting the validity of the act.[1]

Also, from a fiscal point of view, the formality of registration with the fiscal administration[2] was not to be performed unless there is a written act and if special housing, the purpose of the written form was to provide an obligation for the parties which leads on one hand to the satisfying of the public authority's need to keep a clear check on tenancy agreements concluded, and on the other hand to protect either one of the parties from the subsequent ill will of the other, thus ensuring concrete evidence – the document.

De lege lata, written confirmation is no longer mentioned in the case of leasing surfaces, Article 21 of L. no. 114/1996 being repealed by the Article 230 letter s) of L no. 71/2011, the similar wording is not regulated in the law, so that the form prescribed by the Civil Code for the common law tenancy agreement also applies to house leases, as long as they do not have a special character.

The same rules shall apply in respect of registering the agreement with the fiscal authorities, the validity of the act is not affected in case this stepped is overlooked.

The annexes from H.G. No. 1275/2000, in its current form, still include designs for tenancy agreement of special properties, depending on the object.[3]

The Civil Code does not refer to special housing, so that the basis of the written form can only come from L. no. 114/1996. Articles 42 - 44 of the law governing the tenancy agreement for social housing does not refer to a particular form, neither do articles 57-60 from the law, which refer to protocol housing and do not require a special form.

[1] Article 6 paragraph 4 from L. nr. 16/1994, currently repealed – „Only land leasing agreements concluded in writing and recorded with the local authority, following the present law, can be validated or challenged."

[2] The tenancy agreement of surfaces fell in the category of financial administrations in the jurisdiction of which the leased property can be found (article 21 from L. nr. 114/1996, article 31 from H.G. nr. 1275/2000 and article 9 paragraph 2 from O.U.G. nr. 40/1999).

[3] For social housing or for the need of a contract the framework contract is concluded as presented in Annex nr. 8; for concluding tenancy agreement for state-owned properties, or properties of state-owned identities, the contract is concluded according to the model in Annex nr. 12.

However, the contract must be analyzed in terms of the rules laid down by law for its conclusion, according to its nature, i.e. administrative contracts, towards their object. Therefore, social homes belong to the public domain of administrative units (Article 39 of L. no. 114/1996) and protocol housing are public property belonging to the state (Article 57 of L. no. 114/1996), so that they must follow administrative rules in these matters and not civil ones.

Article 861 paragraphs 1 and 3 from the New Civil Code Public state that public property is inalienable, imprescriptible and imperceptible, under the law, they can be managed or used, leased or rented.

In this context, Articles 14 - 16 from L. no. 213/1998 on public property sanctions the leasing of public property only through public auction, under the law, arguing that the lease clause must be included to ensure the operation of the nature of the leased property and according to its specificity.

Even in the absence of an express text requiring the written form of these contracts, on the one hand, the mandatory imposition of a proceeding and of certain clauses requires such a form, and on the other hand, the application of L. nr. 114/1996 has no effect if the use the framework agreement were optional.

However, given that it's an administrative contract one general rules of administrative acts, which assimilate this contract[1] also for which the written form is a requirement[2].

Regarding the service and intervention real estate, the property of economic agents or local public institutions, Article 29 in H.G. No. 1275/2000 provides that they are administered in their own interest by leasing them to their own employees, the tenancy agreement being accessory to the individual employment contract. Even if the concrete way and the conditions of the administration and rental of such properties

[1] Article 2 paragraph 1letter c) second thesis from L. nr. 554/2004 – „administrative acts are assimilated in following the present law and contracts concluded by public authorities with the purpose of highlighting the value of public properties, the accomplishment of work in the public interest, of public services and public acquisitions.".

[2] Article 12 from L. nr. 554/2004 refers to adding the copy of the contested administrative act to the subpoena. Article 8 also – the object of the suit and Article 18 – solutions the court might offer in an administrative suit refer to the obligation to issue the act or any other writ.

are determined by the management of the owning firms or institutions, regulating it as an annex to the employment contract, the tenancy agreement will have the same form, i.e. a mandatory written form.[1]

Regarding the formality of informing the land registry, established according to Article 902 paragraph 1 rap. paragraph 2 from the New Civil Code to be enforceable against third parties for the transmission operation of the use of real estate, it is not a requirement that may affect the effectiveness of the legal act. However, disregarding this provision may result in negative consequences for the parties, in particular the tenant, especially in case the property is alienated by the owner to another person (Article 1811 a) from the New Civil Code).

4. LEASE AGREEMENT FORM

According to Article 1838 paragraph 1 from the New Civil Code, the land lease agreement must be concluded in writing, under penalty of nullification, thus establishing *ad validitatem* the requirement of written form.

Additionally, due to fiscal laws[2], the lessee must submit a copy of the contract with the local council in the jurisdiction of which the agricultural property is leased, in order to record it in the special register kept by the secretary of the local council. At the request of the person filing the notice requirement can be brought out and forced, under penalty of a fine determined by the court for each day of delay.

If the leased property is located within the jurisdiction of several local councils, a copy of the contract shall be submitted to each local council in the jurisdiction of which the leased property is located.

Article 1840 New Civil Code forces the tenant, even in the absence of an express stipulation, to take out insurance on agricultural property in order to cover the risk of crop or animal loss due to natural disasters, which means that besides the tenancy agreement, as provided by law he will be forced to conclude an insurance contract, the proof of which purchase can be made only in written form (Article 2200 of the

[1] "The individual employment contract is concluded base don the consent of the parties, in written form, in Romanian. The obligation of concluding an individual employment contract in written form goes to the employer. The written form is mandatory for the validity of the contract."
[2] Article 62 paragraph 2, 1 and the following, Fiscal Code.

New Civil Code). Proof of insurance contract is usually given by the insurance claim, which must include certain clauses (Article 2201 of the New Civil Code). The law stipulates that the testimony cannot constitute evidence even if there is some written evidence of insurance, barely in the case of documents lost through acts of God or unforeseeable circumstances and a potential duplicate cannot be obtained, the existence and content can be proven by any means. However, the proof of the existence of the insurance contract insurance is given by the insurance certificate issued and signed by the insurer or from the cover note issued and signed by the insurance broker (Article 2200 paragraph 2 New Civil Code).

5. CONCLUSIONS

The tenancy agreement does not usually have a special form, both in terms of its validity and evidentiary requirements, but in this category also falls the land lease contract which has been regulated *ad validitatem* in the New Civil Code only in written form.

The advertising formalities, including those relating to tax consequences do not affect the validity of the contract.

The evidentiary aspects of the contract follow the rules of common law, laid down in the New Code of Civil Procedure, which brings no substantial change to the previous rules in the matter.

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New Civil Code

New Code of Civil Procedure

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

DISCUSSIONS ON THE REGULATION OF UNDUE PAYMENT IN THE CURRENT CIVIL CODE IN ROMANIA

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***Abstract**:*

Inspired by the Civil Code of Quebec, the new regulatory provisions reserved for undue payment in the Romanian current code, advance several solutions that are worth being discussed from a perspective that is slightly different from the current analyses on this source of civil obligations. We intend to examine them from a critical perspective and to make some proposals on this topic.

***Key-words**: undue payment, Civil Code, reglementation.*

TERMINOLOGICAL DISTINCTIONS

The legal terminology specific to undue payment in the current civil code in Romania offers us the opportunity for reflection on several aspects less examined in the doctrinal field.[1]

The first issue is focused on the meaning given in the current Civil Code to both notions of *payment* and *debt*, regarded in the wider context of the regulations concerning the execution and annulations of obligations, as well as the restitution of benefits, an area newly covered in Title VIII of Book V of the Civil Code, with origins in the Civil Code of Quebec.[2]

The distinction between *obligations* and *liabilities* constitutes the current subject of a rather animated debate on the doctrinal statement according to which "extra-contract elements can penetrate the contract generating difficulties both in terms of terminology and of the regime

[1] L. Pop, *Plata nedatorată în reglementarea noului Cod civil,* Journal *Dreptul* nr. 12/2013, I. Adam, *Drept civil. Obligațiile. Faptul juridic în reglementarea NCC*, Ed. C.H. Beck, București, 2013.

[2] See reference no. 38.

applicable to such norms; will their penalty be exercised on the ground of tort or contract?"[1]

The contract sphere is being invaded by more and more debt under the ambiguous name of "general debt" as in the case of Lando Principles (PECL) which establish "general debt" in the first chapter entitled "General Provisions" in the regulation of contracts, targeting good faith and "duty of cooperation", considered as genuine obligations, whereas the current Civil Code in Romania provides in article 1170 that "The parties must act in good faith in both the negotiation and the conclusion of the contract, as well as throughout its execution. They cannot remove or limit this duty."[2] Such regulations require extra effort in the delimitation of the two concepts that may bring into question even the phrase "undue payment" to see if *non-debt* relates to obligation or duty.

According to article 1469 paragraph (2) of the Civil Code, that states that "The payment consists in the remission of a sum of money or, as appropriate, in carrying out any other services which are the subject of the *obligation* itself", the definition leaves no room for interpretation (in Latin "*in claris non fit interpretatio*"). Yet, there is another legal text that complicates things at article 1470 that establishes that the basis of payment is the duty. In a strict sense, if the payment is the execution of an obligation, its foundation cannot be other than the obligation itself and not the duty - an unclear conceptual framework as we shall see. Beyond the two divergent landmarks of the payment, the identification of *duty* with *obligation* really opens a sort of Pandora's Box on the distinction between the two concepts.

Regarded in its strict semantic content, the statement "Any payment implies a duty" seems to pave way for no doubt, imposing itself with an axiomatic value by the force of real evidence. Its firm meaning could be identified in the text of the article 1235 in the French Civil Code that was to influence code authors everywhere, being taken over by our old Romanian Civil Code in article 1092. However, the lack of clarity is

[1] Art. 1457, paragraph (1) CCQ. *Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.*

[2] M. Uliescu, *Buna credinţă în noul Cod civil*, collective volume *Noul Cod civil. Studii şi comentarii, vol. I, Cartea I şi Cartea a II-a (art. 1/534)* Ed. Universul Juridic, 2012, pp. 90-102.

originated in the fact that in Romanian "duty" is a polysemantic term for designating both the passive side of the relation of obligation, the reverse of the *claim* (in French *la dette*) and duty of conscience (in French *devoir*).

According to the former semantic content, *obligation* is regulated in article 1599 *et seq*. on the acquisition of debt and article 1629 *et seq.* on debt remission in the Romanian Civil Code, while in the French Civil Code, which benefits from a more nuanced terminology, the definition is *la remise de la dette*, based on the distinction mentioned above. In other cases, we may speak about the debt of gratitude, respect, i.e. the duty of conscience, seen as a duty *to follow* and *not to pay*. If in ordinary language, the use of polysemy is a quality of expressive communication, in law it is a real virus of the normative discourse, affecting the precision of expression[1].

Consequently, the normative statement of article 1470 of the Romanian Civil Code which provides that "any payment implies a duty" may not have the same meaning as that of article 1235 in the French Civil Code, that states that "*Tout paiement suppose une dette*" because the Romanian text does not clarify what type of debt is envisaged. Moreover, if the payment is the obligation subject, the provision of article 1341 paragraph (2) that "what was paid on concessionary basis is not subject to refund { ... }" is meaningless. Liberality is an act of free disposal, animated by liberal intention (in Latin *animus donandi*) of a person who performs a service, without any obligation, but the same article provides in paragraph (3) that it is presumed to have been made with the intention of debt settlement.

The statement would only make sense if it were agreed that payment could generically mean the simple remission of a sum of money, of goods or services without inquiring their title, a fact that is contrary not only to the traditional legal meaning of payment, as defined in art. 1469 of the Romanian Civil Code, but also to the dictionary definition of the term, according to which *to pay* means to give the equivalent value in money or in kind for purchased goods, for a service, a consummation, etc. Therefore, in order to avoid such an undesirable impact of terminology, the first of the hypotheses examined should aim to the one "who pays without being required", while the so-called liberality payment

[1] G. Cornu, *Linguistique juridique, 3-e édition*, Montchrestien, 2005, p. 10.

could be described as "the benefit received by liberality or business management", which is not subject to refund.

When referring to the Civil Code of Quebec, the most important source of inspiration for our code authors, we have to note that, according to its provisions, "any payment involves an obligation"[1] and not debt, while the latter, regarded from the moral perspective, is invoked as an imperative for compliance with rules of conduct (in Latin, *alterum non laedere*) in civil liability field[2].

In addition, there is reservation to the phrase "natural obligation payment" in article 1471 of the Romanian Civil Code, as it can induce a number of terminological confusion. If payment is a way of extinguishing obligations, can it be extrapolated to the natural obligations? This time the discussion is more delicate so that the answer must be nuanced. Even if today we are witnessing a process of transfiguration of duty, more often seen as a general responsibility to have a certain behaviour, we cannot consider the natural obligation otherwise than it is in reality, an intermediate concept between moral duty without legal sanction and civil obligation which is legally sanctioned.

Therefore, it is of interest the statement of the distinguished professor Marian Nicolae, author of a monumental work dedicated to the extinctive prescription, who, referring to natural obligation, argues that "the existence of an obligation without legal sanction is perfectly possible both legally and logically"[3]. It is true that "the penalty is not the essence of the rule of law"[4], as this author states, but what distinguishes in particular the civil obligation from the natural obligation is exactly the sanction, not generically understood as including other penalties (moral, political, etc.) but the sanction as *sanctio praecepti iuris*, the one missing in the case of natural obligations. This is the reason why the French authors, inclined to metaphors, call them "imperfect or aborted" civil obligations.

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[1]Art.1554 CCQ. *Tout paiement suppose une obligation: ce qui a été payé sans qu'il existe une obligation est sujet à répétition. La répétition n'est cependant pas admise à l'égard des obligations naturelles qui ont été volontairement acquittées.*

[2] Art. 1457, para. (1) CCQ. *Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.*

[3] M. Nicolae, *Tratat de prescripţie extinctivă*, Ed. Universul Juridic, 2010, p. 651

[4] Ibidem, p. 651.

The concern with the accreditation of the natural duty as a civil obligation makes the author state that "performance of the obligation is not a liberality, but a payment (a neutral legal act or fact), even though the pre-existing duty is of free nature"[1]; it envisages the provision of art. 1092 par. 2 of the old Romanian Civil Code that states that "Repetition is not permissible on natural obligations that have voluntarily been paid."

Firstly, it is worth noticing that, not accidentally, the text focuses on the *extinctio*n and not on the *payment* of the obligation. Secondly, the fact that the natural obligation may become the cause of a performance cannot give it the character of a civil obligation in itself, not to mention the fact that it is difficult to accept the phrase "payment of liberality" if we take into consideration the legal definition of payment in the current Romanian Civil Code.

In our opinion, the whole debate on the reason for which the action performed under a natural obligation is not subject to refund, is greatly simplified by the fact that the current Romanian Civil Code recognises the unilateral juridical act as a source of obligation. When a party without obligations but animated by moral considerations, promises a benefit to another party, the former binds to the beneficiary, as provided by art. 1327 of the Civil Code. Consequently, the payment appears as a result of the unilateral will of its author, which once manifested constitutes a distinct source of obligation, and not a payment of a previous obligation, legally non-existent since the debtor has not been individualised yet. If there are situations in which we can speak about a natural obligation when it is assumed in favour of a specific person, or in consideration of a certain status, such as alimony for a child out of wedlock, without legal certificate of parenthood, the conduct of a person in the position of the Good Samaritan is not determined by a previous natural obligation to the other party and it is not liable for payment; it is exclusively the manifestation of the will of the former party driven by sensitivity. Only when promised or executed, the assumed performance can be regarded as a natural obligation, whose continuation over a significant period of time, may provide the *accipiens* even the right to compensation in case of the performer's death, as required by art. 1390 paragraph (2) of the Civil Code. As Georges Ripert states in his monumental work dedicated to the relationship between law and

[1]Ibidem, p. 653.

morality, "natural duty does not exist as long as the debtor did not recognise it by executing it."[1] We also consider as enforcement of a natural obligation the promise for its implementation[2], which is nothing else than "the unilateral promise" currently recognised by the Romanian Civil Code, whose regulation makes it unnecessary the recourse to the idea of conversion of a natural obligation into a civil obligation.

These reflections may seem to be of an extent larger than supposedly appropriate in order to highlight once again[3] the importance of terminological rigour of law in general and in the law-making process in particular. That is why we believe that this obligation / duty symbiosis created by the current Romanian Civil Code can affect negatively the accuracy of normative expression.

In conclusion, we can state that payment requires an obligation, being the principal mode of its execution and extinction, whereas the duty to pay is an extrajudicial imperative, the moral base of the whole edifice of obligation. Therefore, we should actually consider *undue payment* as an unrightfully received, being made without any obligations. According to what we promote, this formula better reflects the reality that it designates by avoiding the semantic implications already mentioned.

Although the phrase "undue payment" is a constant part of civil law, European concern to build a unitary legal terminology at Community level targeted at a unique contract law and implicitly at obligations, may be a good time to reconsider some terms which, although part of the classic tools of obligations, have exhausted their expressiveness for one reason or another. However, we cannot ignore the evidence, namely that, although any payment is a benefit, not any benefit can be regarded as payment, but only the one which is subject to obligations.[4] The same degree of rigour used for the annulment of the notion of "quasi-contract" as being ambiguous, must be respected when defining legal terms such as payment and duty whose meaning is crucial for the whole system of law. If we refer only to the current Romanian Civil Code, the need for uniform terminology is also claimed by the fact

[1] G. Ripert, *La regle morale dans les obligations civiles*, LGDJ, 1925, p. 361.
[2] B. Starck, *Droit civil. Obligations*, Librairie Technique, Paris, 1972, p. 689.
[3] S. Neculaescu, *Noul Cod civil român, între tradiţie şi modernitate în privinţa terminologiei juridice*, Dreptul nr. 12/2010
[4] Perhaps that is why the classic term of this classic spring of obligations is avoided in the Portuguese Civil Code, promulgated on November 25th, 1966, which regulates the undue recourse (*repetição of indevido*) within the cause of unjust enrichment.

that undue payment, service restitution and payment as means of execution of obligations, as distinct subjects covered, impose a uniformity of terminology, so that once defined, these legal concepts should express the same reality.

2. LEGAL NATURE

In the current Romanian Civil Code, undue payment is characterised by the normative statement of article 1341 par. (1) as *a right to restitution* of the party who executes the pay, whereas the Civil Code of 1864 used to regulate it as a relation of obligation report, in which the party who received it (in Latin *accipiens*) has the obligation to restitution[1] and the person making it (in Latin *solvens*) is entitled to repetitive restitution to the creditor[2], after the model of the French Civil Code. Seen from the point of view of the executive party, undue payment is qualified by our code authors either as a "*legitimate legal fact*"[3] or as "a lawful, unilateral and voluntary legal fact"[4], which "generates a relation of obligation on whose grounds the party who paid is the creditor of the obligation of restitution of the executed performance and the party who received the benefit is the debtor of the same obligation."[5]

Firstly, we cannot agree with the definition of undue payment as a *voluntary legal fact* as the effects of undue payments do not occur because *solvens* wanted them, but because of the law requirements. The criterion for the classification of legal facts into voluntary and involuntary classes is based on how their effects are produced. Therefore, the fact that the payment was deliberately made by *solvens* is irrelevant in this respect. A support of our statement is also the explanation given by Marcel Planiol who stated that "the party who becomes the debtor under a

[1] Article 992 in the previous Romanian Civil Code: "He, who by mistake or knowingly receives what is not his refund is obliged to remission to the party from whom it was received."
[2] Article 993 para. (1) in the previous Romanian Civil Code: "He who, erroneously, considering himself as the debtor, has paid a debt, is entitled to recourse against the creditor. "
[3] L. Pop, *Plata nedatorată*, *op. cit*., p. 16.
[4] I. Adam, *Obligaţiile. Faptul juridic..., op. cit*., p. 45.
[5] Apud I. Fl. Popa, în *Tratat elementar de drept civil. Obligaţiile, conform noului Cod civil,* Ed. Universul Juridic, Bucureşti., 2012, p. 359.

quasi-contract is never willingly under obligation"[1], its effects occurring *ope legis*.

Beyond this, we believe that the whole analysis of this source of obligations should be made from the standpoint of *accipiens*, the obliged party, who has received undue benefit and not of *solvens*, the party who pays, similarly to the provisions of the French Civil Code[2] in a normative text preserved by the French preliminary project for the reform of the law of obligations and prescription (abbreviated as Catala project). The doctrine tendency to consider the act of payment as triggering the relation of obligation could be seen as an expression of the same overly moralistic trend that may be identified in the field of liability, a regulation based on the necessity to sanction a human act which is preserved in the current Romanian Civil Code. Similarly to the case of liability in which the assumption is the unjust damage caused to another party[3], the *accipiens* receiving payment is the moment when the relation of obligation is *de facto* generated with regard to the matter that concerns us. At least theoretically, it must be admitted that not all payments are received by *accipien*s, as this party can refuse the payment given by *solvens* for various reasons, a situation which determines the initiation of obligation not at the moment of its execution by *solvens*, but only at the actual acceptance of payment, when the imbalance between the two parties is created.

As mentioned by another French author[4], the imbalance created by the dynamics of values and subject to restoration by means of law of obligations, consists of two effects: the impoverishment of the victim through an unjust injury that must be compensated through tort liability imposed by the imperative *neminem laedere* and poverty due to the unfair advantage given to another party, contrary to the rule *suum cuinque*

[1] M. Planiol, *Traité élémentaire de droit civil, tome 2, Les sources des obligations, les quasicontrats*, LGDJ, 1931, p. 283

[2] Art. 1376. *Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas du s'oblige à le restituer à celui de qui il l'a indument reçu.*

[3] The phrase "unjust harm" is used by the Italian Civil Code in defining the principle of tort liability (art. 2043. *Risarcimento per fatto illecito. Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*).

[4] F. Chénedé, *Les commutations en droit privé. Contribution à la théorie générale des obligations*, Ed. Economica, Paris, 2008, nr. 346.

tribuere[1], whose solution is found in the regulation on lawful legal acts. That is the reason for which the three sources of obligations (business management, undue payment, and unjust enrichment) are grouped under the generic phrase *undue advantage received by another party*, while tort remedy is qualified as *the remedy for the unfair prejudice caused to another party*.[2]

3. DEFINITION

In consideration of the above said, we define the source of obligations in terms of the restitution obligation as the legal fact of receipt by a person called *accipiens*, either personally or by proxy, of a benefit made by another person, called *solvens* personally or by proxy, without being forced, which requires restitution of the benefit received in kind or compensation. We consider the following features in this definition:

- the generic term of undue benefit includes not only the payment of a sum of money, as commonly suggested by the word "payment" , but also any other positive benefit, whose evaluation is done according to the rules established in articles 1639-1640 in the Romanian Civil Code referred to by art. 1344 of the Civil Code;
- undue benefit may be provided either personally, by *solvens* or the trustee, as it may be received either by *accipiens* or a representative, on their behalf, according to art. 2019 of the Romanian Civil Code: "Any trustee must give account on their management and submit to the principal everything they received under their empowerment, even if what has been received was not due to the principal";
- the performance of *solvens* is made voluntarily, in consideration of moral duties and it is not subject to refund, as provided in art. 1471 of the Romanian Civil Code.

[1]The complete triptych attributed to the Roman jurist Ulpian was *honeste vivere, alterum non laedere et suum cuinque tribuere.*
[2]M. Fabre-Magnan, *Droit des obligations, Responsabilité civile et quasi-contrats*, Ed. Presses Universitaires de France, Paris, 2007, p. 3. and A. Bénabent, *Droit des obligations, 13-e édtion*, Ed. Presses Universitaires de France, Paris, 2012, p. 335.

4. CONDITIONS

For activation of restitution of undue benefit by *accipiens*, several conditions generally recognised in the doctrine must be fulfilled.

4.1. RECEIVING BENEFIT

Although the standard hypothesis in art. 1341, par. (1) of the Romanian Civil Code, which proposed the definition of payment and the art. 1491 in the Civil Code of Quebec, which was one of the models of the current Romanian Civil Code, take into consideration the party "who pays", in our approach on the explanations of the legal nature of undue benefit payments, seen by the party obliged to refund, we can note that its first condition is receiving the benefit by *accipiens*, who will be obliged to restitution.[1] Therefore, the mere existence of a payment, as most of our authors argue,[2] is not sufficient because as it is necessary for the benefit to have been received and accepted by *accipiens*, for whom the obligation for refunding is incumbent.[3]

The principle of art. 1472 in the Romanian Civil Code is that "Payment may be made by any person, even if there is a third party with respect to that obligation." However, the creditor is entitled to refuse benefit offered by the third party, if the creditor has previously been informed on the debtor's opposition to it, except for the case in which such a refusal would have harmful effects. According to art . 1474 par. (3) in the Romanian Civil Code, payment made by a third party determines the extinction of the duty if made on behalf of the debtor, a situation in which *solvens* is not subrogated to the rights of the paid creditor, except in the cases and conditions provided by law. The *solvens* interested to prove that the debt was of another party, has the burden of proof, according to the principle *actori incumbit probatio*.

4.2. THE LACK OF THE OBLIGATION TO PAY

According to the legal definition of art. 1469 para. (1) of the Romanian Civil Code, payment consists of "the remission of a sum of money, or, as appropriate, of the performance of any services which are

[1] *Ibidem*.
[2] L. Pop, *Plata nedatorată..., op. cit.*, p. 17, I. Adam, *Obligaţiile. Faptul juridic..., op. cit.*, p. 53.
[3] See A. Bénabent, *loc. cit.*

the subject of the obligation itself." Consequently, the reverse of the legally-made payment, is the opposite situation in which the performance of *solvens* is not made on account of an obligation, as not being a debtor in the relation of obligation. We focus on the absence of obligation, and not of duty, as commonly stated, given the ambiguity of the latter, already examined. Benefits can be executed without any obligation, or when although it exists, it refers to another benefit or another debtor.

- *Absolute lack of liability.* This situation is defined in the Italian Civil Code as *the objective non-debt*[1], sometimes borrowed by the Romanian doctrine as *the objective un-debt* or generically referred to as *undue performance* when the execution of obligation is made out of any obligation relation, the absence of the obligation being absolute in the sense that either it has never existed or if it had ever existed, its title was subsequently dissolved with retroactive effect. The situation in which the obligation is lower than the benefit incurred is also objective un-debt[2].

The absolute non-debt may be *originary* when the obligation has never existed and *occurred* when, due to invalid contract, a debt although existing when the contract was closed, is retroactively abolished due to invalidity or termination of the contract.[3]

- *Relative lack of obligation.* The relative un-debt refers to the situations when the obligation exists, but another benefit than that agreed by the parties is executed, or the benefit is provided not to the creditor but to another party who was thought to have this quality, or the benefit is provided by another person, other than the debtor. The classifications are also made as the absence of obligation can be *objective* or *subjective*, but situations can interfere, so that when there was no real obligation from the part of the *solvens*, but only an imaginary one, we face an absolute non-existence of the obligation of a subjective origin. These situations are important only from a didactic perspective. In this category one can also include a number of circumstances, for example when *solvens* loses the liberating receipt, being forced to pay for the second time but later finds

[1]Art. 2033 *Indebito oggettivo. Chi ha eseguito un pagamento non dovuto ha diritto di ripetere ciò che ha pagato. Ha inoltre diritto ai frutti (820 e seguenti) e agli interessi (1284) dal giorno del pagamento, se chi lo ha ricevuto era in mala fede, oppure, se questi era in buona fede (1147), dal giorno della domanda*

[2] St. Porchy-Simon, *Droit civil, 2-e anné. Les obligations, 7-e édition*, Ed. Dalloz, Paris, 2012, p. 426.

[3] L. Pop, *loc. cit.*

the receipt; the contract is of relative nullity as payment may be qualified as tacit acknowledgment of it.[1]

4.3. PERFORMANCE IS EXECUTED BY MISTAKE

Whenever *accipiens* receives a benefit that is not payable to him in the sense already mentioned, there may be two explanations: either *solvens* knew that he did not owe it to *accipiens*, which means a liberality that triggers impossibility for refund claim, or *solvens* made an error believing that he performed a real payment. The error condition was mentioned by the former text of art. 993 of the Romanian Civil Code of 1864 that stated "He who, erroneously, believing that he is a debtor has paid a debt, has the right to appeal against the creditor."[2]

The current Romanian Civil Code eliminates the error condition under which *solvens* provides undue benefit, which could be interpreted as an advantage for *solvens* made exempt from the difficult proof of his error. Still, such an assumption is contradicted by the provision in art. 1341 par. (2) Civil Code, according to which "It shall be presumed, until the contrary is proved, that the payment was made with the intention of personal debt extinction." The party who has the burden of proof for the contrary fact, meant to rebut the relative presumption (*iuris tantum*) established in favour of the party receiving the benefit, interested in preserving it, is *solvens* (not *accipiens*, as it is sometimes argued[3]). On the other hand, art. 1635 of the Civil Code, concerning the refund of any benefits, includes the hypothesis "goods received unrightfully or in error."[4]

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[1] C. Stătescu, C. Bîrsan, *op. cit*., p. 113.

[2] A critic aspect of both this text and its model, art. 1377 in the French Civil Code, in which the ***solvens*** has the right to repetition against the creditor, is that the return traditionally called ***condictio indebiti*** is required from the part of *accipiens*, but he did not have the status of creditor except in the debtor's misrepresentation as a false debtor. This is why the statement proposed by the Catala French draft law of reform of obligations creditor no longer uses the term creditor in art. 1330 para. (1), but "the one who received undue benefit".(„Celui qui reçoit, par erreur ou sciemment, ce qui ne lui est pas dû, s'oblige à le restituer à celui de qui il l'a indûment reçu")

[3] A-G. Uluitu, în Fl.A. Baias şi colaboratorii, *Noul Cod civil. Comentariu pe articole (art. 1-2664),* Ed. C.H. Beck, Bucureşti, 2012, p. 1396.

[4] This time, the text uses the phrase "without right" in preference to "not due", taken from the art. 1699 CCQ (La restitution des prestations a lieu chaque fois qu'une personne est, en vertu de la loi, tenue de rendre à une autre des biens qu'elle a reçus sans droit ou par erreur, ou encore en vertu d'un acte juridique qui est

The error as a false representation of reality consists of the mistaken belief of *solvens* "who considering himself a debtor by mistake, has paid his debt { ... }", as referred to in art . 993, Romanian Civil Code after the model of art. 1377, French Civil Code. If in the classical conception, the error was regarded as a *sine qua non* condition of any undue payment, through a solution of the French Court of Cassation issued on 2nd April 1993 and evoked in the doctrine,[1] it was decided that in the case of absolutely undue payment, the only condition required is that it be not due, without further analysis of the error of *solvens*.

The error of *solvens* can concern both factual and legal circumstances. The current Romanian Civil Code recognises the error of law as the vice of consent, provided that it is essential, meaning "to refer to a determinant legal rule according to the will of the parties in concluding an agreement", according to art. 1206 par. (3). For its admissibility, art. 1206 of the Romanian Civil Code establishes that the error must be of an excusable condition, *i.e.* it does not focus on a fact that could have been known, with reasonable diligence. It can be either spontaneous or determined by fraud, being likely to be proven by any means.

Regarding the severity of the error, both the doctrine and case law decided that a mere error is sufficient to prove the undue payment. Several contradictory solutions were given by French jurisprudence in cases in which payment had been made by a serious error assimilated to fault (*culpa lata dolo aequiparatur*), when in a first phase, actions of refund were rejected but later, through a consistent jurisprudence, courts have require the *solvens* damages whenever *accipiens* proved the damage suffered as a result of such benefits[2].

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subséquemment anéanti de façon rétroactive ou dont les obligations deviennent impossibles à exécuter en raison d'une force majeure) The distinction between goods and services seems questionable, when in fact, any service is a sort of property in the sense given by art. 535 of the Romanian Civil Code. Therefore, a more accurate term in all its materiality would have been the generic term *benefit*.

[1]M. Fabre-Magnan, *Droit des obligations, Responsabilité civile et quasi-contrats*, Ed. Presses Universitaires de France, Paris, 2007, p. 442

[2] Ph. Delebecque, F-J. Pansier, Droit des obligations. Contrat et quasi-contrat, 6-e édition, Lexis Nexis, Paris, 2013, p. 389.

5. EFFECTS OF UNDUE PAYMENT

The fact of *accipiens* receiving a benefit which is not legally due, generates a relation of obligation in which *accipiens* is the debtor of the obligation and *solvens* is the creditor. The legal action may be also initiated against the creditors of *solvens* through indirect claim, under the conditions imposed by article 1560 of the Romanian Civil Code. According to article 1344 of the same Civil Code, the rules of restitution of undue benefit are those provided in articles 1635-1649 Civil Code and article 1640 para. (1) Civil Code states as a principle that the return is in kind; restitution by equivalent occurs only if restitution in kind cannot occur because of the impossibility or a serious impediment or if the return performance refers to the services already performed. Therefore, *accipiens* who has received undue benefit is obliged to return all that has been received to *solvens*, this principle being applied regardless of the party's good faith or not. The principle *bona fides praesumitur* determines *accipiens* to be presumed to have acted in good faith, which involves repayment benefit only within their enrichment.

5.1. BENEFITS SUBJECT TO REFUND

According to the doctrine[1], the benefits *accipiens* is obliged to return according to distinctive features are the following:

- when the performance consisted of a sum of money, *accipiens* will be required to refund and if the action was in bad faith, the party will be also forced to statutory interest after the rule in art. 1489 in the Romanian Civil Code. The provisions under para. (2) of this article state that interest produces interest if the law or the contract stipulates it to the extent permitted by the legal framework, or when requested by court[2];
- if *accipiens* received generic goods, he shall be obliged to return the goods of the same quantity and quality or at least the average, as provided in art. 1486 of the Romanian Civil Code. Solvens may order damages suffered by the loss of use of property, by the rules of tort liability;

[1] L. Pop, *loc. cit.*

[2] The normative text construction of art. 1489 para. (2) Romanian Civil Code uses the conjunction *or*, therefore the agreement of the subject with the predicative verb is *provides* not *provide*; in addition, the logic of semantics determines the use of the conjunction *and* instead of *or*.

-when the payment was in definitely determined property, *accipiens* is obliged to return it in the condition received. If the property has perished completely and not accidentally or was estranged, *accipiens* will be required to its quantitative restitution, the same as at the time of either receiving or alienation, according to the lowest value; in the situation when *accipiens* acted in bad faith, he will pay the highest value calculated on the date of receipt or accidental destruction. By the exception in the second sentence of the article 1642 of the Romanian Civil Code, when he will prove that the property would have been destroyed even if handed to *solvens*, he will be exonerated. If the property has undergone a partial loss, *accipiens* will compensate *solvens* with its equivalent, except when the loss is due to a normal use of the property. If the restitution is attributable to *solvens*, the property must be returned in the condition in which it was at the time of the legal action, without compensation;
-when payment has covered fruit, the refund will vary according to the good faith or bad faith of *accipiens*. In the former scenario, according to art. 1645 par. (1) Civil Code, *accipiens* acting in good faith, acquires ownership of fruit and compensates for the costs incurred for fruit production. According to the same text, he will not be obliged to compensate *solvens* for the use of property, except when this use is the essence of the benefit and when the property was subject to rapid natural depreciation. When *accipiens* acted in bad faith or when the failure to return fruit is attributable to him, *accipiens* will have to refund all the fruit, both perceived or not, picked or not, and to give *solvens* compensation for the real or potential use of the latter's property;
-when the performance is the execution of work or services, the applicable text is fart . 1640 para. (1) of the Civil Code , which states: "If the refund cannot be in kind due to impossibility or a severe impediment or if the refund refers to the provision of services already performed, the return is made by the equivalent", consequently to the evaluation based on references to the date of the receipt. The execution delay of these benefits justifies the creditor's damages refund representing the legal interest that will be calculated on the cash equivalent of the benefit on the debtor at the time the latter has been notified.

5.2. BENEFITS THAT ARE NOT SUBJECT TO REFUND

There are a number of benefits, which are excluded from the refund of *solvens*, although they were made.

- *The payment received in good faith by the creditor.*[1] Article 1342 (1) states that "Restitution cannot be ordered when, after the payment, the party who had received it in good faith let the time prescription be fulfilled or disposed in any way, of their claim of title or the guarantees of the debt."[2] The text focuses on the situation in which the performance belongs to a person other than the debtor. For the purposes of this provision, the creditor acted in good faith when trusting the intention of this false debtor, he made a valid payment; for this reason he does not take legal action against the real debtor within the prescriptive term and disposes of the debt title, considering it no longer useful. The situation under consideration refers only to the existence of debt in a document under private signature. Otherwise, if his title was genuine, it could have been proved by a legal copy from the notary or from another body that issued it. The circumstances in which the creditor was deprived of his title are not important in this situation. The same solution applies when the creditor has given up the claim guarantees. Therefore, the good faith of the party who received undue payment must characterise both the existence of the debt that belonged to the one who made the undue payment and his "deprivation" of his title.

In order to protect the party who performed a service that was not required, the law gives them the right of recourse against the true debtor, according to art . 1474 par. (3) Civil Code that states: "Payment made by a third party annihilates the obligation if made on behalf of the debtor. In this case, the third party cannot subrogate to the paid creditor's rights except in the cases and on the conditions provided by law." Therefore, *solvens* 's decline against the true debtor of the *accipiens* is based on legal subrogation to the rights of the creditor.

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[1] The question is not the payment itself, but *undue payment* received in good faith by the creditor who was in the error of believing that *solvens* really had to pay the debt. It is not the only case when a term, once defined, is not preserved as such in the subsequent provisions.

[2] The text is elliptical and somehow, unintelligible as it lacks the essential reference, namely that the party who received the payment in good faith let the limitation period *against the true debtor* be fulfilled.

- *Benefits incurred before the end of the suspension period*. Article 1343 paragraph (1) of the Romanian Civil Code, provides that "What the borrower paid before the expiry of the suspension period cannot be refunded, except for the cases when the payment was made by fraud or violence." Another provision, the art. 1413 par. (1) Civil Code, establishes the rule that "The term is an advantage for the debtor, except for the cases when by law, by the will of the parties or by the circumstances, there is an indication that it has been stipulated in favour of the creditor or of both parties."[1]

-*Benefits affected by the condition.* The party who made an undue payment before the fulfillment of the suspensive condition, *i.e.* before the fulfillment of the uncertain event future on which the effectiveness of the obligation depends, as required by art. 1400, Civil Code, cannot ask for its return.

- *Benefits provided in consideration of natural obligation*. According to art. 1471 Civil Code focusing on payment of natural obligation, "restitution shall only be allowed in respect of natural obligations that have been voluntarily fulfilled." The concreteness of this principle is given by art. 2506 para. (2) of the Civil Code stating that "Whoever voluntarily fulfilled the obligation after the limitation period requirement, is not entitled to seek reimbursement benefit, even if at the date of execution he did not know that the time limitation had expired." Such benefits are not subject to refund. As already mentioned, the rationale for this denial of refund is related to moral, not legal aspects. It is believed that a once a certain moral motivation for the performance is recognized, the request for its return is considered to be immoral.

- *Benefits made with the gratifying intention*. According to art. 1341 paragraph (1) of the Civil Code, "what was paid with the title of liberality or business management is not subject to refund." As mentioned, the phrase "payment of liberality" highlights a *contradictio in terminis* as long as, according to art. 1470 in the Romanian Civil Code, "Any payment involves a debt" and liberality requires by definition, *animus donandi*, not to mention business management where the action is characterised by *animus gerendi* and distinct regulation.

If apparently, the Catala project proposes a similar solution through the provision of art. 1330 para. (2) stating that there cannot be a

[1]In order to avoid these two parallel regulations, a regulation on the reference time should have established.

restitution[1] when the one who receives payment proves that it was made with the liberal intention of a natural obligation or from another cause. It should be mentioned that the two texts are of a notable difference: while the Romanian text refers to the payment made by way of donation, the French text considers the situation in which the party who receives payment proves that the *alleged* payment was made in reality by *animus donandi*. Therefore, the refund invoked by *solvens* is the undue benefit.

5.3. SPECIAL SITUATIONS

The refund of undue benefits is usually based on unquestionable moral imperatives (*suum cuinque tribuere*); yet, there are situations where such a solution seems no longer as a normal one.

- *Benefits animated by illegality or immorality* are a controversial topic in the doctrine of civil law. Viewed from the moral perspective, the refund of such benefits received on illegal or immoral reasons should be rejected, as an application of the principle *nemo propriam turpitudinem allegans*.[2]

For the suppression of immoral conduct, the most appropriate penalty would be the refusal to refund benefits.[3] In the situation when both parties were animated by the same immoral cause, the benefit may not be returned, according to the rule in *pari causam turpitunis cessat repetitio* but when *accipiens* is in good faith, the party should keep the benefit, according to the rule *in pari causam turpitudinis melior est causa possidendi*. Because such a solution would provide *accipiens* unjust enrichment, the old Romanian Civil Code proposed that the benefit should come from the state budget. Such solutions have remained at the stage of simple doctrinal exercises, not yet regulated. The current Romanian Civil Code shows in art. 1638 that "the benefit received or made under an illegal or immoral causes always remains subject to refund."

- *Performance made with the property of another party.* According to art. 1491 of the Romanian Civil Code, "When in the execution of its

[1] Art. 1330 para. (2) Catala Project: *Si toutefois il prouve que le paiement procède d'une intention libérale, d'une obligation naturelle ou d'une autre cause, il n'y a pas lieu à restitution.*

[2] The principle envisages the non-invokement of personal turpitude, understood as immorality, not mere negligence, such as it is often claimed in practice.

[3] G. Ripert, *op. cit.*, p. 175.

obligation, the debtor hands in property which does not belong to him or he cannot claim, he shall not demand the restitution of the property surrendered from the creditor unless he assumes responsibility to perform its due with another personal property." Regarded from the point of view of the creditor-debtor relationship, the solution is correct. But if we refer to the owner of the property which has been of object of the benefit, we have to accept this party's right to claim his property from the possession of any unlawful owner. The distinction made in the norm of paragraph (2) of the mentioned text, that "The *bona fide* creditor may return the received property and request, if applicable, refund for the damages suffered", operates only in the creditor -debtor relation, and not against the holder of the right property, which cannot be opposed to the good faith of the creditor as *accipiens*.

- *Performance made for an incapacitated party.* The article 1647 paragraph (1) of the Romanian Civil Code provides that "A person who does not have full legal capacity is not required to refund all the benefits but only the ones in the limits of the achieved benefits evaluated at the date of the request for refund. The burden of this enrichment proof lies with those who sought restitution." This nuanced solution is controlled by two imperatives: the former refers to the protection of the disabled person against the harmful effects that might be produced a contract closed by an inexperienced person; the latter tends to avoid unjust enrichment of the incapable person who, although entitled to protection, cannot have unfair profit at the expense of *solvens* who is impoverished by performance of obligation. Such protection shall cease when incapacitated *accipiens* was in bad faith. According to the provision of paragraph (2), article 1647 of the Romanian Civil Code, this party may have to refund the full benefit when, intentionally or with gross negligence (*culpa lata dolo aequiparatur)*, he made the restitution impossible. The solution is slightly different from the one proposed in the Catala project, according to which the cancellation or termination is attributable to one of the parties that shall owe damages to the other party.[1]

[1] Art. 1162. *L'annulation et la résolution rétroactive du contrat emportent, de plein droit, la restitution intégrale et s'il y a lieu réciproque des avantages reçus en exécution du contrat. Lorsque l'annulation ou la résolution est imputable à l'une des parties, celle-ci doit en outre indemniser l'autre de tous les dommages et intérêts.*

CONCLUSIONS

The legal implications of undue payments are much more numerous. We do not claim to have exhausted them, not even have we taken into consideration the most important ones, and we do not argue that our proposed solutions might be the most rational. They may only be decanted through debate by theorists and practitioners of law, thus contributing to a more accurate interpretation of the meaning of the new provisions of the Romanian Civil Code.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

FINANCING POLITICAL PARTIES BY DONATIONS

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Abstract:
The donation is not only one of the most important contracts governed by the Civil Code, but it is also an important source of support to the political parties. This paper aims to examine the conditions in which a natural or legal person may do an act of liberality political parties in Romania according to Law No 334/2006 on the financing of political parties.
Keywords: *donation, contract, political parties*

PRELIMINARY CONSIDERATIONS

Donation, according to Art 985 of the Civil Code is defined as the "contract by which, with the intention of gratifying, a party, called donor, irrevocably disposes of a good in the favor of the other party, called alienee". Together with the disinterested contracts, the donation is part of the category of the free of charge acts "by which one of the parties aims to offer for the other party a benefit, without having any advantages in return"[1].

From the legislator's definition results that the donation is a liberality[2] because the donor's patrimony is inevitably shrunk with the good donated and the alienee's patrimony is appropriately enriched[3]. In order to have this effect it is necessary the analysis of the intention with which the donation is made, involving the analysis of the contract's object. In literature the contract's cause, "*animus donandi*" is defined as being the conscience and will of the disposer of not receiving any

[1]Stănciulescu Liviu, *Curs de drept civil: contracte*, Hamangiu Publ. House, Bucharest, 2012, p.205
[2]According to Art 984 of the Civil Code: "a liberality is the legal document by which a person freely disposes of his goods, totally or partially, in the favor of another person"
[3]Cărpenaru St., Stănciulescu L., Nemeş V., *Contracte civile şi comerciale*, Hamangiu Publ. House, Bucharest, 2010, p.71

counter-performance[1]. Starting from these two key elements, we mention that liberalities have as object only patrimony rights: real rights or rights of claim, being excluded the extra patrimony rights which cannot be evaluated or are not part of the trade[2].

Regarding the form of the contract, considering the irrevocable feature of the liberality, the legislator imposed the authentic form according to Art 1011 Para 1 of the Civil Code. Non-compliance with this form is sanctioned with the absolute nullity of the contract, the authentic form being a protective measure of the donor's will, which freely and irrevocably disposes of a right in the favor of another person, as well as for his family, the conventional liberality being a mean of embezzling the goods from their inheritable transmission[3].

Regarding the capacity, according to the general rules, the capacity to contract represents the rule, and the incapacity represents the exception. The incapacity exists only where the law expressly states, being of a strict interpretation[4]. The general rule is that according to which every person may dispose by liberalities or may be the beneficiary of a liberality, with the condition to fulfill the legal provisions regarding the capacity.

PRIVATE FINANCING OF THE POLITICAL PARTIES BY DONATIONS

Shall be the beneficiary of a liberality a determinate or, at least,a determinable person. It is directly determinate the person expressly stated in the content of the liberality by mentioning his name, first name or pointing out his quality. It is determinable the person for whom certain criteria are indicated, enough to determine her at the date when the

[1]Văduva D., *Moştenirea legală. Liberalităţile*, Universul Juridic Publ. House, Bucharest, 2012, p.79

[2]See in this regard, Hamangiu C., Rosetti-Bălănescu I., Băicoianu Al., *Tratat de drept civil român. Restituţio*, All Publ. House, Bucharest, 1998, p. 435; Safta – Romano E., *Contracte civile. Încheierea. Executarea. Încetarea*, 3rd Edition, Polirom Publ. House, Iaşi, 1998, p.177; Prescure T., Ciurea A., *Contracte civile*, Hamangiu Publ. House, Bucharest, 2007, pp.144-145

[3]Terre Fr., Lequette Y., *Droit civil. Les succesion. Les liberalites*, Daloz Publ. House, Paris, 1997, p.368 quoted by Moţiu F., *Contracte special în noul cod civil*, Universul Juridic Publ. House, Bucharest, 2013, p.125

[4]Văduva D., *op. cit.*, p.92

liberality generates effects[1]. In this context it results that political parties may be the beneficiary of donations. According to Art 8 Para 2 of the revised Romanian Constitution "political parties shall be constituted and shall pursue their activities in accordance with the law. They contribute to the definition and expression of the political will of the citizens, while observing national sovereignty, territorial integrity, the legal order and the principles of democracy".

The functioning of a political party implies numerous costs, or in order to prevent the limitation of the number of political actors exclusively to the financial powerful ones, the political parties enjoy the possibility of receiving funds through financing. In this context, one can appreciate that financing the political parties represents a guarantee for democracy[2]. For a political party to function financing must have the following features:

- Financing it is admissible only if the tax payer does not ask for political favors in return;
- The need to limit the donations received by political persons;
- The transparency of financing[3].

According to Art 3 Para 1 Let b) of the Law No 334/2006 for the financing of the activity of political parties and election campaigns[4] among the financing sources of a political party are donations, legacies and other liberalities, being assimilated to private financing. Corroborating the legal provisions results that donations made for the political parties can be classified in two categories, namely public or confidential, the criteria being the one of knowing the identity of the donor.

The political parties may receive donations from the following categories of persons:

- Romanian natural persons
- Romanian legal persons

[1]*New Civil Code: coments, doctrine, juridsprudence*, Hamangiu Publ. House, Bucharest, 2012, p.79

[2]Pellicani, *La questione morale*, Mondoperaio, July 1992, pp. 3-4 quoted by Morano D., *Coruzzione e sistema politico in particolare sulla cosidetta partitocrazia*, p.42

[3]Cristescu Claudia, *Legislaţie şi transparenţă electorală*, published in the *Sfera Politicii* Magazine, No 114/2005

[4]*Law No 334/2006 on the financing of the activity of political parties and election campaigns*, published in the Official Gazette, Part I, No 510/22 July 2010, modified by *Law No 124/2011* published in the Official Gazette, Part I, No 433/24 June 2011

- Companies
- NGOs

Art 5 of the Law No 334/2006 establishes that donations received by a political party during one fiscal year cannot exceed 0.025% of the incomes established in the state budget for the said year, and during the fiscal year when there are elections the limit shall be 0.050% of the incomes established in the state budget for that year. In this regard, the donations received from a natural person during one year may be up to 200 basic national minimum gross wages at the value existing on January 1st of that year, and the Donations received from a legal entity during one year can be of up to 500 basic national minimum gross wages at the value existing on January 1st of that year. The donor's identity shall remain confidential when it does not exceed the equivalent of 0.006% of the incomes established in the state budget for that year[1].

According to the law are forbidden:

- Donations of goods, money or free services performed with the purpose for an economic or political advantage;
- Donations for the political parties from another states, foreign organizations or foreign natural or legal persons;
- Donations received from public authorities or institutions, autonomous administrations, national companies, trading or banking companies where the state or administrative-territorial units are majority shareholders or religious cults.

Are allowed the donations consisting of material goods necessary for their activity, but which are not electoral propaganda materials, received from international political organizations to which that party is affiliated to or from the parties or political formations which have relations of political collaboration[2]. Donations accepted by the political parties breaching the legal provisions are sanctioned by absolute nullity (provisions being of public order), and the incomes thus obtained shall be confiscated and become an income to the state budget[3].

This private financing through donations made for political parties implies a thorough verification, thus Art 7 of the republished Law No 334/2006 states that when receiving the donation, it is compulsory to check and register the donor's identity, regardless of the public or

[1]Stănciulescu L. *op. cit.*, pp.214-215
[2]Stănciulescu L., *op. cit.*, p.215
[3]*Ibidem.*

confidential nature thereof. Upon the donor's written request, its identity remains confidential if the donation is within the limit of the annual amount of 10 basic national minimum gross wages. Moreover, the legislator established that the total amount received by a political party through confidential donations cannot exceed the equivalent of 0.006% of the incomes established in the state budget for that year. Even more, all the donations shall be accurately emphasized in the accounting documents, with specification of the date when they were made and of other information which allows the identification of financing sources and also have the obligation to publish in the Official Gazette Part I the list of natural and legal entities that, during one year, made donations whose aggregate amount exceeds 10 basic national minimum gross wages, as well as the total amount of confidential donations received, by March 31st the next year.

CONCLUSION

We may say that donations represent one of the important means for the private financing of political parties. Organized based on the principle of transparency, the private financing as donations has a strict regulation both regarding the quantum, which is established by the legislator to prevent the "subterranean" financing, as well as regarding the rules to be complied with by the natural and legal entities wishing to support the political parties' activity.

In this context, we may say that the liability of the appropriate attraction and spending the financial resources belongs to all those involved and that a much better financial organization cannot be the exclusive prerogative of the state's institutions, but also a major liability for all political parties.

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Pitesti, 23 - 24 May 2014

TAX HAVENS AND OFF-SHORE COMPANIES

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Abstract:

Phenomenon of tax havens emerged in the context of relations between states with different tax systems in an attempt to mitigate the effects of stifling taxes and excessive controls performed by state institutions. Subsequently these areas have become very attractive for money laundering process of the crimes proceeds. The term refers to tax haven countries where are situated offshore trusts are and the level of taxes is very low. Areas where are such companies are numerous - commerce, industry, services, investment, real estate, tourism, marine transport. Thus, "tax havens" (the phrase comes from the American term) involve a territory in which the taxation is very low. Tax havens offer total freedom of foreign exchange and banking and commercial secrecy is assured at a very high level.

Key words:
tax heavens; offshore companies; money laundering; taxation system.

1 . THE FEATURES OF THE TAX HAVENS.

The ancestors of today's tax havens can be considered the Mediterranean states where, in the eighteenth century pirates were well received because of the large sums of money they spent. This money was obtained from robberies committed, and their retreat from the "activity" was encouraged to settle in these countries. What is very interesting is that tax havens custom location near the seas and oceans is largely observed today, with few exceptions, in Western Europe. Characteristic of most tax havens is that they are small countries that have gained independence relatively for short time and are countries with exotic investment and reduced population. These states are generally characterized by a highly developed infrastructure, a geographic location that fosters international tourism and that motivates persons for business as well as the presence of major flows of money in the form of cash [1]. Also, another important feature of these tax havens is the existence of governments that do not break easily under pressure the international community and in this way guarantees the absolute banking secrecy.

Setting up offshore companies widely favored in most tax havens development of an entire industry of lawyers, attorneys, consultants, for relatively affordable fees, establishing companies, representing shareholders, keeps documents of such society etc. The main rule in setting up these companies is that setting to make the signing of only two documents, the Memorandum of Association (Memorandum of Association) and status, which contain the rules of operation of the company, after which are subject to formal approval from the Office registration of companies. In most cases the real owners do not appear in official records, they can be reached only by lawyers who represent them. The secret of all these operations is strictly respected, as an essential component to ensure the viability of the system. Offshore companies usually cannot do business in the country where they are registered, but there are some exceptions to this basic rule.

Areas of activity of the off shore companies are diverse, they behaving as intermediaries in export-import operations, owners of commercial vessels, shareholders and various businesses in the insurance and banking system. In recent decades, all major banking consortium in the world thus opened branches in tax havens and activities in these territories subject or take advantage of local regulations on the control, supervision, prudential measures and banking secrecy [2]. Some states or territories unreservedly accept their inclusion in the category of tax havens while others are moving to avoid their inclusion among them, considering that may be attractive to certain categories of customers. In 2004, the United Nations released a comprehensive study according to which the world today there are about 50 states and territories that meet the main criteria to be classified as a tax havens. Analyzing their geographical location we can say that is found in the following geographical areas:

• Caribbean and Central America, namely Bermuda, Panama, Costa Rica, Belize, Bahamas, Antigua, Netherlands Antilles, and so on;
• Asia - Pacific respectively, Dubai , Lauban Islands, Marshall Islands, Virgin Islands, Macao, Singapore, Hong Kong, Lebanon, Bahrain etc.
• Africa - Indian Ocean e.g. Liberia;
• Europe which includes Gibraltar, Monaco, Andorra Cyprus, Liechtenstein, Luxembourg, Malta;

The data of the IMF shows that are 7,000 billion in financial assets are held in different categories of offshore companies. It is estimated that

U.S. lost annually between 54 and 70 billion dollars from the budget of tax exemptions and therefore the U.S. government pays special attention to these issues. The international community for years pressed for offshore areas to become more transparent. Only five of the 30 have succumbed to these pressures. Regions have become more transparent consider discriminated from the other. Among those who made concessions in this field include Switzerland and Cyprus.

Economic benefits of tax havens:

• a legal system that virtually ensure foreign control;
• ability to deduct pre-tax profits interest;
• ability to maintain the anonymity of the real owners of companies;
• ability to quickly develop business as offshore companies benefiting from lower income taxes or even zero taxes for a specific period of time;
• exchange transactions of offshore companies are not taxed;
• property rights and the intellectual property can be sold to offshore companies at low prices and can then be resold at a higher price, and the difference is not taxed;
• taxes and duties at a very low or even zero;

2. THE TAX HAVENS AND THE OFFSHORE COMPANIES.

In common parlance the term "tax haven" means a geographic area that provides economic and a range of tax benefits offshore companies registered in that territory. Basically, an offshore company can operate under favorable tax conditions only if it is recorded in a "tax haven". In "tax havens" today, the companies are supported by a well-organized legal mechanism, so in that country the law provide favorable conditions for the offshore companies. It should be emphasized that these offshore companies will not pay taxes not because of eluding the law, but because the applicable legislation exempting them from paying taxes.

Offshore companies are used to reduce taxes on profits of "mother" companies located in areas of high taxation and transfer the profits of these companies to offshore companies. In practice, the "mother" company sells certain goods at a minimum price to offshore company and offshore company will resell the goods at a higher price. "Mother" company, because the minimum price charged will have a very small profit and therefore tax will shrink considerably. On the other hand,

offshore company will sell products at a substantially higher price will make a serious profit but not subject to the charge by treasure authorities.

Also, it guarantees the confidentiality of transactions concluded between the company and its clients. Making investments in favorable conditions for an off shore company, ensuring the ability of the transfer currency resources available without breaking fiscal law and monetary circulation. Ownership of an offshore company credit offers the opportunity to lead a great credit policy, minimizing taxes and loans to improve credit and financial services offered to clients. In addition, through an offshore company may grant loans with higher interests of companies located in an area with higher taxes, allowing the transfer of foreign currency in a third country, without violating tax laws and currency and reduction or exemption of tax on profits earned in a country with high taxation. The offshore companies can be used to minimize taxes for joint ventures companies. In this case, the same citizen is the owner and manager of companies, one local and one in another country.

This creates the opportunity to transfer to a third country foreign company profits in the form of taxable dividends. Later, the money may be returned to the country in which the joint venture is registered as investment and insider loans. An offshore holding company can be used to finance its subsidiaries under various jurisdictions in order to obtain tax reductions relating to interest on loans to the "mother" company.

In this case it is holding off shore in an area where it will not pay any tax or other taxes. The profit mentioned method can be used to finance other activities performed by holding or be reinvested in other purposes. Offshore private funds provide partial or total reduction of corporation tax, capital or inheritance. Furthermore, it is guaranteed distribution of income from the operation of that property in strict accordance with the desire of the owner. Offshore investment funds will not pay any tax and no higher legal fees. In addition, dividends and interest are taxed at a very low level or are exempt from taxes. Bringing together small investors in funds offer the opportunity to participate in projects bold and savings in management costs or study areas of the market. The founder is the one who enjoy the greatest benefits. He has the flexibility to conduct abroad and to proceed to the sale of shares. Manager may invest in many countries without paying taxes and can conduct multiple commercial activities.

3. THE CONTEMPORARY ECONOMY AND THE OFFSHORE COMPANIES.

The first step towards setting up an offshore company is hard enough, but in reality the establishment and management of an offshore company is nothing more difficult than an ordinary company. It is possible to increase or decrease the company's registered capital, transfer of shares and change managers more easily [3]. It can be done relatively simply, both merger and division of offshore companies. It's possible the official cancellation of offshore companies without the need for submission of a final accounting records of tax officials in the jurisdiction in which it was registered. Currently in the world there are more than 40 offshore regions offering considerable advantages for companies. These traditional tax havens are located mainly in archipelagos (eg British Virgin Islands), in the island republics (eg the Republic of Naur) or small countries (eg Panama). Permissive legislation and independence of these countries, encourages foreign investors in setting up companies within that territory. In majority of the offshore zones, operating of the companies, foreign investment security and the information secrecy are protected by law.

4. GENERAL ASPECTS CONCERNING THE TAX HAVENS.

In all tax havens, tax benefits have a legal basis [4]. For example, for companies registered in the British Virgin Islands, the tax benefits are provided by a law passed in 1984. The offshore companies pay no taxes other except for an annual tax in the amount of U.S. $ 300, regardless of turnover. In the Bahamas and Belize this tax year amounted to 100 U.S. dollars and 150 U.S. dollars in Panama. It is clear that these tax benefits are substantial compared to what tax imposed in European countries. Tax havens are usually small countries with small population, in development economy and the various services which tourism plays the most important role [5]. Offshore companies in these countries provide substantial revenues. On the one hand, it creates jobs because it requires the existence of firms, institutions registration, registered agents, banks, etc. recorded in this territory. On the other hand, due to payment obligations to the state (tax registration and re-registration) and other

charges, the population get a considerable income. British Virgin Islands has 17,000 inhabitants and presently 300,000 offshore companies are registered in this country. If every company registered on the territory pays an annual tax of U.S. $ 300, only the fees paid by offshore companies is U.S. $ 5,200 per capita.

5 . THE SYSTEM OF TAXATION APPLICABLE IN THE COUNTRY OF REGISTRATION.

The main aim of establishment of companies in offshore tax havens is to reduce taxes and to increase the benefits of the company. It should be stressed that despite the fact that offshore companies are often considered tax exempt company in any part of the world there are not companies fully and legally exempt from any tax and financial tasks.

In general, these principles apply in the areas of registration of offshore companies:

• the company is obligated to pay a fixed annual fee, independent of the turnover and profits of the company. These kind of territories are the Virgin Islands, Bahamas, Belize, etc.

• the tax does not depend on the turnover, but the company's registered capital. In Liechtenstein any foundation annually pays 0.1 % of the share capital. Are exempt from paying taxes only income derived from activities performed abroad. In countries like Panama and Hong Kong, companies can conduct domestic and commercial activities and income from them is taxed based on a linear rate, while income from abroad are exempt from tax. In Hong Kong companies must state separately the Internal Revenue Annual Report.

• taxation is based on a linear rate. One of the most popular areas is Cyprus, where offshore companies pay 4.25% of the total net profit. In these areas, teaching accounting and annual reports is mandatory.

6. CONCLUSIONS.

In recent years, there has been a series of changes in terms of the strengths of tax havens. Especially in Europe, the principle of banking secrecy is not absolute anymore [6]. EU legislation has prompted tightening of the fiscal regimes, controls and serious oversight authorities. The former tax havens areas - Lichtenstein, Monaco and

Switzerland have lost this reputation as a result of the evolution of law. Tightening the European legislation is due to loss of U.S. $ 1.000 billion yearly due to tax havens. The global economic crisis has increased pressure of governments on operators involved in money laundering. Pressures led to the transparency of banking and free access to information for the law enforcement agencies. Slowly, the other tax havens will have to do the same. In this way, law enforcement agencies will be more comfortable in such areas and the public money collected will register a significant increase.

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Pitesti, 23 - 24 May 2014

THEORETICAL AND PRACTICAL ANALYSIS OF GUILT AS AN ESSENTIAL CONDITION OR ELEMENT OF THE CIVIL LEGAL LIABILITY

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Summary: *The issue of civil guilt acquires currently a special importance and at the same time it has the chance of some progressive settlements accommodated to the dedicated solutions in the major legal systems. In the specialty literature of the country and abroad it was spoken and it is spoken about a difficulty of the guilt, by a withdrawal of the civil subjective liability, by a lessening of the social value of the guilt, as its tool to measure the antisocial behavior. Some authors from the field, on the other side, emphasize the high morality of the civil law that suppresses the guilt under various forms, making it the essential condition of the legal liability. The purpose of the present article is to highlight the peculiarities of the guilt as a condition or essential element of civil legal liability, to establish the role, the place and the possible end for this notion.*

Key words*: responsibility, civil liability, tort, guilt, civil guilt etc.*

By making use of his freedom, the man builds his own personality, but, at the same time, he must undertake the liability for his acts. Thus, the man who acts consciously is liable for his own acts and their consequences, being obliged for the reestablishment of the disturbed social balance. The real responsibility is always associated to the order of the commutative justice, which aspires to the instauration of a legal response destined to remove the effects of the prejudicial act. The relation between ethics, moral and law is thus focused on the idea of illegal act perpetrator's guilt.[1] But the illegal act and guilt are one of the conditions of the legal liability which, at its turn, takes different shapes. Out of these shapes of the legal liability, the civil liability comes out as a fundamental category, a complex institution of the civil law[2].

[1] L.-B. Boila. *Guilt, basis of the civil liability, in its both forms, in the text of the new Civil Code, as in the preceding one* ."The Law" (Romania), 2012, no.1, page 151
[2] Ioan Albu, Victor Ursa. *Civil Liability for Non-pecuniary Damage.* Cluj-Napoca: Dacia Publishing House, 1979, p. 23.

We can state that the civil liability is a shape of the legal liability consisting of an obligative legal relation according to which a person is liable for repairing the loss caused to another person by his act or damage for which he is liable according to the legal provisions[1]. The involvement of the legal liability only when guilt-related acts are committed is a social need and the assertion of liability must take in consideration an educational element. In this regard, people should exercise a diligent attitude in relation to other members of society, people should be confident, there should be a safety in relation to people's actions, given that only the acts committed with guilt are likely to attract civil liability[2]. In the field of civil legal relations when participants in these relations do not comply with the rules introduced by them by agreement or will, or by the legislator by means of regulation, there comes out the question of assessing the actions (inactions) of subjects in terms of the values that society deems valid at a certain moment in time, starting from an objective element - the human act and its effect, which is, as we have showed, always concrete, objective and, in any case, commeasurable (even if it has only a conventional character, as in the case of the non-pecuniary damage) - it is necessary to see to what extent this act is attributable to someone.

Moreover, it is necessary to investigate perpetrator's subjective and mental attitude in relation to the act and its consequences. This is, in practice, the issue of guilt. But let's take them in sequence. Analyzing the civil legislation in force (Art.215, 275 of the Civil Code of the Republic of Moldova and others), we conclude that, for the application of any form of liability, a combination of circumstances, including the presence of the following conditions: the wrongful act or nonperformance, or the improper performance or the delay of the obligations; the injury, the causal link between the unlawful act, nonperformance or improper performance and injury, and **guilt**[3] is necessary.

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[1]I.M.Anghel, Fr. Deak, M.E. Popa. *Civil Liability*. Bucharest: "Editura ştiinţifică" Publishing House, 1970, pp. 15-21, Mihail Eliescu. *Delictual Civil Liability*, Bucharest: "Editura Academiei R.S.R." Publishing House, 1972, pp. 7-8, Dumitru Vaduva, Andreea Tabacu. *Civil Law. General Theory of Liabilities.* Bucharest: Pralela 45 Publishing House, 2002, pp. 97-98.

[2]Ion M.Anghel, Francisc Deak, Marin F Popa. *Mentioned works*, p.115.

[3]Ursu Viorica. *Guilt – an essential element of the delictual civil liability in the conception of the national doctrine and of the foreign doctrines in* „Universitas Europaea XXI : The university science in the context of the European integration—

The legal literature defines guilt as "*the mental attitude of the perpetrator at the moment of committing the unlawful act or in the immediately preceding moment before the perpetration, in relation to the act and its effects*".[1]

The definition formulated in the doctrine is particularly valuable because it captures the essence of the issue, of the phenomenon, referring, on the one hand, to the intellectual and volitional grounds of any human action (" the subjective attitude"), and, on the other hand, making the connection between this "subjective" element of the human being with his act and its consequences, thus, with the objective element. The legal doctrine examines two constituent factors of guilt, namely the intellectual or the consciousness-related factor and the volitional factor.

The first is fulfilled by an internal psychic process of representation of aims, means and possibilities for reaching the aims set, combining the motivations of a possible behaviour of mental type of the causality relations between actions and their effects and the consideration of an individual's interests compared to the interests of other participants to the social life.[2] As to the intellectual factor, we pay attention to the degree of development of the power of knowledge in general, thus, the degree of development of science at a certain moment, which gives to humans the opportunity of understanding phenomena, principles, objective causality relations and helps to prevent some antisocial acts. In this context, it is worth mentioning the scientific, technical and other expert examinations on the grounds of which it is possible to determine the situation existing in a certain conjuncture of the perpetration of some unlawful acts[3].

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[1] In this regard: C.Statescu, C.Birsan. *Civil Law, General Theory of Liabilities.* Bucharest: All Publishing House, 1995, page 176. In the same regard, Fr.Deak. *Course of Civil Law, Law of Obligations, Part I, General Theory of Liabilities,* Bucharest, 1960, page 211; Traian Ionascu, *Course of Civil Law, General Theory of Liabilities.* Bucharest, 1950-1951, pag.134; L.Pop. *Civil Law. General Theory of Liabilities,* 1st tome, Iasi :Publishing House of the Foundation „Chemarea", 1993, page 229.

[2] Florin Ciutacu, Cristian Jora. *Civil Law. Theory of Liabilities.* Themis Cart, 2003, page 65

[3] C. Statescu, C. Birsan, *mentioned works,* p.183.

The second factor, and namely the volitional factor, involves the freedom of deliberation and decision-making of the perpetrator of the unlawful act which converges into a mental act of deliberation, of making a decision in relation to the behaviour that will be displayed. When there is a lack of freedom of deliberation and decision-making, we can speak of a lack of guilt[1].

Thus, guilt is a human subjective attitude towards a certain act and its effects and it is not a subjective, generic, theoretical, and ideal attitude. [2] For a correct definition of guilt it is essential to note that, obviously, guilt means a mental attitude towards the illegal act and its consequences, and namely a certain mental attitude i.e. a subjective negative attitude of ignoring the legal rules established in society, considered valid and accepted as valuable at a certain moment in time in the general axiological system of that time.[3]

Ioan-Dorel Romosan, who signed his work "Guilt in the Romanian Civil Law" was the first one to make a complete and multidimensional research of guilt in the civil law from Romania. In the above-mentioned work it is stated that, in civil law, guilt is an essential element of the liability, it turns the illicitness into imputableness, but because of the extraordinary complexity of the social life that meets the civil legal standard, one cannot always explain and outline sufficiently clearly the presence of the subjective factor criticized in human behaviours.[4] Other scientists[5] as M.Eliescu, Ion M.Angliei, Francisc Deak, Marin F.Popa, Tudor R.Popescu, Petre Anca, Traian Ionascu, Eugen A.Barasch and others, examining the civil legal responsibility, make some references in relation to the notion of guilt in the civil law as well. Constantin Statescu and Corneliu Birsan, in their work "Civil Law. General Theory of

[1] C. Statescu, C. Birsan, *mentioned works,* p.183.
[2] Dr. Ioan – Dorel Romosan. *Guilt in the Romanian Civil Law.* Bucharest: ALL BECK Publishing House, 1999, page 8.
[3] To refer to: Nicolae Popa. *General Theory of Law.* Cluj-Napoca: C.H. Beck Publishing House, 1993, page 195
[4] loan-Dorel Romosan. *mentioned works, page 8-9.*
[5] M. Eliescu. *Delictual Civil Liability. Bucharest*: Ed. Academiei Publishing House, 1972. Ion M.Anghel, Francisc Deak, Marin F Popa. *mentioned works,* Tudor R. Popescu, Petre Anca. *General Theory of Liabilities.* Bucharest: Ed. Ştiinţifică Publishing House, 1968. Traian Ionascu. Eugen A Barasch. *Delictual Civil Liability.* Fault as Element of Liability. SCJ, no.1/1970.

Liabilities"[1], have fulfilled a thorough analysis of guilt – condition or element of the delictual legal responsibility and, more generally, have referred to the guilt in the contractual civil legal responsibility.

Studying the specialty literature and acting legislation (Art.1398 to 1425 of the Civil Code of the Republic of Moldova), we noticed that the forms of guilt in the civil law have served as a basis for discussions on the use of the concept of guilt because it was determined that this notion was accompanied or replaced by several words, i.e. negligence, fault, mistake, which have different meanings in different countries. This raises the need for a terminological unification, for a more correct application of civil legal liability. [2] Borrowing the term "guilt" in criminal law was regarded with reservations in the specialty literature[3], estimating that the notion of "fault" would have been more appropriate, as it was traditionally set in private law matters[4]. The only certain effect of this borrowing is the "confusion in the civil legal language" which will inevitably lead to the reopening of the existing controversies on the content and finality of the concept.

In the game of the liability mechanism, fault is an essential element that was studied extensively and deeply in the specialty literature. We can state that the foundation of civil liability depends on the way of interpretation of this notion. Over time, a series of definitions were outlined, each making a substantial contribution to the interception of the special features of guilt. The data were located between the mental attitude of the offender in relation to the offense and its effects or the abnormality of his damage-causing behaviour[5]. In the French legal literature[6], the definition of delictual guilt was influenced by the tripartite structure of the institution of liability, conditioned by the existence of an

[1]C. Statescu, C. Birsan. *mentioned works,* p.175-197.
[2]T.Ivancova. *Guilt- a condition of the delictual civil liability in the contemporary doctrine of different states,* "Law and Life" 2012, no.3, page 45
[3]S. Neculaescu. *New Civil Code, tradition and modernity as to the regulatory legal terminology*, in "Law" no.12/2010, p.24-26. of Ursu Viorica. *mentioned works,* page 407
[4]L.R. Boila. *Guilt – the eternal "lady" of the delictual legal liability*, in "Romanian Journal of Private Law" no.2/2010, p.35. of Ursu Viorica. *mentioned works,* page 407
[5]L.-B. Boila, *mentioned works,* page151
[6]J.Carbonnier. *Droit civil. Les biens. Les obligationes*, (*Civil Law. Assets. Liabilities*)Paris: Quadrige/Puf Publishing House, 2004, p.2294. from Ursu Viorica. *mentioned works,* page 408

injury, the commission of a fault and the causality relation. In this regard, it was underlined that one fault is a characteristic condition of liability for the own acts, the other two elements being found in all cases of liability.

In the German doctrine and the doctrine from other countries with German legal guidance[1], the theory of the "Aquilian relativity" was stated, referring to the distinction between the relative or absolute character of the civil guilt. According to this theory, the breach of the liability imposed by a rule of conduct is not culpable and, therefore, is not generating liability on certain persons who have no discernment of their actions, in relation to which protection should be guaranteed. This theory has found an echo in the doctrine of other countries of German orientation, such as Sweden, Turkey and Austria, without being dedicated in legislation. It has also been accepted in the Netherlands and was "welcomed" in Common Law (USA and England). [2]

Russian doctrinarians, discussing about guilt as a condition of civil legal liability, are concerned about the issue of presumption of guilt. Thus, the opinions on this subject are divided into several directions. The majority considers that guilt is presumed in civil law[3]. Some argue that the Civil Code of the Russian Federation contains special rules providing for the need of proving guilt[4]. Others think that it must be prescribed by law and needs not be proven in court proceedings[5].

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[1] Art.823, Chapter 2 of the *German Civil Code*. from T. Ivancova . *Guilt- a condition of the delictual civil liability in the contemporary doctrine of different states,* "Law and Life" 2012, no.3, page 47

[2] T. Ivancova . *mentioned works,* page 47

[3] I.B. Novitsckiy, L.A Lunts. *Обязательственное право*. (*Law of Obligations*) Moscow, 1950, 319 in D. Bodganov. *Вина как условие гражданско-правовой ответственности (анализ теории и судебной практики)*.(*Guilt as a condition of civil legal liability(Analysis of theory and legal practice*) Russian Judge, 2008, № 4, page 20.

[4] Federal Law of the 10th of January, 2003 № 18-ФЗ *Устав железнодорожного транспорта Российской Федерации*. (*Charter of the Railway Transport of the Russian Federation*) СЗ РФ, 2003, № 2, page 170.

[5]V.K. Babayev. *Презумпции в советском праве*. Учебное пособие. (*Presumptions in the Soviet Law*. Study Guide) Gorky, 1974, page 14. N.N. Tsukanov. *О критериях правовой презумпции*. Законотворческая техника в современной России: состояние, проблемы, совершенствование. Сборник статей. (*On the criteria of the legal presumption.* Lawmaking technique in modern Russia: condition, issues, improvement. Collected Works)N.Novgorod, 2001, page 504. O.A. Kuznetsova. *Презумпции в гражданском праве*. (*Presumptions in Civil Law*) Sankt-Petersburg, 2002, page 25-26.

As to the definition of guilt, in the French doctrine[1] it was considered that it would consist in the breach of an existing obligation, and another author has analyzed the guilt from three points of view: a material element, a human element and a sociological element. The author believes that the guilt is "the conjunction of these three elements, each of which is a specific aspect." [2] If we talk about the material element, then we can lay stress on the physical act that causes damages and which consists in a certain human behavior that can be interpreted not only as an action, but also as an inaction. The action can be physical, psychological, intellectual, and the inaction may consist of an omission, non-compliance with a legal obligation, or in an abstention, when there is a legal obligation to act.[3]

As to the human element or, as other authors[4] call it, the psychological element, or simply will, is the one (human element) or (will) that allows the distinction between different types of guilt and that determine guilt imputability to a certain perpetrator: ***intentional guilt*** (characterized by an intention of causing harm. Typically, when such a type of guilt is proven , the consideration of other elements becomes practically deprived of interest, since the defendant fails to produce evidence of a justifiable act, both the causality relation, as well as the unlawful nature are presumed) ; " ***inexcusable guilt*** " (which means the guilt involving the awareness of the likelihood of causing a damage and the acceptance of this situation regardless of the reason or, in the concept adopted by law , the voluntary and exceptionally serious guilt) ; ***serious guilt*** (the guilt assimilated by deception and is found usually at professionals) ; ***unintentional guilt*** (encountered in the material of quasi-crimes, consisting of negligence or incaution . It has some degrees of assessment and namely *culpa lata (serious guilt), culpa levis (slight guilt),* and *culpa levissima (very slight guilt)).*

The following element is the unlawful (sociological) element. The

[1]M.Planiol. *Etudes sur la responsabilite civile*, (*Study of the Civil Liability*) in "Revue Internationale de Legislation et de Jurisprudence"(*International Journal of Legislation and Jurisprudence*), 1905, p.283. from Ursu Viorica. *Mentioned works,* page 409
[2]R.Demogue, *Traite des obligations en general*, (*Treaty on Obligations in general*)3rd tome, Paris, 1923, page 367 and the following from Ursu Viorica. *Mentioned works*, page 409
[3] Paula Mircea Cosmovici. *Civil Law. Real Rights. Liabilities. Civil Code. 3rd Edition.* Copyright 1998 –ALL BECK Publishing House, page 27
[4] Paula Mircea Cosmovici. *Mentioned works,* page 27

latest French doctrine presents at least three points of view. For some, the essential condition is that the offender comes out of the scope of the law. For the others, it is necessary that the offender affects the subjective right of another, and, finally, a third opinion, which seems to prevail, is that the perpetrator must have deviated from the behavior that would have been shown by a good parent in family, i.e. an abstract model of behavior.

As to the concept of «violation ", we should note that the Principles of European Tort Law[1] preserve this notion in the Art. 4.102, according to which: "A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct." Not less, the term "violation" includes generally both the intentional violation, i.e. the *dolus*, trickery or intention and the unintentional guilt, i.e. the fault.

The Romanian legal doctrine has paid attention as well to the issue of replacing the term of guilt with the one of violation/mistake, as Art. 998 of the Romanian Civil Code mentions the violation, which can include the intentionally committed act and the one committed by fault by means of negligence or imprudence[2].

Respecting the traditional course of things, we use, however, the terms of guilt and fault, not removing the possibility of their replacement with a closer term, fit to the real situation by a legislator in a future regulation.

The range of problems of the civil fault acquires new meanings at present: some authors[3] are proponents of the theory of diminishing role of guilt in support of objective grounds, which would impair the diminution of the role of the preventive and educational function of liability and others[5] present the idea that the content of the civil fault in

[1]European Group on Tort Law, *Principles of European Tort Law*, Ed. Spinger, Vienna, 2005. from Ursu Viorica. *Mentioned works*, page 409

[2] M. Eliescu. *Mentioned works*, p. 170 and the following from Florin Ciutacu, Cristian Jora, *Civil Law. Theory of Liabilities*, Themis Cart, 2003, page 142

[3] P.Jourdain. *Les principes de la responsabilite civile*, (*Principles of Civil Liability*)3rd edition, Paris: Dalloz Publishing House, 1996, p.17-20. G.Viney. *La faute* (*Fault*) in "*Traite du droit civil*"(*Treaty of Civil Law*), under the supervision of J.Ghestin, Librairie Generale de Droit et de Jurisprudence(*General Library of Law and Jurisprudence*), Paris, 2006, p.400-413., from L.-B. Boila. *Guilt, basis of civil liability in its both forms in the texts of the new Civil Code as in the preceding one, "The Law" (Romania), 2012, no.1, page 151*

the sense of abandoning the traditional *mental attitude* of the perpetrator, focused on an objective element, the abnormality of his damage-causing behavior, should be re-qualified.

In conclusion, we can however say that, in the specialty literature from the country and from abroad, they have talked and still talk about a dead end of guilt, of a set-back of the subjective civil liability, about a decline of the social value of guilt, in its quality of a tool of measuring the antisocial behaviors.[1]

Some authors launched out a real "crusade" against guilt, as grounds of the civil liability, forecasting for it, sooner or later, an inevitable end.[2] This fierceness could be explained if we take in consideration the indisputable virtues of the objective civil liability, but, however, these virtues do not justify the conclusion that the history of liability based on guilt has ended. We consider that one can talk more of a limitation of the application field of the liability based on guilt and, as a consequence, of a cessation of a quasi-exclusive domination of guilt, perceived as grounds for civil liability[3].

Thus, the issue of the civil guilt acquires a special importance at present and has, at the same time, the chance of finding progressive solutions, adapted to the solutions devoted to the great systems of contemporary law.

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[1] T. Ivancova *Peculiarities of guilt – a condition of the application of the contractual civil legal liability* "Law and Life", 2012, no.2, page 31.
[2] Sache Neculaescu. *Delictual Civil Liability.* Bucharest: Publishing and Press House "Şansa", SRL, 1994, p.148.
[3]Ioan-Dorel. Romosan *mentioned works***,** p.20.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE STAFF OF THE EUROPEAN PUBLIC POSITIONS

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Abstract:

The European public position represents an administration of the mission to serve the institutions stated by the Union's Treaties. Although these missions have evolved in time with the major steps of the European construction, it is still possible to separate a few that are part of the essential prerogatives: creating legislation, applying it and controlling its application, management positions. They all have been part of the attributions of the European public position; their importance in the administration has had a tendency to increase in the past few years.

The European public position exists for more than half a century and has known in all this time deep transformations that were strengthened in the past ten years. These evolutions regarded both the statute of the public position, as well as the configuration of the institutions that it serves in order to achieve the quantitative and qualitative composition of the personnel animated by the concern to serve an ideal of peace and prosperity of the Union and its partners.

European civil servants are agents subjected to the statute and integrated in one of the European Union's institutions as civil servants or temporary agents.

Beside the European public positions subjected to the statute above mentioned, there are also other positions subjected to the other statutes: agents of the European Bank of Investments, national detached experts, European MP's assistants etc.

Key words: *European public position, statute of the civil servants, European civil servants, categories of personnel, European public institutions*

1. THE HISTORY OF THE EUROPEAN PUBLIC POSITION

The model of the communitarian public position is an original one. It had a slow birth since 1950, when the notion of European public position did not existed, but there was the model of the international public position, which represented the roots of the new notion[1]. At the same time, it has at origins its own physiognomy being influenced by the numerous national systems of the Western-European states, sometimes

[1] P. Mahoney, *La fonction publique européenne: une itroduction.Origines, caractérestiques et perspectives pour l'avenir*, în *Vers un modèle européen de fonction publique?*, Bruylant, Bruxelles, 2011, p.6-4

opposite, thus forming a synthesis of the French system of public service career and not that of a framework for employment or contracts. The recruitment is influenced by the German system of national examinations[1]. Finally to all these are added managerial elements resulted from the British experience[2].

2. THE MODEL OF THE EUROPEAN PUBLIC POSITION BETWEEN 1952 AND 1986

The public position is traditionally defined as a tension between the service to the sovereign and the fight for autonomy and independence.

Starting with 1920, with the creation of the United Nations Society the international servants appeared as parts of the state with certain independence towards it.

At the European level there was a cross-border or multinational institutional logic, considering the multinational feature of this group. It must be formed so that it is compatible with the patterns, by definition preexistent, regardless we are talking about international models (international or multinational organizations) or national models (the systems of the public service present in Europe).

The debate was made with emergency when this issue arisen on the European political agenda in Luxembourg, at the end of 1952. First of all, the debate was centered about the very nature of the system that should be maintained for the above mentioned servants: a contractual system, close to the private system and/or to that of the existing international organizations, or an elderly based system, more precisely based on the career and statute. Once the issue has been resolved in the favor of the second alternative, in 1956 was adopted the first statute of the European Community personnel (CECO). Subsequently, in 1962 was adopted the statute of the European Atomic Energy Community (EAEC) and European Economic Community (EEC) personnel. We shall limit here in stating that until 1962 there was a permanent movement in defining the notion and legal framework of the European public service evolving from the contractual nature of the relations of the European

[1] *Ibidem*, p.13.
[2] See also J. Boulouis, *Droit institutionnel de l'Union Européenne*, 6e édition, Montchrestien, 1997

public servant with the European institutions to the statutory level, basically being perfected in 1962, after which it has suffered numerous modifications[1]. Regarding the content of the statute of the European civil servant there is a major closeness between it and the stature of the French civil servant.

3. THE RENEWED INSTITUTIONAL AND STATUTARY FRAMEWORK

The European public position is meant to serve the institutions whose mission and functioning framework are defined by treaties. The successive enlargement starting with 2004 and the entrance into force of the Lisbon Treaty lead to important evolutions from which we shall retain here only those related to the European public position.

4. GENERAL PRESENTATION OF THE European PUBLIC POSITION

The European Union has more main institutions and different specialized bodies. Upon their budget depends the number of the servants, nowadays being almost 47.000 servants of different categories (26.000 for the Commission, 6.000 for the Parliament and 3500 for the Council)[2], to which are added 3.000 agents (14.000 for the Commission and more than 1.300 for the Central European Bank.

5. THE DIVERSITY OF THE SITUATIONS

Each European institution is competent to recruit and to manage its own personnel. They can use their personnel specifically, namely depending on their missions and needs, without being subjected to foreign rules or to the will of the Member States.

This management is independent towards the Member States and enters in the competence of the European competent authority and their appreciation cannot be censured by a judge.

[1] During 1969 and 1996 over 70 modifications were brought by regulations. See also V. Vedinaş, C. Călinoiu, *Statutul funcţionarului public european*, Universul Juridic Publ. House, 2nd Edition, Bucharest, 2007

[2] P. Mahoney, *op. cit.*, p.16

It is enough to explain how may vary the contractual stipulations and statutory provisions whose ensemble represents the general regime and the particular regimes of each institution's personnel.

The practice and the law of the European public position initially were not uniform between the institutions, or, even sometimes, within each of them.

The rights and obligations attached to the service within a European institution require the definition of the position as a European public agent. This wording is not consistent is all cases because the European institutions use different categories of personnel with different attributions. On the other hand, they are modified all the time, the European administration being compelled to adjust itself in the context where it acts.

Also, the European jurisprudence determines a normal trend of aligning the civil servant statute to the contentious solutions thus equilibrating the interests of the organizations and the guarantees ensured for their agents.

The doctrine has tried to define the European civil servant. Thus, we agree to the widest definition, because it has the credit to cover different situations. According to such definition, the European civil servant is any person by whom the European administration acts.

Fall into the category of the European civil servants the following: permanent, auxiliary or temporary civil servants, occasional collaborators, technical experts, and, sometimes, some members of the presidential cabinets. By noting these clarifications we shall be able to determine the notion of the "European staff". Fundamentally, however, the European public law feature depends on the nature of the attributions performed by a person.

6. CIVIL SERVANTS

The permanent mission, the stability of the structures and the application of the budgetary principles explain the emergence of permanent positions in almost all European institutions. It is thus explained the distinction between the civil servants appointed in those positions, namely with exclusive, durable and continuous titles and the other agents.

In a strict meaning, the European civil servant is the agent of a European institution enjoying the fullness of his rights and is liable for all his obligations resulted from his job description[1]. This overall situation is a model close to the regimes applicable to other categories of personnel.

The personnel statute represents the legal framework of reference for the labor relations between the institutions and their agents, especially when they are permanent.

6.1. NORMATIVE STAFF (ADMINISTRATORS)

After the 2004 reform it has moved from four to two categories of personnel (administrators and assistants).

In some institutions, the personnel is composed by civil servants, either their employment is statutory as in most cases of the European Union or, more rarely, is contractual. To these civil servants are offered, by contract or by decision, permanent positions, namely integrated in charts, thus stated in the organization's budget (Art 6 of the EC statute) and are remunerated.

These civil servants belong to some different categories. The administrators have positions as directors, of design, of study, as well as linguistic or scientific positions, such as jurists, economists, auditors, translators, interpreters and intermediary positions: head of unit or superior positions: director, general director. They held positions requiring a high level of qualification. The assistants have application positions, technical or executive, such as the position as secretaries, administrative assistants, archivists, etc.[2]. Also, their number may vary depending on the institution, and their situation is stated by the personnel statute (Art 1, Art 4 and Art 6 of the EC statute). They concur exclusively, durably and continuously to the performance of the European public service.

The statute of the European civil servants and the regulations of application offer to the European civil servants a situation which, in many points of view, derogate from the national law and entails for the governments and organization specific and important obligations. They

[1] A close definition was given by Art 2 of the Law No 84/16 of 11 January 1984 on the statutory provisions regarding the public state position (French national law). See also G. Peiser, *Droit de la fonction publique*, Dalloz, 20e, Paris, 2010, p.9-12
[2] P. Mahoney, *op. cit.*, p.29

enjoy a statute of European public law having immunity towards the national jurisdiction.

For the stability of the other categories personnel is applied a more flexible and less stringent regime. It is thus sometimes tried the restoration of the contractual situations. In this regard, for example, the European Council authorized the Union to recruit contractual personnel (Regulation No 723/22 March 2004).

6.2. HIGH CIVIL SERVANTS

Politically, a particular place is offered, within the European institutions, to high administrative authorities and to the personalities invested in jurisdictional positions.

They are the general directors, UN commissioners or other persons holding a position in the general secretariats, these positions being placed beyond the current administration of an institution. They have the attributions to reflect, have initiative and negotiate with governments, according to the structure and customs of each institution.

Generally it is attributed a governmental, constitutional and diplomatic statute of this high responsible, sometimes recruited from politics or from the high national civil servants, due to a serious competition between states. Their situation is stated by statuary or derogative conventional provisions.

However, in any of these situations, regardless of their origin, these dignitaries must be seen as European agents of the highest and complete rank. The regime applicable must be inspired from the principles of the international public position, with all the protections offered, with the only reserve stated by contracts, statutes and primary regulations.

As members of the European jurisdictions for them it must be recognized a privileged situation not only towards the governments, but also towards the heads of the European institutions.

If they cannot be seen as European civil servants, they are not less owners of the positions, of responsibilities, and so of privileges with international feature. Is it the same for the agents of the above mentioned graft jurisdictions.

7. AGENTS WHO ARE NOT CIVIL SERVANTS

Without enjoying the quality and privileges of the civil servants, different categories of personnel effectively compete to the European collaboration and are sometimes attributed with important tasks. Thus, have emerged multiple categories of personnel entrusted with missions regarding the object and needs of each institution.

All these persons have, within the European administration, a job connection that offers to their situation the feature of originality. The names may vary according to the statute: experts, linguists, consultants, auxiliaries, temporaries, volunteers, interns, replacements, counselors, different specialists. Some of them are volunteers, while most of them enjoy contracts. The duration of these engagements is usually limited.

8. CONTRACTUAL, TEMPORARY AND AUXILIARY PERSONNEL

In order to face the temporary obligations or depending on the budgetary provisions of the institutions and personnel charts, these often use agents whose position is not mandatorily stated by the administrative and budgetary structure.

The situation of these collaborators is stated by contractual stipulations.

In 2004 the European Union has created a new category of non-regular personnel: contractual agents (Regulation No 723/2008[1]).

Without a precise contrary provision, the contractual agents cannot invoke the benefit of the statute, because it is not applicable for them.

The auxiliaries could not, based on their recruitment method and even if their employment is permanent, invoke the rights of the civil servants appointed in permanent positions, nor demand the assimilation of their services with those of the regulars, or to obtain the completion of their employment for as long as the administration did not committed itself to such acknowledgement. In this regard, the administrative court stated in the cases requiring the censor of the institutions attributing to

[1] Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, OJ L 124, 27 April 2004

agents a series of short-term contracts, during their entire career, without having the right to a social security, to pension etc.

In exchange, even if these temporary agents do not enjoy the statutory rights and benefits of the civil servants, they must undertake to comply with all the regulations, norms, instructions, procedures and directives of the European institution. The European Union does not assume the health insurance for the interns, or the expenses due to accidents or diseases which could intervene during the internship.

9. OCCASIONAL COLLABORATORS

Many institutions resorted to personnel recruitment on the spot, namely without offering them a desk, but letting them work in their own place. They are: projects personnel, conference organizers, consultants assigned with a precise job, high rank experts, specialists assigned with periodical and definitive tasks, maintenance personnel, workers etc.

These agents are often subjected to the local law, at least partially, meaning that their situation is stated by the legislation in their workplace. This regime is completed with its subjection to the competence of the national courts, applying the national law, which sometimes compels the European institution, despite its immunity and privileges to carry out their decisions.

For the occasional collaborators, the relation with the European public institution is established by contracts. They do not have the features of the European civil servants. The agents thus recruited do not have a definitive position in the budget or personnel chart of the European public institution.

Some institutions appeal to national servants for cooperation, research and technical expertise missions or for the sessions of the commissions etc. These collaborators do not enjoy the quality as public European agents, but, during their mandate, they are often protected as if they would be entitled to invoke it. The abundance of these missions has determined the European Community to appeal to numerous national experts, detached from the administration of the Member States. They are appointed for three years and remunerated by their origin state (EC Commission 26 July 1988).

After all, for the agents who are not servants is applicable, in different degrees, the internal law of the European Union.

On the points not covered by the employment contracts, the practice and jurisprudence tend to apply for all collaborators, when they act on the behalf of the institution, the general principles of the European public position, and even sometimes to offer them the benefices of the immunities necessary to fulfil their mission. In case of a doubt or contractual silence, an agent is presumed to have been recruited with the right to pension; any contrary interpretation of the employer demands an express waiver to the rightful pension of the agent.

10. EXPERTS

As an effect of the development of the direct or indirect operational activities of the European public institutions, the European public position was enriched with a new numerous and progressive category of agents, the experts.

In order to face all the needs from their areas of activities, the institutions are determined to recruit personnel specialized in different areas: administrative, financial, technical, education etc. We are not talking only about high rank servants, but also about management or execution personnel. It is for instance the case of the states which are now in the procedure of negotiations for EU admission, for this needing to adjust their legislation in all areas of activity in order to correlate it with the European one, to train the technical and administrative personnel etc. in this regard all states have required experts, consultants, counselors etc.

In the main, the technical assistance positions are temporary and consultative: the situation for which they intervene is not durable and the institution must be able to adjust the difficulties arisen in its activity. The experts' missions are thus different than the normal positions in the European administration.Some missions are very brief, others are longer. Numerous technical assistants enjoy the renewal of their missions. Even if he is recruited for a specific mission, the European expert must not be confused with the servant, because his relation with the public institution is not the same. These agents are generally assimilated to the owners of limited engagements. The specific features of these engagements are: must not exceed a total of four years of service; their salary scale is very flexible and many conditions are negotiated between the parties.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THEORETICAL ASPECTS REGARDING THE INTERNSHIP CONTRACT AS ADDENDUM TO THE INDIVIDUAL LABOR CONTRACT

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Abstract:

A major modification of the labor Code by Law no. 40/2011 was that of the introduction for the graduates of higher education institutions of the internship period. The provisions of art. 31 paragraph 6 in the labor Code, according to which "the effectuation of the internship stage is regulated by special law" are concretized in Law no. 335/2013 regarding the effectuation of the internship stage for graduates of higher education institutions which complete the brief provisions of the labor Code in this regard, specifying the necessity of concluding an internship contract with the conclusion of the individual labor contract. Such a contract cannot be regarded as an addendum to the individual labor contract or as a clause, as the probation period (art. 31 in the labor Code) nor as a professional formation clause to the individual labor contract (art. 20 paragraph 2 letter a in the labor Code), but it is an independent civil contract, named, as an accessory to the individual labor contract.

Key words: *internship period; graduates of higher education institutions; internship contract.*

A major modification of the labor Code by Law no. 40/2011[1] was that[2] of the introduction for the graduates of higher education institutions of the internship period (except those professions where internship is regulated by special laws, as is the case of: chartered accountants and authorized accountants, medical doctors, notary, lawyers and judicial executors, financial auditors, magistrates, probation service staff etc.) [3].

[1] Published in the Official Monitor, part I, no. 225 from 31 March 2011.
[2] Ion Traian Stefanescu, *Principalele aspecte teoretice si practice rezultate din cuprinsul Legii nr. 40/201 pentru* modificarea si completarea Legii no. 53/2003 – Codul muncii in Dreptul no. 7/2011, p. 14.
[3] Alexandru Ticlea, *Tratat de drept al muncii*, edition VI, publishing house Universul Juridic, Bucharest 2012, p. 416.

Art. 31 paragraph 5 of the labor Code did not make any other specifications regarding the internship period than to institute the obligation of the employer to release the internship certificate stamped by the territorial work inspectorate in whose jurisdiction are the headquarters of the employer.

The provisions of art. 31 paragraph 6 in the labor Code, according to which "the effectuation of the internship stage is regulated by special law" are concretized in Law no. 335/2013 regarding the effectuation of the internship stage for graduates of higher education institutions[4] which complete the brief provisions of the labor Code in this regard, specifying in art. 1 paragraph 2 that "the purpose of effectuating the stage is to insure the transition of the higher education institutions graduates from the education system to the labor market, to consolidate the professional competences and abilities in order to adjust to the practical demands and requirements of the work place and for a more rapid work integration, as well as for acquiring experience and seniority in the work field and, according to the case, in a specialty".

The internship period is legally defined by art. 2 letter f, as being "the time period between the date of employment and the date of completion of the internship stage which is concluded with the release of a certificate signed by the employer".

Prior to this regulation, in the doctrine was mentioned that the stage "begins at the same time with the conclusion of the individual labor contract in a position corresponding to the profession acquired through university studies by the graduate[1] in cause" [2] andthat it "involves the continuation of the professional training from the practical point of view at the work place"[3].

It was also shown that the "law does not assimilate the stage of the probation period"[4], opinion which was reproached with the fact that "if it was admitted that the common law rules regarding the probation period are not applicable to them, their juridical situation would be

[1] Published in the Official Monitor, Part I, no. 776 from 12 December 2013.
[2] Ion Traian Stefanescu, *Tratat teoretic si practic de drept al muncii*, Publishing house Universul Juridic, Bucharest, 2012, p. 263.
[3] Alexandru Ticlea, *Tratat…op. cit.*, p. 421.
[4] L. Dima, *Aspecte de noutate privind contractul individual de munca in urma modificarii Codului muncii prin Legea nr. 40/2011,* in the Curierul Judiciar no. 2/2012, p. 90.

legally unprotected…at least until the appearance of the special law, the duration of the stage period is of 6 months for the higher education graduates and there are applied the common law rules regarding the probation period, respectively art. 31 paragraph 3"[18].

As a novelty element the normative act provides in art. 3 paragraph 1 that "the internship period takes place based on an activity schedule approved by the employer, at the proposal of the department manager in which the intern performs his activity". The latter has the obligation according to art. 4 paragraph 1 "to work for and under the authority of an employer, for an individual or legal person, in exchange of a retribution called salary, based on an individual labor contract and the internship contract".

From the analysis of these provisions we can notice that the higher education graduate can be employed also by an individual performing independent economic activities or a liberal profession, which implies that the mentor, meaning "the person designated by the employer who coordinates the intern during the internship period and who participates at the evaluation activity[2]", to be the individual who has the quality of employer which can create difficulties in the application of the provisions regarding the final evaluation of the intern.

At the same time, there is mentioned an internship contract, which according to art. 16 paragraph 1 "finishes together with the conclusion of the individual labor contract".

From here results that such a contract cannot be deemed as an addendum to the individual labor contract or as a clause, like the probation period (art. 31 from the labor Code) or as a professional training clause of the individual labor contract (art. 20 paragraph 2 letter a from the labor Code), but it is a contract by itself of civil nature, designated, with accessory character to the individual labor contract.

As specified in the specialty literature, "the stage excludes *de plano* the use of the probation period for these graduates"[3], at their debut in the profession.

Even if art. 16 paragraph 2 mentions that the duration of the internship contract is of 6 months, such a provision cannot lead to the

[1] I.T. Stefanescu, *Cateva aspecte controversate din Codul muncii si Legea dialogului social*, in Dreptul no. 8/2012, p. 116-118.
[2] Art. 2 letter d.
[3] Ion Traian Stefanescu, *Tratat…op. cit.*, p. 263

qualification of the individual labor contract concluded by the intern as being a labor contract for a determined period, but one concluded for an undetermined period.

Also as novelty can be appreciated the provisions of art. 5 paragraph 1, according to which "at the proposition of the department manager where the intern performs his activity" is designated a mentor by the employer "from the qualified employees, with professional experience of at least 2 years in the field where they will perform the internship stage". It is also mentioned that, as mentor, this employee can only coordinate and supervise maximum 3 interns.

For the accounting experts and the authorized accountants it is provided that the stage consists of the effectuation of professional works, under the guidance and control of the stage guardian[1], and for the interns legal advisers under the control of a guiding legal adviser[2], and for the lawyers under the guidance of a qualified lawyer (master).

Art. 6 provides an incompatibility with the mentor quality of the employee who "was sanctioned with one of the sanctions provided in art. 248 paragraph 1 letter b-d in the labor Code…, and the disciplinary sanction was not radiated, within the conditions of the law".

Results that such an incompatibility does not intervene if the employee designated as mentor was sanctioned with a warning, according to art. 248 paragraph 1 letter a, such a warning of the employee not being a real and true disciplinary sanction[313].

Among the obligations of the mentor is also (art. 7) the general one, to coordinate the activity of the intern, to propose means of resolution of the works attributed to him and to supervise the manner in which are performed the attributions of the position occupied by the intern.

It is expressly provided in art. 7 letter d that the mentor is a member in the evaluation committee which is constituted according to art. 13 and the implementation rules.

A specific provision is that in art. 9 paragraph 1, according to which "in case of termination or modification of the individual labor

[1] Alexandru Ticlea, *Tratat…op. cit*., p. 417
[2] Dan Top, *Particularitati ale raportului de munca al consilierilor juridici*, in Revista romana de dreptul muncii, no. 2/2004.
[3] Dan Top, *Dreptul muncii – Dreptul securitatii sociale*, eddition II, publishing house Bibliotheca, Targoviste, 2013, p. 292.

contract of the mentor which has an impact on the performance of the stage, the mentor has the obligation to make a report on the internship period effectuated by the intern up to that moment". When the work report is concluded, regardless of the reasons imputable to the mentor or not, or at the change of the work place (for example in case of transfer), there must be drawn up a report regarding the activity of the intern, which is forwarded according to art. 9 paragraph 2 to the department manager where he performs his activity, naming another mentor for the stage period remained unfulfilled.

The same situation is provided by art. 10 and when the mentor is disciplinary sanctioned with one of the sanctions making him incompatible with such a quality.

The stage contract is concluded, as mentioned in art. 16 paragraph 3, mandatorily in writing, in Romanian, being an *ad validitatem*[1] condition, as in the case of conclusion of the individual labor contract. For both contracts the obligation of drawing them up in writing belongs to the employer.

Through the internship contract there are established the rights and obligations of the parties regarding the effectuation of the internship period, which can be completed, as specified in art. 17, with the provisions of the collective labor contract and the internal regulation applicable to the employees.

The rights and obligations of the parties in the internship contract are provided in detail in articles 23-26. The intern has the following rights:

- to beneficiate of the coordination and support of the mentor;

- to have an established activity schedule according to his job, whose level of difficulty and complexity to increase gradually during the internship period; About this we must mention that according to art. 3, the activities schedule comprises the "quantifiable performance objectives and indicators based on which the evaluation is done, as well as "the planning of the activities which will be performed, according to the level of the competences and practical abilities targeted to be acquired during the internship period".

- to beneficiate from an objective evaluation;

[1] Alexandru Athanasiu, *Comentariul art. 16 din Codul muncii*, in the Curierul Judiciar, no. 2/2012, p. 83.

- to have the necessary time for individual preparation, for the consolidation of the competences and acquiring practical skills necessary for the job;

- to be granted, by the employer, the access to the information sources useful for his improvement and which will allow him consolidation of knowledge;

- to participate at the professional training forms organized for interns; In this sense the provisions of art. 21 must be analyzed, which provide that if the intern has beneficiated from professional formation initiated by the employer, he cannot have the initiative of terminating the individual labor contract for the period established in the addendum, which involves its conclusion for the internship period.

- to receive the evaluation report and the certificate of completion of the stage. It is mentioned that the evaluation report of the evaluation committee, which is communicated to the intern on the date of its completion by the committee (art. 14 paragraph 1) can be contested with the legal representative of the employer, the latest in the working day following the acknowledgement (art. 14 paragraph 4).

We can appreciate that the provisions of art. 14 are a real contesting procedure, specifying not only the term for settlement of the contestation (the employer being obligated to settle the contestation, according to paragraph 5, the latest in the last day of the stage), but also the possibility that the intern has, if unhappy with the answer received at the contestation, to address, according to paragraph 6, in term of 30 days, to the "competent instance in the matter of work conflicts". Because the law does not specify, we appreciate that the competent instance is the court in whose area of activity resides the intern.

The intern has also correlative obligations of these rights, respectively:

a) to prepare professionally in the field for which he effectuates the internship;

b) to organize an evidence of the effectuated activities;

c) to follow the attributions given by the mentor and the hierarchically superior manager within the organizational structure where he effectuates the stage;

d) to consult the mentor for the realization of the works assigned by the department's manager;

e) to keep confidentiality about all aspects regarding the performed activity, in accordance with the rules established by the employer; We consider it is not imposed to conclude a confidentiality contract, because such an obligation is implied;

f) not to exercise, during the stage period, activities which constitute unfair competition to the employer; And such an obligation we believe is implied in the individual labor contract concluded with the intern, as mentioned in the specialty literature "during the execution of the individual labor contract, the fidelity obligation of the employee towards his employer also includes the non-competition obligation in the execution of the work attributions"[1].

g) to participate in the evaluation process. A problem which can appear in practice is that of not appearing at the final evaluation.

Regarding the employer, he has, according to art. 24 the following rights:

- to establish for the intern, in the job description, the attributions in the field in which the stage is performed;
- to verify the theoretic and practical knowledge of the intern in the work process;
- to exercise control over the manner of fulfillment of the attributions corresponding to the job;
- to apply corresponding sanctions to the disciplinary deviations. We mention that we are talking about the disciplinary sanctions provided in art. 248 paragraph 1 in the labor Code, because in the internal regulation there cannot be provided other sanctions.

The obligations of the employer are provided by art. 26 and consist of:

a) designating a mentor which would coordinate and support the intern for obtaining the objectives and performance indicators established in the performance schedule of the internship period; even if the law does not expressly provide we deem that the employer has to issue a disposition (decision) in this sense.

b) to establish for the intern an activity schedule in the field in which the stage is performed;

[1] Raluca Dimitriu, *Obligatia de fidelitate in raporturile de munca*, Publishing house Tribuna Economica, Bucharest, 2001, p. 14-15.

c) to insure the appropriate equipment – logistics, technical and technological – necessary for the capitalization of the theoretic and practical knowledge received by the intern during the stage;

d) to evaluate the knowledge of the intern at the end of the stage period;

e) to release to the intern the certificate for the period in which he performed the activity based on the stage contract, the acquired competences and practical skills and other mentions;

f) not to use the intern for other activities than those provided in the contract. Besides, in art. 4 paragraph 2, it is provided the interdiction for usage of the interns in other activities or exercising other attributions which are not provided in the job description or stage contract.

During the execution of the contract, the monthly basic salary of the intern, established in the individual labor contract, is (art. 18) the one negotiated by the parties, for an 8 hours program per day, respectively 40 hours in average per week. It is also stipulated that the provisions concerning the salary are completed with the ones from the applicable collective labor contract.

Art. 19 paragraph 1 provides that the stage period is suspended in the case of cessation of the individual labor contract, or if "the intern is in medical leave for a period larger than 30 days", a period larger than 30 days not being considered in the calculus of the stage period.

Regarding the cessation of the stage contract, art. 22 provides that this contract can rightfully end with the parties' agreement on the date agreed by them or at the initiative of one of the parties.

If the stage contract ceases for reasons which cannot be attributed to the intern, he can continue, according to art. 22 paragraph 2, the effectuation of the stage period, with the condition that, within 60 days, to engage with another employer and conclude with him a stage contract for the unfulfilled period.

A special situation of cessation of the individual labor contract is provided by art. 20, in the sense that "at the end of the internship period, when the evaluation was finalized without its promotion, the individual labor contract can cease exclusively by written notification, without notice, at the initiative of any of the parties, without the necessity of motivating it", being practically a similar situation to that of discharging the employee for professional inadequacy at the end of the probation period.

In such a case, the employer can only sign in once for the same position, a higher education graduate who would effectuate the stage based on an internship contract. It is of course a measure meant to prevent possible abuses from the employers.

In article 27 is provided that the financing of the stage can be done from the following sources: proper budget of the employer; special European fund; budget of the unemployment insurances; sponsorship from individuals of legal persons; other sources.

For the purpose of stimulating the employers, except those in the public sector, to conclude contracts with the interns, is provided by art. 27 paragraph 2 that they will beneficiate monthly, of a sum equal to 1,5 times the value of the social reference indicator of the unemployment insurances and stimulation for occupation of the work force, provided by Law no. 76/2002 regarding the insurance system for unemployment stimulation for occupation of the work force[1].

It also mentions that "the employers cannot receive double financing for the same person". It refers of course at the possibility of subsidizing the work places in the case of employing higher education graduates, according to art. 80 paragraph 1 letter c from law no. 250/2013 for the modification and completion of Law no. 76/2002 regarding the unemployment insurances system and stimulation of the work force[217].

In accordance with art. 30, the employers who beneficiate from the amount mentioned above, are obligated to maintain the work reports of the interns during the stage contract period. If the individual labor contract ceases at the initiative of the employer, prior to the date provided in the stage contract, he is obligated to restitute (art. 31) to the county agency for the occupation of the work force, the sums collected from the budget of the unemployment insurances for the respective intern, plus the reference interest of the National Bank of Romania, in force at the date of cessation of the work report.

Such a stimulated can only be beneficiated from if the work report of the intern is suspended, and the amount is granted proportionally with the time worked by the intern. In the situation where after the cessation of the stage contract, at the initiative of the employer, also ceases the individual labor contract, the employer cannot beneficiate

[1] Published in the Official Monitor, Part I, no. 103 from 6 February 2002, with ulterior modifications and completions.
[2] Published in the Official Monitor, Part I, no. 453 from 24 July 2013.

for the same position of another measure of stimulation of the occupation of the work force provided by the law.

The work inspectors are authorized, according to art. 33, to control the manner of conclusion, execution, modification, suspension and cessation of the individual labor contract and the internship contract.

Regarding the evaluation of the intern "the evaluation committee draws up, as provided in art. 8 paragraph 1, 5 working days before the termination of the internship period, an assessment report comprising the following elements: a) description of the activity performed by the intern; b) degree of fulfillment of the objectives and performance indicators established in the activity schedule developed during the internship period; c) competences and skills acquired by the intern, manner of fulfillment of the attributions corresponding to the job and the clauses of the internship contract; d) conduct and degree of implication of the intern during the stage period; e) conclusions regarding the development of the stage period; f) other mentions."

Based on the assessment report drawn up by the evaluation committee, the employer issues a certificate of completion of the stage.

10 working days before the termination of the stage period, the intern draws up, according to art. 11 paragraph 1, the stage report. It comprises the description of the activity schedule performed by the intern during the stage period and is taken into account by the evaluation committee, in the final evaluation of the intern and is transmitted by the intern to the department manager where he performed the activity.

Chapter III of the analyzed normative act refers to the evaluation procedure of the intern. The evaluation of the intern's activity is realized (art. 12) based on:

a) analyze of the degree of fulfillment of the objectives and performance indicators established; b) appreciation of the level of consolidation of the competences and of acquirement of the practical skills necessary for the exercise of an occupation in the field where he effectuated the stage; c) stage report.

The manner of constitution of the evaluation committee is established, according to art. 13 through the methodological norms of application of the legal provisions.

In accordance with art. 14 paragraph 1, the report of the evaluation committee for the stage period is communicated to the intern on the date of its completion by the evaluation committee. It is also

mentioned that the promotion of the evaluation is finalized with a certificate signed by the employer, case in which, the stage period constitutes seniority in that specialty, and failure of the evaluation is finalized with the issue of a certificate acknowledging the finalization of the stage.

The intern can contest (art. 14 paragraph 4) the assessment report with the legal representative of the employer, the latest in the working day following the date of acknowledgement. The employer is obligated to solve the contestation the latest in the last day of the stage. After receiving the answer to the contestation, the intern can address to the competent court in the matter of work conflicts, in term of 30 days from the receipt of the answer to the contestation.

The competent instance is the court in the area where the complainant resides, respectively the work litigations and social insurances section of this court.

In term of 5 days from the completion of the stage, as provided in art. 15, the employer has the obligation to issue to the intern the certificate of completion of the internship, stamped by the territorial work inspectorate in the territorial area of the employer's headquarters.

The county agencies for the occupation of the work force, respectively of Bucharest city, have the obligation (art. 32 paragraph 2) to constitute a data base with the beneficiaries of this legal act.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

CONSIDERATIONS REGARDING THE ADMINISTRATION OF THE SIMPLE COMPANY IN THE REGLEMENTATION OF THE NEW CIVIL CODE

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Abstract:

Law no. 287/2009 on the Civil Code has brought significant amendments regarding the companies' condition in general, causing changes in commercial law. If initial the Civil Code started doubtful enough regarding the companies, apparently regulating two categories of companies (companies in the Civil Code and trading companies), by art. 77 of Law no. 76/2012 for the implementation of the Code of Civil Procedure remedied these gaps, replacing in all normative acts contents the collocation " trading company / trading companies" with " company / companies regulated by Law no. 31/1990".

However remained the simple company as successor of former civil company to take over the obligation to make available for the subjects a form of unincorporated association but which borrows the traits of companies regulated by Law no. 31/1990 in terms of their administration.

Key words*: simple company, administration, director*

Until the entering in force of the Law no. 287/2009 regarding the Civil code, there was a distinct difference between the two major categories of companies, in the previous regulation. Thus, there were business corporations, regulated by the Law no. 31/1990, which had a legal personality, and non-stock professional corporations, regulated by the Civil code from 1864, which didn't have a legal personality, as they were limited at the size of the memorandum of association.

After the new regulation was in force, a slight lack of correlation of the new Civil code could be observed, already having the norms in activity.

Therefore, if the texts of the new Civil code would have been very rigidly interpreted in comparison with the provisions of Law no.

31/1990 regarding the business corporations[1], we could have concluded that there are two types of legal personality companies: a category regulated by the new Civil code, and another category regulated by Law no. 31/1990.

According to this interpretation, the present conclusion could have been by analysing art. 1888 of the Civil code, as well as art. 2 from Law no. 31/1990. Following these dispositions, when it comes to companies, the Civil code referred to the unlimited companies as being general limited partnerships, based on shares, and also as partnerships limited by shares.

Of course, this awkwardness of the regulation cannot be interpreted in the sense that the effects of applying the norm could have been unlawfully converted from the intention of the lawmaker, even though there was the possibility of a better correlation of the new regulation with the one that already existed. This correction was made, though late and in an abnormal manner, from the legislation technique point of view, through art. 77 from Law no. 76/2012, in order to apply the Civil procedure code, replacing from the content of all the legislative acts the phrase 'business corporation/corporations' with 'corporation/corporation regulated by Law no. 31/1990'.

ABOUT THE MANAGEMENT OF SIMPLE COMPANIES

Although the simple company, as a form of company that replaces the non-stock professional corporation from the previous regulation, has no legal personality, being unable to participate on its own, as a subject of distinctive right, at the civil circuit, the Civil code provides in art. 1913 – 1919, directive regarding the way in which this corporation will be managed.

According to an opinion[2], even though the simple corporation does not benefit from a legal personality, it must be represented in legal relations with the third parties. That being said, I assess that one cannot talk about a representation of a simple corporation in its relations with

[1] The name of the law is the one before the entering into force of the new Civil procedure code and of the law of application, as through the latter the word 'business' has been removed.

[2] Gh. Piperea in Fl.A. Baias, E.Chelaru, R. Constantinovici, I. Macovei, *The New Civil Code. A comment on articles*, Ch. Beck Publishing, Bucharest, 2012, p. 1935.

third parties because that does not exist as a distinctive right subject, as it is in fact a representation of the associates in their relations with third parties.

According to the text of art. 1913 of the Civil code, the managers of the simple corporation will be assigned through the memorandum of association or through separate documents. These decisions only borrow the mechanism that applies in the case of companies regulated by Law no. 31/1990, separate documents, in this case the decisions of the shareholders regarding the company, based on art. 1910 and following the Civil code.

Also, the aspects regarding the way in which the mangers organise their activity, the limits of the power of attorney and any other aspect regarding the management of the company will be established in the same manner, through the memorandum of association or through separate documents.

Regarding the legal nature of the mandatory contract of the manager of the simple corporation, I assess that it is double, from a contract as well as a legal point of view.

The content of the mandate is firstly contractual, as the obligations of the manager are a result of the power of attorney given by the shareholders through their will, materialised in the memorandum of association or in the separate documents adopted by the Shareholders' Assembly. Actually, this is also the specific of the relations regarding the candidate search reports, as the action of the principal is adjacent to the will of the agent, which is manifested through the naming of the principal, the establishment of his power of attorney and the area of his actions, his recall.

Nevertheless, the content of the power of attorney is not exclusively contractual, as the public order interest for the position of manager determines the regulation of some obligations through law. Thus, art. 1914 of the Civil code establishes that the management powers are offered by law, which also indicates a legal judicial nature of the contract of mandate.

As a result, the specificity of the legal relations between the company and the manager are those of a power of attorney with double legal nature – contractual and legal.

The manager is the carrier of the will of the shareholders, even though he doesn't participate at its development (as he is not a

shareholder), he is the one that expresses directly the relationships with the third parties, he is not a mere principal (with purely contractual obligations), but the carrier of the shareholders' will, by expressing and executing their will.

The rule established through the Civil code is the one according to which the company is managed by the shareholders, who have a mutual power of attorney, one for the other, and the management through persons that are not shareholders is the exception[1].

According to 1913 paragraph (2) of the Civil code, the managers of the company can be shareholders or foreign the company, physical or legal persons, of Romanian or foreign citizenship. These decisions are also taken from the Law no. 31/1990, as their application is different from the companies that have a legal personality. Thus, regarding the simple company, the management is done, usually, as it results from art. 1913 paragraph (3) from the Civil code, which establishes that only through a contrary decision from the memorandum of association, can a foreign manager be assigned to the company. If the shareholders do not provide this type of derogatory decision, the management will become their responsibility, as each of them will have a mutual power of attorney for managing, one for the other.

All the operations made by the manager will also be valid for the others, even though they haven't expressed their consent. Nevertheless, it is concluded that the operations will only be for the administration and preservation, and not for decision, in which case the consent of the shareholders would be mandatory. Those documents for the decisions that are adjacent to the company's activity or to the object of the memorandum of association, meaning those operations provided and consented by the shareholders prior to their conclusion, will also be included in the same area as the documents for management.

Regarding the limits of the manager's power of attorney, art. 1914 paragraph (1) of the Civil code shows that, in lack of an opposition from the shareholders, the sole limit of the power of attorney is the company's interest. Nevertheless, the formulation lack legal precision, because it represents the interest of a person that does not exist – the company. It would have been more suitable to talk about the interest of

[1] Gh. Piperea in Fl.A. Baias, E.Chelaru, R. Constantinovici, I. Macovei, *op. cit*., p. 1935 and the following.

the shareholders, taking into account the lack of legal personality of the simple company.

Regarding the responsibility of the manager, he will be liable to the shareholders and not to the company, as it is shown in art. 1915 paragraph (1) of the Civil code, because, as I have shown before, the simple company does not have a legal personality [as it is required by art. 1892 paragraph (1) pf the Civil code], is not a subject of a distinctive right and it cannot make the manager liable, as the competence of use is lacking.

The liability of the managers is joint if they have worked together, as the responsibility proportional to each manager's guilt can be established as the prejudicial act is accomplished.

If the shareholders assign more managers to manage the simple company, but they omit to mention the mean in which they will develop their activity or the powers that each of them have been given, each of them managers could manage the interest of the company by themselves and in good faith.

If the shareholders decide that the managers should work together, the managers will be obligated to take the decisions together, even if one of them cannot act. Regarding this provision of the text, one can add the decisions from the power of attorney, because the lack of a manager could determine a blockage of the company, if the talking of the decisions is requested in unanimity, which I assess that is getting far from the purpose of the management. Thus, according to art. 2017 paragraph (2) of the Civil code, the agent can strain from the instructions received, namely to work together with the other managers, if it would be impossible for him to give notice beforehand to the shareholders and if it is possible to presume that they would approve the exception, if the circumstances that justify it would be known. So, in this situation, a blockage of the simple company can be avoided, if one of the managers could not act, which would lead to the blocking of the activity.

In the same manner, art. 1917 of the Civil code establishes that the rule of majority or of the unanimity for taking a decision by the managers can be broken, only in the cases of force majeure, when the absence of one such decision could cause severe damage to the company. I believe that this decision is much too restrictive towards the provisions from the mandate contract that I have mentioned, which would reduce the possibility for the waiver from the majority of the unanimity solely in

limited cases – force majeure – which could cancel the interest of the shareholders and delay the taking of important decisions for them.

Concerning the cease of the manager's power of attorney, according to art. 1914 paragraph (2) of the Civil code, it can be cancelled according to the general rules regarding the mandate contract – *ad nutuum*. The shareholders can anticipate other means for ceasing the power of attorney, even wavering of the common right.

A discussion can be carried out regarding the prohibition established by art. 1918 from the Civil code, which forbids the associated that are not managers as well, to take acts upon deciding against the goods of the company. A first mention would be, again, related to the simple company that, because it doesn't have a legal personality, it also doesn't have the capacity to use and, also, it doesn't have assets and it would not be able to have goods, as it is wrongfully provided in art. 1918 of the Civil code.

On the other hand, the document for decision are usually, outside the management acts and they won't be able to be fulfilled by the manager with the exception when they would be comprised in the area of the normal activity and they would be in the interest of the shareholders.

Lastly, art. 1919 of the Civil code mentions the possibility of representing the company in legal matters by the managers with a right for representation, or in the lack of naming some managers, through shareholders, if there is no contrary stipulation in the memorandum of association, which would also give the right for representing only to some of the shareholders. Again, the same problem arises: how can an entity that doesn't have a legal personality, nor a competence for use, be represented? Of course, the solution would be to consider that the representation comes for the shareholders and not for the simple company.

CONCLUSIONS

Along the problems that I have tried to signal, related to the new regulation, that preferred a solution for reproducing some decisions from Law no. 31/1990, that unfortunately doesn't apply and that are efficient in the case of companies that have a legal personality, we must state that the texts of the new Civil code that refer to the memorandum of

association and to the simple company also has some good parts, they are more clear, some aspects and derailed and expanded.

Nevertheless, some texts lack precision, do not have a practical application and refer to situations that cannot be talked about, if we were to report to the subject treated.

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Pitesti, 23 - 24 May 2014

THE FORM AD VALIDITETEM ATTRIBUTE EXCLUSIVE OF LEGISLATOR IN THE 2009 CIVIL CODE

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Abstract:

The form ad validitatem can be considered one of the limits of freedom of contract. Although the will is an essential factor of the contract and, on the basis of freedom of contract, consistently stated that the parties are free not to enter into contracts, to enter into desired contracts, both named and unnamed, with wanted contractual partner as well as to introduce all sorts of clauses, even not provided for by law, for the type of contract concluded, with only one condition to not prejudice the mandatory regulations or aspects related to public order or morals, the legislator does not allow parties to raise, through their freely expressed will, the form of a certain legal act, which according to law is not solemn, to the state of prerequisite for the valid conclusion of the respective act.

Keywords*: contract, voluntary form, freedom of contract, limits, enforceable title.*

Along the requirements or the substantive issues that the law imposes for the validity of any legal documents, the lawmaker has also instituted certain formal requirements, for various purposes, such as: for the purpose of ensuring the validity of the legal document (the said *ad validitatem* or *ad solemnitatem* requirements), for the purpose of ensuring the evidentiary hearing or for proving a legal document (the said *ad probationem* requirements), for the purpose of achieving the opposability against the third parties of a certain legal document.

The doctrine defined the form of the civil legal document as representing the 'mean of externalising the manifestation of will, made with the intention to create, adjust or dissolution of an actual civil legal report'[1].

[1] Gabriel Boroi, Carla Alexandra Anghelescu, *Civil law course. General part*, 2nd edition, revised and added, Hamangiu Publishing, Bucharest, 2012, page 176.

The rule, instituted by the lawmaker in art. 1178 of the Civil code[1], in the subject of the form for the validity of the legal documents is the one of consensualism. 'Through the principle of consensualism one understands that the only condition necessary and sufficient for concluding an agreement is the simple act or externalisation of free and uncoerced will of the contracting parties; the concordant wills of the parties are not obligated to take a special form of externalization'[2].

Article 1242 paragraph (1) of the Civil code institutes a true exception from the principle of consensualism, when it decides that 'it is struck by the absolute nullity of the agreement concluded in the lack of the form that the law undoubtedly requires for its valid conclusion.'

For the state in which the parties will opt for the written form of the document, for the purpose of observing/recording/validating the said document, the documents that make such an occasion can be under the private signature or in true documentary evidences, each having its legal value (art. 1241 from the Civil code). As I was saying, the written form can be imposed by the lawmaker, for the purpose of ensuring the evidentiary hearing or for the validity of the document. For example, in the case of an agricultural lease, according to the provisions of art. 1838 paragraph (1) of the civil code, the written form of the agricultural lease is required *ad validitatem*. In other cases, as the sale of succession rights, marriage convention, lease agreement, trust or the sale of real estates, the validity of the documents is conditioned by the authentic form.

Depending on the root or source, the form of the legal document can be[3]:

- legal (imposed through a legal decision);
- voluntary or conventional (imposed by the contracting parties).

Regarding the form agreed by the parties, we see that according to the dispositions of art. 1242 paragraph (2) of the Civil code, 'if the parties have agreed that the contract will be concluded in a certain form, that is not required by the law, the said contract will be considered as

[1] The freedom of form: 'The agreement is concluded through a simple agreement of the wills of the parties, if the law does not impose a certain formality for its valid conclusion'.
[2] Liviu Pop, *Civil law treaty. Liabilities. Volume II. The agreement*, Universul Juridic Publishing, Bucharest, 2009, page 389.
[3] Gabriel Boroi, Carla Alexandra Anghelescu, *op. cit.*, page 177.

valid even if the form is not abided'. In other words, we conclude that the formality through which the parties could make conditions, solely through their will, the validity of a certain legal document lacks the efficiency that they counted upon.[1]

The argument of the lawmaker is hardly accessible[2]. What could have been the reason for limiting the principle of liberties for the legal document, when the sole obstacle is the abidance of public order and good morals?

Let's imagine the situation when the parties agree with the conclusion of a contract (for which the law does not request the form *ad validitatem*), establishing the rights and obligations that constitute its effects, but they also agree that the said agreement will be considered as validly concluded solely when it shall be made up in its true form.

Of course, we will think that the parties have taken into account the various advantages of the true document, which are constantly highlighted by the specialised literature[3]: ensuring the liberties and the certainty of the consent; warning the parties on the special importance that certain legal documents have on the assets; the easiness of proving the content, the rights and the obligations assumed; the easiness of the authorities assigned with the surveillance and control of certain activities and/or people in checking the reality and legality of the documents concluded etc.

A strong argument could also be the state of enforceable title that some civil legal documents acquire, according to the law, for the fulfilment of some functions provided by the law.

I will further give an example, by presenting some legal novelties on the subject, regulated by the Civil code from 2009:

- the decisions of art. 1798 of the Civil code, which applies the executive force of the lease agreements regarding the commitment to pay the rent on the terms and in the means established in the agreement or, in

[1] Titus Prescure, Roxana Matefi, *Civil law. General part. The persons*, Hamangiu Publishing, Bucharest, 2012, page 172.

[2] The solution for validating the agreement for the lack of a form agreed by the parties is considered to be 'arguable' in the recent doctrine. See Sache Neculaescu, *The sources for the liabilities in the Civil code art. 1164-1395*, C.H. Beck Publishing, Bucharest, 2013, page 289.

[3] Titus Prescure, Roxana Matefi, *op. cit.*, page 171; Gabriel Boroi, Carla Alexandra Anghelescu, *op. cit.*, page 178; Petrică Truşcă, Andrada Mihaela Truşcă, *Civil law. General part*, Universul Juridic Publishing, Bucharest, 2012, pages 194-195.

lack of them, according to the law. The executive power of the lease agreements is solely recognised in the cases where it fulfils the conditions prescribed by the law; true document or document under private signature, registered at the tax administration. Because the text cannot make the distinction, in order to be enforceable, it is resulted that all the lease agreements concluded through a private signature document must be registered at the tax administration, even though the person that is leasing is a professional that pays taxes on profit and doesn't pay a separate tax for revenues obtained from rents (for example, a company that leases spaces from an office building)[1].

Thus, the person that is leasing is exempted from formalities and additional expenses, as he is not obligated to request in court the ordering of the renter to pay the rent, as he can request, according to the law, the forced execution of the payment for the due rent in the terms of the lease agreement.

- According to the provisions of art. 1809 paragraph (2) and (3) of the Civil code, the lease agreement concluded for a determined period of time represents an enforceable title for the obligation to restore de asset, if it was determined through an authentic document or, if applicable, through a document under private signature, recorded at the tax authority. These dispositions can eliminate the possible abuses of the tenant that, upon the expiration of the term, refuses to fulfil one of the primary obligations – the return of the asset leased.

The legal solution is also useful from the perspective of avoiding the time and financial expenses that would be involved by the obtainment, though legal procedures, of the tenant's evacuation[2].

- in accordance with the provisions of art. 1816 paragraph (3) of the civil code, the lease agreement concluded for an undetermined period of time, determined through an authentic document or, if applicable, through a document under private signature, recorded at the tax authority, is enforceable regarding the obligation to return the asset, if it is ceased through cancellation.
- The dispositions of art. 1845 of the Civil code institutes the enforceable title of the agricultural, if it is concluded in the authentic

[1] Decebal-Adrian Ghinoiu, in the collective work *The New Civil code. Remarks on articles*, Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), C.H. Beck Publishing, Bucharest, 2012, page 1837.
[2] *Idem*, page 1847.

form or recorded at the local council[1], for the payment of the lease on the terms and in the means established in the contract. Thus, the lessee is exempted from the fulfilment of some additional formalities and from the occasional expenses from the obtainment of the enforceable title against the lease holder.

- In the case of the bailment agreement, art 2157 paragraph (1) from the Civil code institutes, in case of cease through the death of the bailee or through the expiration of the term, regarding the obligation to return the asset, the enforceable title if it is concluded in the authentic form or through a document under private signature with a certain date. According to art. 2157 paragraph (2) of the Civil code, the enforceable title of the bailment agreement subsists even when a term for the return has not been mentioned, with the exception when the use for which the assets was burrowed has been provides or when the provided use is permanent. Also, because according to art. 2156 of the Civil code, the bailer has the right to ask the return of the asset beforehand if the bailee dies, the bailment agreement, concluded in the authentic form or through a document under private signature with a certain date, will represent the enforceable title against the bailee's inheritors, for the return of the asset[2].

- Based on art. 2165 of the Civil code, the lease for use agreement concluded in the authentic form or through a document under private signature with a certain date represents the enforceable title, in the conditions of the law, in of cease due to the death of the loaner or through the expiration of the term.

According to the Civil code from 2009, the free will of the parties cannot go up until when the parties can condition, solely through their will, the validity of a certain legal document of a certain form of expressing the consent. The *ad validitatem* forms cannot be instituted by the lawmaker.

[1] Article 1845 of the Civil code maintains the solution provided on paragraph (5) of art. 6 from Law no 16/1994 regarding the enforceable title of the agricultural lease concluded in a written form and recorded at the local council, regarding the payment of the leasehold and it also extends the enforceable title to the agricultural lease concluded in the authentic form.

[2] Diana Ungureanu, in the collective work *The New Civil code. Remarks on articles*,, Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *op. cit.*, page 2139.

CONCLUSIONS

We consider that the regulation on the subject should not have excluded the possibility of the parties of the civil legal document, to raise, through their will, the form of a legal document that, according to the law, is not solemn, at the rank of an essential condition for the valid conclusion of the said document. In supporting this ideas, there are also the express provisions of art. 1185 of the Civil code: 'when, during negotiation, a party insists on reaching to an agreement on a certain element or on a certain form, the agreement shall not be concluded until reaching a consensus regarding them'; thus, the parties are free to condition the final agreement for certain subjective elements or to a certain form of the agreement. A party can insist that the future agreement be concluded in the authentic form, even though the law does not impose it.

By abiding the free will of the parties, the Italian Civil code recognises the 'conventional form' as being imperative in art. 1352 that provides that: 'if the parties have agreed through a document to adopt a determined form for the future conclusion of an agreement, it is presumed that the form was established for the validity of the latter.'[1] In the same sense are the dispositions of art. 125 and art. 154 paragraph (2) of the German Civil code, art. 16, from the Swiss Civil code of liabilities, as well as art. 37 from the European Agreements Code (The Project of the private persons from Pavia).

The text of art. 1242 paragraph (2) from the present Romanian Civil code represents a limitation of the contractual freedom principle. Even though it supports its own decisions regarding the agreement on the theory of autonomy of will, proclaiming that only the will of the private persons creates the right, that anyone can have any behaviour he/she wants, with a limit, generically expressed, of not harming others[2], through this regulation, the lawmaker of 2009 does not defend this point of view. This orientation breaches the supreme will of the parties,

[1] „Se le parti hanno convenuto per iscritto di adottare una determinata forma per la futura conclusione di un contratto, si presume che la forma sia stata voluta per la validità di questo".

[2] Paul Vasilescu, *Civil law. Liabilities (in the regulation of the new Civil code)*, Hamangiu Publishing, Bucharest, 2012, page 313.

without being able to deduce through reasons, the necessity of the state's control.

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Pitesti, 23 - 24 May 2014

MODALITIES OF ADMINISTRATION OF THE HILD'S GOODS AS PART OF THE PARENTAL AUTHORITY

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Abstract:

Parents have the duty and the right to care of their minor children's goods. This refers to an extremely personal competence and consiquently a nontransferable one, either with an onerously or free title, fact that does not exclude the possibility to pass for payment third persons to do certain actions that refer to administration, on the condition that these persons must be achieved under their guidance and coordination.

Parental authority regarding the child's goods or the patrimonial syde refers to his patrimony and regards the civil right connections namely: the administration of the minor's goods; the legal representation of the minor younger than 14 years; the agreement of the civil juridical acts of the minor younger than 14 years.

Both component parts, respectively the administration of the child's goods and the representation or the agreement of the civil juridical acts of the infant have their own legislative source in Art.501 Civil Code. Our intervation is established only to the administration of the child's goods.

Key words*: simple administration, concurrent administration, administration under judicial control, limits.*

1. PRELIMINARIES

Parents have the duty and the right to care of their minor children's goods. This refers to an extremely personal competence and consiquently a nontransferable one, either with an onerously or free title, fact that does not exclude the possibility to pass for payment third persons to do certain actions that refer to administration, on the condition that these persons must be achieved under their guidance and coordination.

Parental authority regarding the child's goods or the *patrimonial syde* refers to his patrimony and regards the civil right connections namely:

- the administration of the minor's goods;

- the legal representation of the minor younger than 14 years;
- the agreement of the civil juridical acts of the minor younger than 14 years[1].

Parents' rights and duties regarding the child's goods are ruled by the principle of patrimonial independence between parents and children that imposes parents not to have any rights over the child's goods, not even the child to have any right over the parents' ones, excepting the right of heritage and maintanance (Art.500 Civil Code). On the other side, those two components of the patrimonial side, namely administration of the child's goods and legal representation of the approvement of the minor's civil legal acts, have their legal source in Art.501 Civil Code, which took over the provisions of Art.105 Family Code, statuing: ”Parents have the right and the duty to administrate their minor child's goods, as well as to represent him in the civil juridical acts or to approve him these acts, according to the case”. After the age of 14 years, the minor exercises his rights by himself and, in the same way, he carries out his duties, but only with his parents' agreement and, according to the case, of the guardianship instance [Art.501 par.(2) Civil Code, the old precaution being found again in Art.105 par.(2) Family Code, Art.124 par.(2)].

As against the third persons of good faith any of the parents which fulfils alone a current use for exercising the rights and carrying out the paternal duties is that he has the other parent' assent too [Art.503 (2) Civil Code].

In fact, this problem is not laid but only in those situations – relatively rare – when the child is the owner of some goods. In practice

[1] Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, X ed. revised and enlarged by M. Nicolae and P. Truşcă, Ed. Universul Juridic, Bucharest, 2006, p. 334; E. Chelaru, *Drept civil. Persoanele – în reglementarea NCC, 3rd* ed., Ed. C.H. Beck, Bucharest 2012, p. 66 ş.u.; C.T. Ungureanu, *Drept civil. Partea generală. Persoanele – în reglementarea noului Cod civil,* Ed. Hamangiu, Bucharest, 2012, p. 62 ş.u.; O. Ungureanu, C. Munteanu, *Drept civil. Persoanele – în reglementarea noului Cod civil, 2nd* ed. revised and enlarged, Ed. Hamangiu, Bucharest, 2013, p. 160 ş.u.; E. Florian, *Dreptul familiei – în reglementarea noului Cod civil,* ed. a IV-a, Ed. C.H. Beck, Bucharest, 2011, p. 354; C. Irimia, în *Noul Cod civil. Comentariu pe articole,* coord. Fl. Baias, E. Chelaru, R. Constantinovici, I. Macovei, Ed. C.H. Beck, Bucharest, 2012, p. 547; M.A. Oprescu, *Ocrotirea părintească,* Ed. Hamangiu, Bucharest, 2010, p. 185 ş.u.

this problem occurs more particularly in the orphans' case, who have their part from the heritage of one earlier dead parent. However it is still possible that a minor had got, from his grandparents or from other relatives or friends, generous gifts. It is not excluded the fact that the minor had stocked savings as a result of his carried on work.

2. THE SIMPLE ADMINISTRATION IN CONNECTION WITH PRACTISING IN COMMON

Firstly, the administration of the minor's patrimony must be considered like belonging in the base situation that Art.795-800 Civil Code take as a starting and comparison point. In this sense the Civil Code disposes that the parents' rights and duties to have charge of the child's goods submit to the rules established for the administration of the child's goods by guardianship excepting the drawing up of the inventary if the child does not have any other goods than those ones of private use (Art.502 Civil Code)[1]. Then, concerning the legal conditions of the disposal acts, these are the same with that one established in matters of guardianship (Art.144 Civil Code) excepting the fact that it is not necessary the agreement of the family council because this one cannot be instituted but only in the minor's guardianship[2].

Law submits the administration of the minor's patrimony to a kind of administration named *simple administration*, when parents exercise in common the paternal authority.

This connection determines punctually three series of cases in which the administration is simple.

Nowadays, as well as in the past, we speak, firstly about the legitimate legal family's case, where father as well as mother are alive and none of them is in any situation unable to exercise the paternal

[1]In the Argentinian law the child's goods administration belong to the parents without be necessary a formality to come into their mandate possession. Anyway this general rule has an exception. In the case of goods from marital community, inheirted by the children through succession after her husband's decease, survivour parent must to make an inventory of all that goods in three months after decease, under penalty of losing the beneficial (art. 296, C. Civ. argentinian). In this case the goods from the marital community goes to an confusion between these and those that belong to the parent, confusion which the law wants to avoid from the beginning. Making the inventory has an character of precondition to disposal of goods to parent.

[2] E. Florian, *op. cit.*, p. 245.

authority: parents live toghether in the family; none of them is in the incapacity to manifest his own wish, none was sentenced for desertion of family, none lost the right to exercise the paternal authority by delegation, interdiction or decay. The family situation is complete. It is the reference situation, the simplest one.

By an outstanding innovation, the new Civil Code has established or extended, between divorced parents or illegitimate parents, the possibility of exercising in common the paternal authority opening in this way the way of the simple legal authority that accompanies it.

However, at the bottom of the administration of the minor's patrimony lie two principles:

1. Until his civil majority, the minor is in an incapacity of exercise: he cannot administer his patrimony by himself, as long as he reaches the age of eighteen years.

2. By compensation, law has decided to entrust his goods to his parents and to make by this thing the attribute of the paternal authority. Named protectors of the child's person, parents have the second duty, but a natural one, that of being the trustees of his patrimony.

The object of the administration is not only the carrying out of the proper acts of administration, but also, generically, the administration of the patrimony, task including disposal acts.

In common exercising of the paternal authority, equality between parents becomes perfect. Father and mother are both of them legal administrators.

In this way, they take part on the same footing at the minor's representation.

But, in practising the representation, we find again the combination of different methods of administration.

As an element of novelty, regarding the administration of the minor's goods Art.142 Civil Code establishes: "(1) The tutor has the duty to administer with good faith theminor's goods. With that end in view, the tutor acts in the capacity of an administrator charged with the *simple administration* of the minor's goods, the previsions of the 5th title from the 3rd book being applied adequately, excepting the case in which by this present chapter it stipulates differently[1]. Therefore, as a general rule the

[1]For an comment of the First Title, "The administration of another person's goods", art. 792 ş.u. C.civ., L. Mirea, in *Noul Cod civil. Comentarii, doctrină şi jurisprudenţă, op. cit.*, vol. I, p. 1112; The administration of another person's goods in the quebecuaz law,

administration of thechild's goods extends over all his goods".

As an exception, the goods acquired by the minor as free goods are not submitted to the administration, but only if the testator or the donor stipulates otherwise. These goods are administrated by the trusty or by the person appointed by the disposal act or, depending on the case, named by the instance of guardianship [par.(2) of Art.142 Civil Code].

Briefly the duties of the parents – administrators charged with the *simple administration* of someone else's goods are the following ones:

- to make all the necessary acts for conserving the goods, as well as the useful acts for these ones could be used in accordance with their usual destination [Art.795 Civil Code];
- to pick the fruit of the goods and to exercise the rights due to the administration of these ones [Art.796 par.(1) Civil Code][1];
- to cash the administered debts delivering legally binding adequate receipts and to exercise the rights due to the movable values that he has in administration, as well as suffrage, the right of conversion and that of redemption [Art.796 par.(2) Civil Code];
- to continue the way of utilization or of exploitation of the frugifere goods without changing their destination without the authorization of the instance of guardianship [Art.797 Civil Code];
- to invest the sums of money found in administration in accordance with the provisions reffering to the investments considered secure; the investments established periodically by the National Bank of Romania and the National Committee of Movable Values are presumed secure (Art.831 Civil Code);
- to modify the investments made before he has got his quality or made by himself in the position of administrator.

In the position of administrators, parents will be allowed to deposit the sums of money in a credit or ensuring institution or in an organism of collective investment, as far as the deposit is repayable at sight or as a result of a notification of utmost 30 days. At the same time, they will be allowd to make savings for longer periods of time as far as

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see I. Boți, V. Boți, *Codul civil din Quebec: sursă de inspiraţie în procesul de recodificare a dreptului civil român, i*n SUBB nr. 1/2011, p. 57 ș.u.

For detalis regarding exercise of guardianship on the minor's goods (including the previous regulation), see L. Irinescu, în *Noul Cod civil … op. cit.*, vol. I, p. 173-184; O. Ungureanu, C. Munteanu, *Drept civil. Persoanele, op. cit.*, p. 280-281.

these are completely guaranteed by the Deposit Guarantee Fund in the Banking System, or depending on the case, by Protection Fund of the Insured [Art.833 par.(1) and (2) Civil Code]. Finally, we also mention the disposals of Art.810 Civil Code, that gives parents the right to stay in justice for any wish or action with reference to the administration of goods and may interfere in any wish or action having like object the administered goods.

Then, in the position of administrators of the minor's goods, parents will be allowed to deposit the sums of money that are given to him at a credit or ensuring institution or in an organism of collective investment, as far as the deposit is repayable at sight or as a result of a notification of utmost 30 days [Art.833 par.(1) Civil Code]. At the same time, the tutor has the right to stay in justice for any wish or action with reference to the administration of goods and may interfere in any wish or action having like object the administrated goods.

Then, as an administrator of the minor's goods parents will be allowed to deposit the sums of money that are comitted to him in an institution of credit or of insurance or in an organism of collective investmentin proportion as reimbursable at sight or as a result of a notification not more than 30 days [Art.833 par.(1) Civil Code]. As well, the tutor has the right to stay in the justice for any petition or action having like object the administered goods (Art. 810 Civil Code);he is justified to cash the administered debts, to exercise the rights due to the movable values that he has in administration as well as the right to vote,that on conversion and the right to redemption [Art.796 par.(2) Civil Code].

Parents are kept to act in the administration of the minor's goods with the diligence of a good owner, namely as if he would do it if he administered his own goods, with honesty and loialty – Art.803 Civil Code – and to avoid the conflicts of interests between his duties and his own interests (Art.804 Civil Code).

Consequently the policy of the administration of the minor's goods is perectly levelling because father and mother, both of them administrators and legal representatives, have the same powers. But the paternal action takes more forms.

For certain acts (for a usual administration), the equality is put into a competitive practice, by the offer made to one or to another of the parents, indiscriminately, to initiate a certain act acting alone. For other

more serious acts, the parents' equality consists of the necessity of the approval of both of them.

So we find, in their complementary function incitement to initiative, the guarantee weighting, the two main registers that form the frame of the tipology of the administration methods: the competitive administration and the common administration.

But the conditions become more complicated by the necessity of a judicial approval for the most serious acts, becoming, in this way a trilogy.

At last, the administration system contains three groups, three stagies which correspond to a gravitation scale of judicial acts: for the less serious ones we have the *competitive administration*, for more serious acts we have the *common administration* and for the acts still more serious, we have *the common administration* under a judicial control.

3. THE COMPETITIVE ADMINISTRATION (THE INDIVIDUAL INITIATIVE OF FATHER OR OF MOTHER)

This one disposable equally both, for father and for mother, permits each of them to act on one's own account.

It relies on a legal assumption of power stipulated by Art.503 par.(2) Civil Code: ”Confronted by the third persons anyone of the parents putting alone into practice a usual act in the exercise of the paternal rights and duties is presumed it has the other parent's consent, too”. By virtue of this rule, both mother and father are justiflied to the third persons of good faith (a visible addition to the formulation of law) to achieve availably, acting alone the administration acts. The usual administration is competitive and mutual.It is offered indiscriminately, to the most diligent person's initiative.

The assumption of Art.503 par.(2) answers to the same folowing finality: the stimulation of the individual action facilitating the intervention of each of the parents and, with that ending view, the third persons' assurance, covering the responsibility of these ones; law establishes that which belongs to father or to mother, indiscriminately. Law endows each of them, acting alone, with the same belief assuring for each of them the same provisions concerning the usual powers, legal dower of minimum autonomy, offer made to the most diligent person. As

regards this presumption we shall return in the chapter established to the exercise of the paternal authority.

4. THE COMMON ADMINISTRATION (A COMMON ACTION OF FATHER AND OF MOTHER)

Certain acts cannot be fulfiled but only with both parents' agreement. This represents another way for limiting the unexpected and overflawing of each other: this acts require, cumulativle mother's intervention or that of father and must rely, under the sanction of nullity on the agreement of both of them. It is that we name – in opposition given to the competitive administration – common administration, and this means a real substance rule which associates both parents. Certain acts require, to be able-bodied, the parents' agreement. None of the parents is justified to fulfill them alone. The parents fulfill them together and this represents rather a rule of moderation than one of distrust, but, at the same time, it is a serious prudence. Although there is not a text of law in matters of simple administration that establishes deliberately the consent of both parents, we think that this is essential on the ground of the principle of both parents' equality in exercising the paternal authority. Then, if law sets up in art.346 alin.(1) Civil Code regarding the regim of the legal community of goods that the acts of alienation or of entailing with real rights having as common goods cannot be concluded but only with the agreement of both parents, so much the more these acts cannot be concluded when it comes to the goods of the minor situated under the paternal authority.

a). The establishing of the acts

These acts are appointed by reference to the system of tutelage. In one word (and under the condition of the restrictions linked to the third series of powers) it comes to the acts of disposition.

b). Moderation

Nevertheless, this principle is moderated by an important attenuation dedicated to purify the rule of unanimity about the eventual abuses.

The double consent is not always the implacable condition of carrying out the act. As a measure of facilitating, law does not make an irreplaceable element from this thing. In the absence of the accord between parents, the act can still be executed, with the condition of

being approved by the judge of tutelage. Therefore, if one of the parents strikes against to the refuse or the absence of the other parent, the parent who opposes does not dispose of a discretionary aptitude of veto or of blocking. To solve the conflict or to fill up a deficiency and, in both cases, to save the administration from ”paralysis”, law permits to the legal administrator who wants to act for replacing the paternal consent with a judicial authorization. Art.799 alin.(2) Civil Code stipulates: ”A good amenable to the danger of the immediate depreciation or destruction can be estranged without this authorization” (of the guardianship instance – a.n.). Par.(3) disposes: ”When the administration has as an object a patrimonial table or a patrimony the administrator may estrange a good individually determined or entail it with a real guarantee of the universality. In the other cases it is necessary the previous authorization of the judicial instance.

Practising a control of opportuneness based on the ordinary criterion of solving the paternal conflicts then the judge estimates if the act is conformable to the child's interest. In this case too, law has established the auxiliary device of clearing away that accompanies, in the regular manner, the requirement of the unanimity, in matrimonial, paternal or joint possesion matters.

5. THE ADMINISTRATION UNDER JUDICIAL CONTROL (THE PARENTS AND THE GUARDIANSHIP INSTANCE)

Named ”simple”, the legal administration is however placed , for the most serious acts, under the control of justice: certain very important acts require not only the parents' consent, but also the judge approval, as an additional condition. Although they bring into accord by themselves , parents cannot carry them out without the approval of the judge of tutelage.The intervention of this one is necessary in this case: there is no question of an subsidiary intervention of substitution or of arbitration dedicated to remove the impediment of an absence or of a right of veto, but about a (main) intervation of supplement. On the top of the hierarchy, this corresponds to the third stage of administration, which passes under a judicial control.

Art.799 alin.(1) and (3) Civil Code establishes those acts of dispositio whose achievement require this way the judge's approval (as

part of a patrimonial administration it forms a small part of the most serious operation. Thus: (1)" When (the) administration has as an object a determined individual good, the administrator will be allowed to alienate with an onerous title the good or to entail it with a real guarantee when it is necessary for conserving of the value of the good, the payment of debts or the maintenance of the manner of use in accordance with the usual destination of (the) good, only with the authorization of the beneficiary or, in case of encumbering this one or in the case when this one has not yet been determined, of the judicial instance"; we can add to these ones the *judicial regim of acts*, that are allowed to be finished by the tutor (established in art.144 Civil Code) and that is allowed to be applied to parents too, with the difference that it is not necessary the notice reference of the family council board, because this must not be instituted but only in the case of (the) minor's tutelage. Therefore, in the category of (the) acts of disposal that parents must not carry out without the authorization of the the guardianship instance fall: the acts of disposal, ((the) acts of transfer, (the) acts of constitution main real or accessory rights, the division, (the) acts of abjuring the minor's patrimonial rights); in this way, all (the) acts that exceed the act of administration[1] [Art.144 alin.(2) Civil Code]; partition (Art.674 Civil Code); the statement of liquidation (this restrictive list amends the general formulation of the domain due to the second stage of administration: (the) common administration covers all (the) acts of disposal, excepting those ones that require in addition, the intervention of justice).

If the administrator under a judicial control is justified to carry out, with the approval of the judge of tutelage, all the acts that the tutor may do with an approval (and, especially, to burden with real rights the minor's buildings), parents dispose of some power, in the same conditions, as part of the legal simple administration, because this is,

[1] In our doctrine there are specifications of that the law calls "acts which exceed the right of administration". Thus, in an opinion they are acts of disposal that due to gravity, importance or their exceptional character they are outside the scope of the current management of the patrimony (see S. Ghimpu, S. Grossu, *Capacitatea şi reprezentarea persoanelor fizice in the rsr law*, Scientific Publication House, Bucharest, 1960, p194. Thus, they are disposal acts those through the goods are disposal or they constitues the main or the accesory real rights or giving up to the patrimonial rights of the minor child, that means acts which has as effect the exit or the encumbrance of its patrimonial goods (see M. Banciu, *Reprezentarea în acte juridice*, Ed. Dacia, Cluj-Napoca, 1995, p. 60).

hypothetically, situated under a judicial control in the case of the gravest acts, becoming, *parte in aqua*, a species of kind.

It must be underlined, as we have already shown, that the effectuation of these acts must answer to a necessity or to recommend a undoubtedly advantage for the minor. The agreement of the instance will be given for *each act in part*, and in the case of sale it must be shown that this is made by manner (Art.145 Civil Code – the old Art.130 Family Code). Art.140 alin.(4) Civil Code adds to these acts: the payment of the debts that the tutor or someone of the members of the family council, the husband, a relative in a straight line or (the) brothers or (the) sisters of these ones who can make oneself voluntary, only with the authorization of the the guardianship instance. On the other hand, in the same category are included the sums of money that rise above the necessities of the minor's support and of the administration of his goods, as well as the financial instruments that are laid down, on the minor's name, in a credit institution (specified by the family council in the tutor's case within 5 days from the date of cashing them (Art.149 Civil Code).

There are *two exceptions* from this rule: on the one hand (the) acts that have a less patrimonial value for instance acts of conservation and administration, the cashing from the bank of the sums that parents have deposited in a distinct account for the minor's support; as well, (the) parents may transfer without any notification and authorization the goods put under distruction, degradation, alteration or depreciation, as well as those useless for the minor[1]; on the other hand, there are judicial acts that parents must not contract *not even within the agreement of the the guardianship instance*. Art.144 alin(1) and Art.147 Civil Code enumerate these acts, namely:

> The judicial acts between parents/tutor, this one's husband, a relative in a straight line, the tutor's brothers or sisters, on the one hand, and the minor, on the other hand; however anyone of them may buy in a public auction a good of the minor if he has a real guarantee concerning about this good or owns it in co-proprietorship with the minor [Art.147 Civil Code].

Therefore, concerning certain actions, law has considered that it is

[1]For the persons and the authorities entrusted with atributions regarding of performing legal acts by those who haven't exercise capacity, see, I. Reghini, Ş. Diaconescu, *Introducere în dreptul civil.*, Ed. Hamangiu, Bucharest, 2013, p. 179-188.

indispensable to establish and absolute prohibition; the judges could not authorize these actions not even in the case in which it is considered to be in the minor's benefit.

6. ACTS THAT THE PARENTS ARE NOT ALLOWED TO CONCLUDE NOT EVEN WITH THE AGREEMENT OF THE GUARDIANSHIP INSTANCE

a). The buying of goods from the children

Parents must not buy by themselves or by a third person the child's goods. In a hypothetic public auction when the parent has got a real guarantee concerning the good, law allows the parent to buy because it seems that the danger that the parent takes advantage of hid quality of legal official to get a smaller price and also there is not the risk of organizing unreasonably the sale to get the good he wants, because he has got on this one a real guarantee has been removed. In the event that father or mother would be co-proprietar together with the child, they might get that good by the forced ceasing of the co-proprietorship.

b). The parents' constitution into assignees of credits, rights or actions against their own children

Parents may not constitute themselves into assignees of such rights or actions against their own children, because this assignement would guide to conflicts between (the) parents' interests and their own minor children's ones, situation that the law wanted to avoid.

- donations made by the parents in the name of the child, excepting the usual gifts in accordance with the child's financial conditions;
- the assuring in the name of the minor of someone else's duty [Art.146 alin.(3) Civil Code].

Parents must not force their children to be the guarantees for them or for third persons. This thing is perfectly justifiable, because the guarantee must not produce any benefit for the minor, but instead it exposes him to a lot of useless and sometimes serious risks.

It would be prudently from the parents' side, although Art.799 Civil Code makes no provision about this thing, to request the approval of the judge of tutelage, to constitute, together with their minor child, a building civil society (a usual fact between parents and children), because this society whose members are permanently constrained of

social duties is as important as the acts enumerated in the text (the analogy to incite the character into an unlimitted principle of enumeration). It folows that the loan contracted by the society, once established, is not null, because the society, a juridical person, has got the capacity to oblige itself in order to achieve its object[1].

c). The incident sanction in the case of (the) acts concluded by parents with the non-observance of the interdictions imposed by law or with the non-observance of the requirement of the authorization of the the guardianship instance

This is the relative nullity, of the respective act [Art.144 alin.(3) respectively Art.146 alin.(4) Civil Code]. The action in annulment may be exercised by the parents, the tutor, the family council or by any member of this one, as well as by a default public attorney or at the information of the the guardianship instance. It must be added that Art.799 alin.(4) Civil Code disposes that the concluding of the estranging in absence of the preceding asked according to this article attracts, in the

[1]The 279 art. of argentinian C. civ, in his initial form, dispose that the parents are not allowed to make a contract with the children that are under their parental authority. This disposition was too general and it was eliminated in the actual article 297. In the argentinian doctrine there was underline that in fact, the common life demonstrated that certain contracts, such as the contract of reconstitution of an company, was perfectly compatible with the relationship between parents and the minor children and more than that. Thus, the argentinian jurisprudence declared that the interdiction which was in the old article 279, it doesn't applying and to the company established between the mother and children to continuated the affaires of the deceased husband ans father. This solution is inflicted because the mother and the children, they has become associates in fact as a consequence of father's decease; there aren't the risk that the mother to rely on its capacity to enhance the benefits in the detriment of children because contract of company doesn't make anything than to reflect the legal reality that results from the father's decease and because the contributions and the benefits are not the result of a negociation, but they came from the sum of the inventories; there is not an interes conflict considering that the prosperity of the affair will be advantageous for everyone. In tha case which this solution are not accepted should be obligatory the dissolution of the company in fact and the liquidation of the affaire, that will means ruining minors. For similar reasons there has authorized a company between the mother and minor children to continuated the affair that was belong to deceased husband together with a third party, whose company was dissolved by his death and withdrawal of other associated; performing a contract of company between mother and children (which become associated in fact in the affair of deceased husband) with a third party; transformation a joint stock company in which it holds shares the parents and the children, in a new company with limitated responsability (see G.A. Borda, Tratado de derecho civil. Familia II, Octava Edicion, Editorial Perrot, Buenos Aires, p. 473)

case in which it causes prejudices, the duty of a complete repair and represents a reason for the administrator's replacement.

7. THE ANNUAL REPORT AND THE DISCHARGE OF MANAGEMENT

As administrators, the parents, the same as the tutor, have got some duties during and after the cessation of the administration. In accordance with Art.152 and Art.153 Civil Code (the old Art.134 and Art.135 Family Code) the folowing measures will be taken:

- yearly, the parents or the tutore must make an annual report for the the guardianship instance about the way they have administered the minor's goods and about the way they took care of the minor; it will be presented with 30 days from the end of the calendar year;
- apart from this one, the parents or the tutor are obliged to make anytime – at the request of the the guardianship instance – annual reports about the way they have taken care of the minor;
- the the guardianship instance verifies the accounts regarding the minor's expenses made with this one's support and with the administration of the minor's goods:if they are regularly prepared and if they correspond to the reality[1].

Conformably to Art.160-162 Civil Code, at *the ceasing of administration* will be taken the following measures:

- within the most 30 days from the ceasing of the administration, the parents, the tutore or, as applicable, this one's vheirs are indebted to present to the the guardianship instance a general annual report. The tutore has the same duty in the case of moving off from the tutelage [Art.160 alin.(1) Civil Code];
- the goods that were in their administration will be given back, as applicable, to the ex-minor, to this one's heirs or to the new tutor;
- the parents' or the tutor's discharge of the management will be done only after the delivering of the goods, the checking of the accounts and their approval by the the guardianship instance [Art.162 alin.(1) Civil Code];

[1]E. Florian, *op. cit.*, p. 389.

- the discharge of management does not exonerate the parents or the tutor for the caused prejudice by their guilt [Art.162 alin.(2) Civil Code]; the tutore which replaces another tutor is obliged to ask him the repairing of the prejudicies that he has brought on this way to the minor [Art.162 alin.(3) Civil Code].

Relating to the sale of the minor's goods for the coverage of the supporting expenses and the administration of his goods [Art.148 alin.(2) Civil Code], we consider beside other authors, that this measure must be taken only in the last analysis, namely in the case when it is impossible to get his support from the minor's relatives or when neither the organ qualified with the social protection cannot participate in this way[1].

Thus, the administration named *simple* is, indeed, in each of its forms, a levelling paternal regime. Law summarizes the consequences: the paternal administration jointly obliges the father's and the mother's responsability, if the act on which both of them have produced a prejudice to the minor. Administrators with rquivalent powers, both parents are responsable co-administrators.

8. THE CONTROL AND THE LIMITS OF THE PATERNAL AUTHORITY WITH REFERENCE TO THE ADMINISTRATION OF THE CHILD'S GOODS

During the exercising of the paternal authority, can exist certain limits. As a matter of fact, there are situations when the power confered in this way to the titular of the paternal authority is not exercised according to its purpose, namely in the child's superior interest. In such cases, the public authority's intervention is justified, that can take different forms.

Firstly, all the minor's goods are put to the parents' or the tutor's administration.

As an exception from the general rule stipulated by Art.142 alin.(1) Civil Code, the goods provided by Art.142 alin.(2) and those provided by Art.42 Civil Code are excluded from the paternal administration.

1. <u>The Limits</u>

a). The Goods Got by the Minor as a Free Title

[1]M. Mureşan, *op. cit.*, p. 112; E. Lupan, *op. cit.*, p. 237

These goods are eluded from the administration only in the case when the testator or the donor did not stipulate in other way. These goods are administered by the trustee or that appointed person by the disposal act or as applicable named by the the guardianship instance [Art.142 alin.(2) Civil Code]. If the testator or the donor would believe that the paternal administration would be prejudicial, he could abstain from making the liberality, folowing from this a prejudice for the child, prejudice that law wants to avoid it.

A problem that could be put: the author of the testament may deprive the parent of the administration of the goods that belong to the forced inheritance of the child .

The child's forced inheritance. Even if the donor may deprive the parent of the administration, a question is put if the author of the testament has got the same right with respect to the goods that belong to the children's deposit. This problem is put in general when the grandfather – the father of the spouse dead beforehand – situated in animosity relations with his son-in-law or daughter-in-law, wants to impede them to administrate the goods that would return to the grandchildren by forced inheritance in his succesion.

In terms we consider that it is visible the fact that Art.142 alin.(2) Civil Code refers only to the voluntary disposition of goods. The basis of this norm, we have already told it, consists of the fact that if the condition that deprives the parent of the administration was not accepted, the testator would be allowed to abstain from the formulating of this problem, with the impairment in consequence of the minor. Only on the basis of this preocupation not depriving the minor it could be admitted that the regime of the goods to depend in this case on the parts' desire and not on the law. But this fear does not exist with regard to to the succesional reserve. And it is not posible that the free will of the author of the testament be allowed to deprive the parent of that is due to him by law, without any reason. The succesional reserve avoids completely the author's wish, that cannot impose any condition against this one.

Beyond some cases of exception, the whole family regime is structured on imperative norms. As there are those ones that attribute the administration in the parents' care task. It is good to be like that. In this case it deals with a matter of family solidarity and cohesion. The parents depriving of the right of administration insinuates in the bosom of the family a reason of suspicion, an abnormal situation, an undermining of

the paternal authority. As well that what is the most serious is that in most cases, this exclusion would depend not on the child's interests, but on the cheer against the parent. And it must not be forgotten that the law has stipulated methods of remedial against the bad administration by the parent of the child's goods.

Naturallyif the testator left the child something in addition the succesional reserve, he would be allowed to impose this condition concerning the overplus. Here we fall into the sphere of action of the Art.142 alin.(2) Civil Code.

b). The incomes obtained by (the) children by work, artistic or sports occupations or referring to their profesion

Although the juridical acts refering to the enumerated aspects are closed by the parents' agreement , alin.(2) of the art.42 tells us that in this case the minor exercises lo\\alone the rights and executes in the same way the obligations risen from these acts and he may decide alone on the obtained incomes.

2. The Auditing

In the case of being some more serious transgresions from the titulars of the rights of the paternal authority, the instance may take the measure of declining them from the rights. Apart from these measures, there are administrative auditings by which there are exactly discovered the cases in which such measures are necesary. The faculty insure themselves with regard to carrying aut of the duty of tuition was given to some administrative authorities. On the other hand, the administration of social assurances may control the conditions in which children are educated or the manner in which gratuities are used. The social asistants are those who will make the required verifications of the spot. From this point of view, it must be underlined the fact that, even if this posibility is not known by many people, any person, which holds informations with regard to an inadequate treatment applied to the minor, may inform the local social asistant, so that this one makes by his turn, a visit, that might lead, finally, to the taking of some more serious measures.

Moreover, any person which is acquainted with bad treatments or privations applied to the minor has the duty of informing the administrative authorities, without taking into account the profesional confidentiality (therefore this aspect hints firstly the doctor), on the contrary, being liable to sanctions.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

LEGAL CONSCIENCE - IDEOLOGICAL PREMISES FOR DEVELOPING THE LAW

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Abstract:
In developing the law, if the lawmaker fails to ground the normative solution properly in reality and ignores the real circumstances, but merely seeks to impose his own realities that do not meet the requirements of society and the collective conscience, the cases of inapplicable legal standard will become increasingly more common. Based on this finding, this article discusses the role of the legal conscience in lawmaking.

Keywords*: legal reality, legal conscience, law.*

1. LEGAL REALITY - SEPARATE FORM OF EXISTENCE OF SOCIAL REALITIES

Along with the other elements of social, moral, political, economic reality and so on, the legal reality, sometimes called legal system or legal over-structure is considered an indispensable component of social realities in the determined historical conditions. "Its existence can not be separated from the existence of the other parts of society, supporting their influence and in turn influencing them"[1].

Legal reality consists of the sum of legal phenomena and legal conscience manifested generally and individually, of all the legal rules which organize society, as well as the relations and situations that often arise or are envisaged by law.

* Post-doctoral researcher, Titu Maiorescu University, Bucharest; My contribution at this work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013.

[1]N. Popa, *Consideraţii privind dimensiunea socială a dreptului şi factorii de configurare a acestuia*, în „Revista de Ştiinţe Juridice nr. 2/2007", p. 7 .

It is generally thought nowadays that the legal reality has a rich content in which we find the law - as a normative phenomenon (positive law) - but which does not limits itself. Therefore, the juridical components are legal conscience, law and legal relations (rule of law).[1]

However, in establishing the foundation of legal relations, throughout time various meanings have uncovered different aspects to the legal reality. On one hand, it has been stated[2] that legal rules are established only in social relations in a certain historical period, thus giving a narrow scope to the legal reality. On the other hand, it has been shown that "the legal reality is much broader than what we find in the law, case law and court practice. It can be found anywhere where man claims its necessities with respect to his peers."[3]

When talking about legal realities, M. Djuvara remarked that "the legal phenomenon or legal reality comes in many varieties. First and foremost, the purpose of law studies is the legal relationship between people. Someone owes money to someone else, therefore creating a legal relationship. This must be studied, it is the objective of legal research, and secondly, the study extends to the rules of positive law, i.e. rules that are effectively applied, the rules written into laws. Finally, undeniably, the legal reality can be found in the actual wording of the law text, which is called lawmaking. We therefore have three broad categories of legal realities."[4] Further, the same author attempts to find an answer to the nature of legal realities and in so doing shows that "the reality of the legal phenomenon represented by a law text is a logical reality. The law text contains a logical rule, which should be applied to the multitude of cases that will be presented, and only so does it have a purpose. When we find rules relating to contracts in the Civil Code, for instance, we know that they pertain to cases that will arise in the future, to contracts to be concluded. The entire private social life may be reflected in a short law text."[5]

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[1]N. Popa, *op. cit.*, p. 8.
[2]A. Naschitz, *Teorie şi tehnică în procesul de creare a dreptului*, Editura Academiei, Bucureşti, 1969, p. 22.
[3]M. Manolescu, *Teoria şi practica dreptului*, Editura Fundaţiei Regele Mihai I, 1946, p. 282.
[4]M. Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, Editura All Beck, Bucureşti, 1999, p. 141.
[5]*Ibidem*, p. 146.

Therefore, following Djuvara's thinking, we come to consider that the legal reality cannot be perceived through our senses, because it is a reality based on pure logic, in which the regulatory solution appears as a synthesis of social relations in a certain area where phenomena and relations intertwine as a result of dynamic legal reality .

From this perspective, it has been argued that the legal reality contained ideas (theories, opinions, representations, etc.), regulatory principles (principles of objective law), subjective manifestations (rights and obligations) and plan juridice facts.[1] It has also been shown that the legal reality in grounded in time and space, which means that there are as many realities as there are legal systems. However, at the same time it should be individualized in relation also to other realities of an given existence, such as moral, political and economic reality.

If we refer to the legal reality as a source of future law projects, we must remember that its mere existence actually gets under regulation, but how it appears fraught called meanings, meanings and values as a result of the impact between phenomena and people, the latter combining material characteristics with the ability to reason, evaluate, and desire.[2]

By capturing the configuring elements of the legal reality, doctrine has argued "that we are dealing with an ideal reality of the rules of law in force, constituting a positive law system, then a reality of concrete behaviours in accordance with this ideal quality. The transition from ideal to actual reality takes place through legal conscience, which logically gives way to rule of law through subjective behaviours, manifested in legal relations."[3]

The legal reality, as a part of social reality which has a much broader scope, constitutes itself around the law, around which revolve all the other components of this reality. The existence of legal reality cannot be dissociated from its components over which it exercises an influence and is in turn influenced by them. At the same time, there are tight bonds between these components of legal reality as well (legal conscience, law

[1]I. Ceterchi, I. Craiovan, *Introducere în teoria generală a dreptului*, Editura All, Bucureşti, 1991, p. 87.
[2]I. Mihalcea, *Valenţele creatoare ale tehnicii dreptului*, Editura Conphys, Râmnicu Vâlcea, 2000, p. 112; R. Duminică, *Lege şi legiferare în societatea românească actuală*, Teză de doctorat, Craiova, 2012, pp. 17-19.
[3]Gh. C. Mihai, R. I. Motica, *Fundamentele dreptului. Teoria şi filosofia dreptului*, Editura All, Bucureşti, 1997, p. 76.

and legal relations), influencing each other and configuring together all social relations regulated by legal norms.

In the following part, we will focus on only one element of legal reality, that legal conscience, an element which despite its extreme importance in the development of the law is very often neglected.

2. LEGAL CONSCIENCE - A WAY TO SHOW A SOCIAL CONSCIENCE

In order to question the legal conscience, we must first refer to the social conscience in the scope of which it comes. Legal conscience, seen out of necessity as a manifestation of social conscience and defined in turn as "an inner sense expressed in value judgments of their own acts in the sense of good and evil, given a set of ideological representations and social behaviour."[1] The social conscience should not be considered a sum of individual consciences, but rather a generalization of these, consisting of moral conceptions, religious, philosophical, economic or legal. All these concepts have emerged and developed throughout the historical evolution of each society.

Therefore, the spiritual existence or the conscience appeared with human society and the way of living in society. With the social environment, a new report between man and nature is established, which will turn into practice, i.e. an active and intentional way, purposefully and using the appropriate and necessary means of earning a living. The practice will become the determining factor to shaping and developing structures of conscience.[2]

Depending on the arrangement of its elements, either one over the other vertically or horizontally as overlapping levels as forms of reflection of various areas of social reality. Social conscience takes shape in the common conscience (common knowledge and social psychology) and theoretical conscience (science and ideology). Social conscience can manifest as political, legal, moral, artistic, scientific, philosophical and religious conscience. Obviously, we are interested in its manifestation as legal conscience.

Legal conscience is a complex social and psychological phenomenon, composed of elements of a rational, emotional and

[1] Check in *Dictionnaire, Le Petit La Rousse*, Cedex, Paris, 1993, p. 260.
[2]C. Stroe, *Compendiu de filosofia dreptului*, Editura Lumina Lex, Bucureşti, 1999, p. 43.

volitional nature, specific to each stage in historical development of society. It represents all concepts, ideas, feelings and volitions concerning the law, the legal phenomenon and generally the assessment of the law in force, the approval or rejection of ideas of law, feelings of justice and legality.[1] As such, the "legal conscience has two levels - a rational component, the legal ideology[2] (all representations pertaining to the legal phenomenon) and a mental component, the legal psychology (all emotional feelings such as feelings, volitions).

3. LEGAL CONSCIENCE FUNCTION IN THE DEVELOPMENT OF THE LAW

A good legal policy, the result of translating real requirements of social development in terms of the norms[3], constitutes a real educational method, contributing decisively to the formation of the individual's cultural attitudes toward the behaviour requirements contained in the law.[4] In a sense, legal conscience appears as a set of social order must be notified to their addressees with the provisions relating to penalties to be applied in case of failure or otherwise, legal concepts must be expressed in legal rules, which means that the right is a manifestation of legal conscience.

However, not all of the legal conscience is expressed in legal norms at any given time, and all the while it would be difficult to state that there is complete harmony between the legal concepts and legal rules. From this perspective, legal draftsmanship is defined in this context as all processes through which legal conscience is expressed in law and it influences greatly in achieving such harmony.[5]

Legal conscience continues to grow even after the concretization of some of the legal rules that constitute concepts. Evolution can occur

[1]M. Luburici, *Teoria generală a dreptului*, Editura Universităţii Creştine „Dimitrie Cantemir", Bucureşti, 1994, p. 33.
[2] C.R.D. Butculescu, *Consideraţii privind influenţa culturii juridice asupra codificării în România în perioada 1864-2009*, în Volumul Ştiinţă şi Codificare în România, Ed. Universul Juridic, Bucureşti, 2012, p.364
[3] E.Ciongaru, *Unele aspecte privind validitatea dreptului*, Volumul Sesiunii ştiinţifice a Institutului de Cercetări Juridice „Acad. Andrei Rădulescu" al Academiei Române, Ed. Universul Juiridic, Bucureşti, 2010, p.523.
[4]N. Popa, *Teoria generală a dreptului*, Editura C.H. Beck, Bucureşti, 2008, p. 41.
[5] R. Duminică, *Lege şi legiferare în societatea românească actuală*, Teză de doctorat, Craiova, 2012, pp. 17-19.

propter legem (based on the law), in which case the law influences legal conscience and *contra legem* (against the law), in which case, legal conscience produces the necessary correctives to amend existing legal rules, in the way desired by society.[1]

By analysing the function of legal conscience, we have found that it has the role of a receiver and a buffer. By receiver, we mean that it receives stimuli from society, orders them and subject them to an axiological examination. As a buffer, is comes between these stimuli (which appear most often as true commands and pressures generated by sociological creative forces of law) and the normative reality with its own regularities, its own rhythm and its own dynamics which prevent it from following these pressures "blindly". The normative function of legal conscience is mediated by the cognitive and cultural, also known as axiological, instances of conscience through which man becomes the true subject. In a pluralistic society, in which the structures are deeply concerned by essential changes, the regulatory function of conscience is linked organically to the creative tool in anticipation. Search and innovation legal solutions, which are the best, can only be the fruit of mature thinking, so that the center of reference of the ontology of conscience is the conscious being and the exercise of legal conscience is the equivalent of a dynamic and spiritual organization of life.[2]

CONCLUSIONS

It is undisputed that both the legal conscience of the people as well as the specialized one of the lawmaker are the ideological prerequisite to developing the law. We cannot talk about a legal system without the people who created it and the people which it concerns, being fully aware of it.

[1] R. P. Vonica, *Introducere generală în drept*, Editura Lumina Lex, Bucureşti, 2000, p. 25.
[2] N. Popa, *op. cit.*, p. 41; I. Boghirnea, *Teoria generală a dreptului*, Editura Sitech, Craiova, 2010, p. 43.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE EFFECTS OF INVOKING PUBLIC POLICY IN INTERNATIONAL PRIVATE ROMANIAN LAW UNDER THE NEW CIVIL PROCEDURE CODE

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Abstract:

Public policy in Romanian international private law is made up of all the fundamental principles of law of the Romanian state, applicable in legal relations with foreign element. At the procedural level, it manifests itself through the public policy exception of private international law. This exception constitutes the court procedure used by the court to remove the effects of foreign laws from applying in a normal legal relation in private international law, if they contravene the law of the forum state and the fundamental principles on which it is based.

Keywords*: public policy in international private law, legal relationship with a foreign element, foreign law, the law of the forum.*

1. PUBLIC POLICY IN DOMESTIC LAW AND IN INTERNATIONAL LAW. CONCEPTUAL LIMITS

In international private law, the concept of public policy begins in the public policy in domestic law, however, without being mistaken for it.

In domestic law, public policy reveals an imperative quality of legal rules from which the parties cannot derogate through individual acts, unlike the supplementary rules. The New Civil Code refers to public policy provisions from Article 11 according to which "all special dispensation shall be offered by convention or unilateral legal acts from laws concerning the public policy or good morals." Legal provisions pertain to public policy "whenever they policy or prevent a legal act the

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application of which would harm the entire social body. When the act is harmful to only one or several few members of society, the law dealing with such an act is not of public policy."[1] Therefore, the laws protecting the general interest are considered as belonging to public policy[2].

In international private law, public policy prevents the application of foreign law which usually applies according to conflict norms. There are two fundamental differences[3] between the two notions, namely:

- either public policy has a different function, although, upon careful analysis, both reveal and protect the interests of the same state. Public policy in domestic law specifies the limits of free enterprise allowed to the parties involved, while public policy in international private law specifies the limits of application of foreign law.

- the scope of the two concepts is different in application, in the sense that not all public policy rules in domestic law are also public policy rules in international private law. Consequently, only a part of public policy rules in domestic law count also as rules of public policy in international private law.

Also, between public policy in domestic law and that in international private law the following similarities can be established[4]:

- the objective of both institutions is the legal protection of fundamental interests of the forum state (social, moral, economic, political, etc.);

- the common source is domestic law, even if public policy in international private law are also international sources;

- the same purpose: to prevent the application of a law. Public policy in international private law prevents the effects of foreign laws, and public policy in domestic law censures concluded legal documents that carry legal force for the parties.

[1] E. Herovanu, *Tratat teoretic şi practic de procedură civilă*, Institutul de Arte Grafice „Viaţa Românească", Iaşi, 1926, pp. 57-58.
[2] E.Ciongaru, *Drept internaţional privat. Noţiuni generale*, Ed. Scrisul Românesc, Craiova, 2011, pp.15-16.
[3] A. Fuerea, *Drept internaţional privat*, Ed. Universul Juridic, Bucureşti, 2008, p. 58.
[4] Refer to O. Ungureanu, C. Jugastru, A. Circa, *Manual de drept internaţional privat*, Ed. Hamangiu, 2008, p. 104.

2. EFFECTS OF INVOKING PUBLIC POLICY IN INTERNATIONAL PRIVATE LAW. DOCTRINAL CONTROVERSIES

The effects of invoking public policy are analyzed in the doctrine[1] in relation to two cases, namely:

- public policy is invoked in matters of creating a legal relation[2], thus creating rights;

- public policy is invoked in matters of entitlements.

The first situation was highlighted two opinions. Public policy has a negative effect because foreign law is removed and therefore the legal relationship can not be established. However, public policy can have a positive effect, because by invoking it foreign law normally used in this case is removed and in its place local laws will apply (*lex fori*).

According to the second opinion, the effect of public policy is substituting foreign law with that of the forum state, meaning that the law of the forum state instead of the normal law (foreign law).

The distinction between negative and positive effects of public policy is more apparent than real, given that in any case a solution must be given, and it may only apply on the basis of a law, that of the forum state.

With reference to the second situation - public policy in matter of acquired rights - invoking the effects of public policy are more mitigated than in the first case, in the sense that there may be some legal relations that would not have been created in the forum state due to opposition from public policy, but which having appeared in the foreign country, are acknowledged even in the forum state. The mitigating effect of public policy in the matter of rights acquired abroad does not occur in all cases, i.e. automatically. The court must decide for each case in part.

However, we must also refer to the acknowledgement of public policy effects in countries other than that in which it was invoked. Thus, the effects of invoking public policy in a country do not occur due to its authority in another country, but only because that country's public

[1] Refer to A. Fuerea, *op. cit*., pp. 60-61.
[2] E.Ciongaru, *Teoria generală a dreptului*, Ed. Scrisul Românesc, Craiova, 2011, pp.58-61.

policy allows the effects to be maintained. The solution is in keeping with the national character of public policy.[1]

3. PRESENTATION LEGAL PROVISIONS ON PUBLIC POLICY ROMANIAN PRIVATE INTERNATIONAL LAW

Article 2564 paragraph 1 of the New Civil Code stipulates with great economy that the application of foreign laws is prevented if it violates the public policy of Romanian international private law. Here we come across a breach of public policy of Romanian international private law if the application of foreign law would lead to an incompatible result with the fundamental principles of Romanian or EU law and with fundamental human rights. Consequently, when preventing the application of foreign law, Romanian law will apply.

Invoking public policy may be done by observing two cumulative requirements:

- foreign law must be able to regulate the legal relation with foreign element;
- the applicable foreign law must come into conflict with fundamental principles of Romanian courts, EU law or fundamental human rights.

Removing a foreign law occurs only when the differences between the regulations in attendance are essential. The effects of invoking public policy are correct to conflicts of laws in space and in time and space. Acting differently, the effects of public policy will be complete or mitigated.

In principle, the domestic laws do not set public policy content, but only provide the abstract possibility of applying it in the regulated areas. Subsequently, we offer by way of example certain such legal provisions[2]:

- article 2567 from the New Civil Code states that "rights gained in a foreign country are respected in Romania, unless they are contrary to public policy in Romanian international private law."

- article 1094 from the New Code of Civil Procedure provides that "foreign rulings are recognized completely in Romania, if it refers to the personal status of citizens of the State where they were made or if

[1] R. Duminică, L. Olah, *Drept internațional privat. Partea generală*, Ed. Sitech, Craiova, 2014, pp. 98-99.
[2] R. Duminică, L. Olah, *op. cit.*, pp. 101-104.

being passed in a third party State, they have been first recognized in the State of origin of each party involved, or in absence of such recognition, they were made under the law applicable according to Romanian international private law and are not contrary to public policy and Romanian private international law and the fundamental human right of self defense has been respected."

- article 76 paragraph 1 of Government Ordinance No. 26/2000 on associations and foundations provides that "foreign non-profit legal entities may be recognized in Romania, under condition of reciprocity, based on prior approval from the Government, the registration in the Register of Associations and Foundations at the Court of Bucharest Registry, whether validly constituted in the state of which they have the nationality, and their statutory purposes do not contravene Romanian public policy."

In other cases, the law stipulates the actual content of public policy in the field of regulation, in that it shows the legal rules which if violation would warrant applying a dispensation of public order in international private law. Two situations may arise.

In the first case, the law establishes only the content of public policy in Romanian international private law.

For example, article 2586 paragraph 2 of the New Civil Code sanctions the quality of public policy in international private law of the principle of freedom of Romanian citizens to get married.

The provisions quoted above show that if one foreign law - which is the national law of either one of the future spouses - which refers to the conflict law concerning the main conditions of marriage, it provides an impediment to marriage which, according to Romanian law, is incompatible with the freedom to enter into marriage. That impediment will be removed as being inapplicable in case one of the spouses is a Romanian national and the wedding takes place on Romanian territory.

Article 2600 paragraph 2 of New Civil Code granted the quality of public policy to provisions in Romanian law on the admissibility of divorce to a Romanian citizen on the basis of sound reasons, but without being overly restrictive.

The text states that if foreign law normally applied does not allow the divorce or it does under extremely restrictive conditions, Romanian law will apply if one of the spouses is a Romanian citizen or a habitual resident in Romania at the time the divorce petition was made.

Article 1096 paragraph 2 of New Code of Civil Procedure sanctions the quality of public policy of national legislation on civil status and capacity of Romanian citizens. The regulation stipulates that recognition of a foreign ruling may not be refused solely on the grounds that the court issuing the foreign ruling applied a law other than that which would be determined by the Romanian international private law, unless the suit involves the marital status and the ability of a citizen Romanian, and the solution adopted here differs from that which would come under Romanian law.

In a second case, Romanian law protects public policy in international private law of any system of law applicable in this case. In this case fall all provisions of Article 2639 paragraph 3 of the New Civil Code whereby if the main law applicable in the conditions of the legal act requires, under penalty of nullification, a certain solemn form, no other law referred to in paragraph 2 (law of the place where it was drawn up, the law of nationality or habitual residence of the person who consented to it, the law applicable in accordance with international private law of the authority that examines the validity of the legal act) cannot remove this requirement, regardless of where the report was drafted. The legal text shows that, if the solemn form is an *ad validitatem* requirement (of public policy) in the legal system applicable of the legal act (whether this system is Romanian or foreign), this condition will apply in all cases, removing any provisions contrary to other systems of law, as stipulated in article 2639 New Civil Code.

Last but not least, we consider it necessary to refer also to the provisions of international conventions to which Romania is a party.

The international conventions that constitute sources of international private law, public policy is provided, usually in theory. An example of this can be found in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (to which Romania adhered by the Decree Nr. 186/1961), which in Article V paragraph 2 letter b) provides that recognition and enforcement of a foreign arbitral award may be refused, *inter alia*, if it is contrary to the public policy of the state issuing the request[1].

[1] To see: Andreea Tabacu, Andreea Drăghici, *Asistenţa judiciară internaţională*, Editura Universul Juridic, Bucuresti, 2011, p. 76.

CONCLUSIONS

Public policy in private international law differs from one state to another state[1]. It does not invoke a rule against the relevant foreign laws, but against their application in that case, i.e. in the outcome that would result if the foreign law would apply in the case.

Therefore, public policy is not absolute, but relative. Public policy is invoked only if the foreign law is contrary to the essential rules of the forum state or its vital interests. We appreciate that public policy is a necessary institution in conflict law, but to ensure stability of legal relations the intervention of public policy is permissible only in exceptional circumstances.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE STATUTE OF THE BANKING MEDIATOR WITHIN THE CONTEMPORARY LEGISLATIVE FRAMEWORK

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Abstract

Mediation is an already disputed legal concept in the specialised literature. However, we cannot say that the problems raised by the accomplishment of mediation have been completely clarified.

A controversial aspect is, in our opinion, the statute of banking mediators. By dealing with this issue from two different perspectives, the perspective of a practician and of a theoretician, we want to emphasize the problems raised by the exercise of this profession, starting from the present regulation in the field.

This study also deals with the banking mediator's relationship with the credit institutions, respectively, to what extent the nature of this relationship can affect the fairness specific to the profession of a mediator

Key-words*: mediation, banking mediator, legislation*

INTRODUCTION

At present, banks face a serious problem, i.e. bad loans. Bad loans can be defined as "those bank loans granted to clients, whose economic and financial situation, worsen due to different causes during different stages of the crediting process, does no longer ensure partial or total credit reimbursement conditions or interest payment conditions and related fees[1].

Due to the powerful economic changes, many persons ended up not being able to pay in due time the established amounts, instalments, interests and bank fees. In such cases, the bank would be entitled, complying with the legal and contracting provisions, to execute the

[1] Lavinia Maria Nețoiu, *Creditele neperformante – o realitate*, în revista „Finanțe-Provocările viitorului", nr.6/2007, p.174, accesabil pe http://www.financejournal.ro/fisiere/revista/30313770827_NETOIU_RO.pdf, accesat în data de 23.04.2014, ora 17.32

debtor, being able to seize the assets owned by the debtor. Such a solution does not have advantages for any party, debtor or creditor (whose debt is many times bigger than the value of the assets to be seized). But this would not the only problem the bank could have in such a situation. Because "any credit that can no longer be reimbursed (...) should be registered as a bad loan, too, in the bank records and written on the «off balance sheet», operation obligatorily accompanied by setting up of risk provisions in an equal amount to the quantum of the bad loan (...), it means the bank has to make a high financial effort that could affect the credit-worthiness index"[1].

USEFULNESS OF MEDIATION IN THE BANKING FIELD

In such a situation, they say a banking mediator could find the appropriate solutions for the performance of the contracting relationships between the debtor client and the bank. Moreover, even the New Civil Code[2] encourages the „amicable settlement of the dispute, by mediation, pursuant to the special law" (art. 21 para. 1 NCPC – new civil procedure code).

In the doctrine, they say that mediation advocates made tireless efforts to obtain the modification of Law no. 192/2006, by making compulsory the obligation of informing people regarding mediation[3]. However, as the bank credit agreement is enforceable[4], the parties would go to the court only in the case of an appeal against enforcement, the information regarding the usefulness of mediation being already tardy.

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[1] Gheorghe Piperea, *Despre necesitatea extinderii procedurii insolvenţei la simpli particulari pentru supraîndatorare*, în vol. Probleme actuale în dreptul bancar:lucrările conferinţei internaţionale probleme actuale în domeniul juridic bancar, Editura Wolters Kluwer, Bucureşti, 2008, p.547

[2] Legea 134/2010 privind Codul de procedură civilă, publicată în Monitorul Oficial nr. 485 din 15 iulie 2010, republicată în Monitorul Oficial nr.545 din 3 august 2012

[3] Viorel Mihai Ciobanu, *Comentariu*, în Viorel Mihai Ciobanu, Marian Nicolae (coordonatori), *Noul Cod de procedură civilă, comentat şi adnotat*, Vol.I – art-1-526, Editura Universul Juridic, Bucureşti, 2014, p.52

[4] Potrivit art.120 din Ordonanţa de urgenţă nr.99/2006 privind instituţiile de credit şi adecvarea capitalului, publicată în Monitorul oficial nr. 1027 din 27 decembrie 2006: „Contractele de credit, inclusive contractile de garanţie reală sau personală, încheiate de o instituţie de credit sunt titluri executorii".

ISSUES OF COMPARATIVE LAW REGARDING BANKING MEDIATION

In the French law system, since 2003, the credit institutions "have to appoint a mediator that should recommend solutions to disputes regarding the operation of the deposit accounts held by natural persons"[1]. The mediators thus appointed have to draft an annual activity report to be submitted to the governor of the Bank of France who is also the chairman of the Banking Mediation Committee[2]. The banking mediation activity is considered to be an extremely beneficial one, and it would be appropriate "the extension of the mediators' competence to other categories of disputes which might occur regarding the contracting relationships between a bank and its clients"[3].

Also, in other law systems, less propagated through the media than the French one, even in non-European systems, banking mediation is regarded as appropriate. In the Tunisian law, for example, pursuant to the regulations in the field, "each credit institution should appoint one or more mediators in charge with examining the requests filed by the clients and related to their disputes. The mediator should propose appropriate mediation solutions within a two-month period from the reception date of the request. The requests are sent to the banking mediator for free (...). This should be notified to the bank's clients."[4] They say that the mediation procedure thus guarantee the independence, transparency, rights to defence and efficiency.

THE STATUTE OF THE BANKING MEDIATOR

The Romanian Banking Association [ARB] supports the idea of banking mediation. This is emphasized by its representatives who stated:

[1] Joel Petit, *Banca Franţei şi protecţia consumatorului,* în vol. Probleme actuale în dreptul bancar: lucrările conferinţei internaţionale „Probleme actuale în domeniul juridic bancar", Editura Wolters Kluwer, Bucureşti, 2008, p.249.
[2] Ibidem.
[3] Ibidem.
[4] Samir Brahimi, *Sistemul bancar tunisian: Noul Statut al Băncii Centrale a Tunisiei şi noua lege a instituţiilor de credit, în vigoare după modificările legislative din mai 2006*, în vol. Probleme actuale în dreptul bancar: lucrările conferinţei internaţionale „Probleme actuale în domeniul juridic bancar", Editura Wolters Kluwer, Bucureşti, 2008, p.91.

"The banking community is the promoter of banking mediation"[1]. ARB collaborated with the Romanian Banking Institute and with the mediation committee for training banking mediators. ARB also supports and promotes the Banking Mediator Association, encouraging the collaboration of the interested persons with the last one "in order to reduce the number of cases reaching the court of law, many of them being groundless"[2].

So, there is the question if banking mediation can be achieved by any mediator or by a specialised one.

Following the enforcement of Law no. 192/2006 regarding mediation and the profession of a mediator[3], banks have tried, by means of ARB, to set up their own system of dispute amicable settlement in the banking system. In this regard, ARB registered at OSIM [The State Office for Inventions and Trademarks] the trademark of "banking mediator"[4]. However, banks have understood quickly that they cannot create a parallel mediation system because the profession of a mediator can only be performed by persons authorized by the Mediation Council, pursuant to arts. 7-8 from Law no. 192/2006. Although this project had received the approval of BNR [Romanian National Bank], it was not approved by the Competition Council[5].

At present, in Romania, the profile of the "banking mediator" is beginning to emerge. This is an authorised mediator who is specialised in the banking system. In this regard, we mention here the Association of Mediation in the Financial-Banking System (Finban), and the Union of Banking Mediator from Romania.

Finban presents itself as "a professional association of fully experienced mediators in the financial-banking sector, set up by mutual agreement of the founding members, as a private law, freestanding, non-government, non-political and non-profit, Romanian legal person"[6].

On the other hand, the Union of Banking Mediators [UMB] from Romania is made up of authorised mediators from Romania "who

[1] Radu Gheţea, preşedintele ARB, citat de http://www.bankingnews.ro/medierea-bancara.html, accesat în data de 23.04.2014, ora 17.00.
[2] Ibidem.
[3] Publicată în Monitorul Oficial nr. 441 din 22 mai 2006
[4] Tudor Tatu, *Istoria medierii în domeniul bancar*, http://www.mediatorbancar.ro/publicatii.htm, accesat în data de 23.04.2014, ora 18.40
[5] Ibidem.
[6] http://www.finban.ro/ro/despre-noi, accesat în data de 23.04.2014

expressed their will to become associates in order to perform some general interest activities in the mediation field and especially in the financial-banking"[1]. UMB is a private law legal person, non-profit, non-government and non-political and independent. According to its statute, "the goal of the union is the defence of the rights and the promotion of professional, economic, social, scientific and cultural interests of its members, the promotion and development of mediation as an alternative dispute settlement solution, pursuant to the legislation in force (...)" (art. 6 of Statute of UMB)[2].

UMB has become legal in front the court of law by Civil Judgment no. 3414/2010 of the Court of Appeal of Bucharest, final, by the ÎCCJ's [The High Court of Cassation and Justice] rejection of the second appeal filed by the Mediation Council. The Court made the Mediation Council register the Union of Banking Mediators, petitioner, in the National Register of Associations – Profession of Mediator, stating that "the refusal of the defendant public authorities (i.e. The Council of Mediation) (...) is not justified, as it is issued due to abuse of power, being exerted the right of appreciation by breaching the plaintiff's right (i.e. – UMB) provided in Law no. 192/2006"[3]. The Court appreciated that "the mediation in the specialised (financial-banking) field comes undoubtedly under the domain of regulation of Law no. 192/2006 (...). The denomination associated to the profession of mediator, that of "banking", does not change the activity of the members of the plaintiff Association into another kind of profession than the one regulated by Law no. 192/2006, it actually specifies and singularizes the domain of specialisation of the members of the plaintiff (...)"[4]. Moreover, the Court decided tangentially regarding the fact that the "specialisation" of

[1] http://www.mediatorbancar.ro/citeste-tot-articolul.htm, accesat în data de 23.04.2014, ora 19.00

[2] Sentinţa civilă nr.3414/2010 a Curţii de Apel Bucureşti, citată de Adina A.Stancu, R.Savaliuc, Uniunea Mediatorilor Bancari a câştigat în faţa Consiliului de Mediere. În urma deciziei ICCJ din 19.01.2012, Consiliul e obligat să înregistreze UMB la Registrul Naţional al Asociaţilor Profesiei de Mediator, http://www.luju.ro/dezvaluiri/evenimente/exclusiv-uniunea-mediatorilor-bancari-a-castigat-in-fata-consiliul-de-mediere-in-urma-deciziei-iccj-din-19-01-2012-consiliul-e-obligat-sa-inregistreze-umb-la-registrul-national-al-asociatiilor-profesiei-de-mediator?print=1, accesat în data de 24.04.2014, ora 13.40

[3] Ibidem .

[4] Ibidem.

banking mediators is not to be mistaken for "the specialisation as actual experience of each mediator"[1], because, according to the special law, it has to be authorised or approved by the Council of Mediation.

CONCLUSIONS

By banking mediator, we understand an authorised mediator who assumes this title at present, based on the training and experience gained in the financial-banking field.

We appreciate that such a specialisation is appropriate[2], this field raising difficult problems, such as those related to banking, insurance and leasing instruments or products, or the capital market.

Banking mediation is at the beginning in our country, but we appreciate that this kind of mediation will develop rapidly, due to the many advantages offered.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE EFFECTIVENESS OF PUBLIC SERVICES IN CONTINENTAL PORTUGAL – THE PAC CASE

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Abstract:

The Agency for Administrative Modernisation, IP is integrated in indirect Administration and aims to operationalize initiatives to modernize and boost the participation and involvement of different stakeholders, whether internally or in their relationship with citizens, aimed the simplification and innovation in achieving the change Public Administration.

The Citizen Service Points (PAC) are multiservice with personalized service, installed in Local Municipalities, as extensions of Citizen Shops, which equip the regions of greatest interiority of a multichannel network ensuring greater proximity with the requirements and due diligence for Public Administration.

In this respect, with the assumption the paradigm change in the delivery of public services, the objective of this study was based on measuring citizen satisfaction regarding the services provided in the PAC. To this end, descriptive univariate and bivariate analysis was performed for the treatment of data collected and in order to meet the main goal of the present research. All inference analysis was carried to determine if the differences and/or relationships found between the features in the sample are extrapolated to the population, considering a significance level of 5%. For this purpose, the object of study focused on Citizen, a sample of 306 users, that go to the 54 PAC distributed by Portugal.

According to the results achieved, it can be said that citizens are very satisfied with the efficacy of the PAC. Also showed that the variables related to Accessibility, Products and Services and Involvement and Participation of the citizen have the greatest weight when we trying to measure global satisfaction of the citizen while PAC users.

Keywords*: Public Service; Citizen Service Points; Efficacy; Interoperability; Satisfaction.*

[1] R&D Centre funded by the Multiannual Funding Programme of R&D Centres of FCT - Portuguese Foundation for Science and Technology, Ministry of Education and Science.

INTRODUCTION

In the context of actions leading to a greater proximity from citizens to the state appeared in 2002, in the wake of Citizens' Shops, a new awareness: The Citizen Service Points (PAC). The Citizen Service Points implemented in Portugal reflect the actions of various governments for the implementation of the new paradigm of decentralized public services, closer to the citizen and all economic agents. Additionally, the analysis of the public service value to society made clear the relevance of the physical distribution model focused public services, in a complementary logic in relation to other distribution channels. It also allowed understanding their own catalytic role in administrative modernization, as well as the direct and indirect effects for citizens, businesses and the own image of the country.

In this context arises the present research work which intends to analyse the impact and proficiency of this channel of public services, the Citizen Service Points with increasing importance in everyday life and quality of life of the populations they serve. Strategically located in regions with lower population density and installed in municipalities, but still very little studied, despite the multiplicity of interests and material available for research. Thus, the objective of this study is based on certifying the satisfaction of citizens using PAC, in its many valences. It was understood also to investigate on this subject would be a disclosure of the PAC and the services provided therein, because, unfortunately, it appears that there is still a lack of knowledge of this type of service in one part of population. Thus, it is believed that the reach of this study is a way to validate and promote what has been done and is being done in the administrative modernization in Portugal, as well as to identify how the public perceives the good practices and how these positively influence their relationship with the state and their quality of life.

The purpose of this research study was focused on citizens who used one of the 54 Citizen Service Points in Portugal Continental. The PAC on the islands of Madeira and Azores not included in this study because of specific circumstances of coordination of respective Regional Governments what would take much more time to collect data.

We chose to use a descriptive and quantitative methodology. The instrument for data collection was based on the model CAF (Common Assessment Framework), builds on the excellence model of EFQM

(European Foundation for Quality Management) and in order to contribute to the public services improvement through self-assessment based on a model consisting of criteria based on principles of excellence. We applied a questionnaire titled "Satisfaction Questionnaire for Citizens/Clients", divided into 4 components with which it was intended to obtain information on the Global Image Organization, Involvement and Participation, Accessibility, Products and Services. The set of information collected identify the importance attached to the service, the satisfaction of citizens and consequently the perceived quality of the PAC. In this sense, this empirical study is organized into six points. After this point where it is made a brief introduction to the topic under study, in the following section it will be presented the organizational model adopted for decentralization and public service improvement. Subsequently the second point addresses the issue of the Citizen Service Points impact in Portugal. Under points three and four, it is made, the empirical analysis on the study subject, is intended to meet the target of empirical study and validate the research hypotheses, will be described the data collection methods instruments and research techniques, data collection process and the procedure for its collection and sample selection, processing, analysis, discussion and interpretation of results. Lastly will be presented the main conclusions of this study.

1. PUBLIC SERVICES DESCENTRALIZATION

One of the main conclusions of 'Putting Citizens First', a study conducted by the Public Administration Committee of the OECD (1996), on administrative modernization in Portugal, showed that the orientation of the citizen was the engine of change management. One of the most successful examples of the close relations between citizens and the administration was the creation of local services, including the Citizen Shop and Citizen Service Points, at the level of central government and the Municipal Services Assistance, at local government.

In this context, the municipal service comes embodied in a new organizational unit to facilitate the relationship between citizens and the municipality, providing better access to information. This new unit, commonly known as Municipal Services Assistance, or even the Citizen Office, functions as the municipality 'front office'.

Its main tasks are: the treatment of various issues related to

licensing and payment of fees and licenses, assignments within the city, the receipt and delivery of documents and several citizen requests, forwarding all applications to the various municipal services , providing information on the status of specific processes and other matters useful to citizens, as in the case of the valences of the Citizen Service Points and other branches or portals that are normally installed in these physical spaces, it is therefore within the municipal service that develops throughout the service Public Administration (PA) decentralized services. There is no doubt, however, that local government became more coordinator and less service provider and operates in a more increasingly competitive and dynamic environment. The coordination calls for new policy instruments and strategies, such as public/private partnerships and networks participation among politicians, employees and citizens. It is time for the Public Administration to convince himself that his existence is justified by citizens and not by its mere existence. It exists to help promote the citizens and economic agents' initiative in constructing a dynamic and social entrepreneur environment. A civically engaged society requires facilitator Administration in what concerns the initiative of citizens and economic agents.

It is in this context that the progressive implementation of new information technologies is constituted as a crucial lever for creating an environment conducive to universal infrastructure for e-Government, allowing the society to encourage the sharing of public responsibilities. The construction of this new society involves the continuous production of new knowledge.

Based on all the above, and based on the information the Agency for Administrative Modernisation (AMA), was establish to enunciate some Portals in operation or being implemented nationwide:

- Citizen's Portal and Portal Enterprise;
- BMS - Multiservice Counter;
- Citizen Shop Mobile;
- One Stop Shop - Let's Have A Child;
- Balcony I Lost my Wallet;
- Simplex MAR;
- Senior Balcony;
- Entrepreneur Balcony.

As Junqueiro (2002) states "The e-government, besides and providing a significant reduction in public expenditure, also means

greater transparency in relations between citizens and civil society" (pp. 336-337). This author also notes, with emphasis, that the start of digital technologies in Public Administration offers a real opportunity to increase efficiency, quality and cost-effectiveness. Also believes that states need to invest heavily in how public services are provided, using new tools and digital technologies and reshaping its inner workings, breaking interdepartmental barriers and redesigning new methods and organizational forms.

2. THE IMPACT OF CITIZEN SERVICE POINTS IN PORTUGAL

According to information released by the General Agency for Administrative Modernisation, through various channels you have access to the image of the PAC and its impact on the lives of citizens and businesses is very relevant, the services near to economic and social agents is extremely important and qualitatively changes qualitatively the lives of everyone. Without knowing a study concerning this subject, it is known that the PAC has inferred a degree of quality public services.

A good perception of the service is created, not only by a technically correct work, but also by the successful interaction between user and employee. Even though there are among the population very different reasons for evaluating the PAC, the new service units are cosy, unlike the old public office, the new are characterized by a healthy, clean and ventilated environment which provides comfort and welfare to the citizen, with high functionality and structured to allow the integration of various organizational services installed on them, to all this it is added the standardization of clothing and identification of officials/employees. The location in strategic areas is one of the key factors, it is intended for citizen easy access to the service, near parking areas served by public transport, and these are very relevant indicators to the population who uses the PAC and for Local Authorities that received them.

The access to services for people with special needs, particularly with regard to architectural barriers is also a factor of quality and equity of services to all citizens. Modern computer technology allows rapid communication between different actors in the network and access to databases, which gives citizens a feeling of security and certainty that their process is not simply on paper. The fact that users can make payments electronically is one of the advantages pointed to this service.

People who integrate these units are selected for their expertise and sensitivity to serve. The continuous training equally concerns the use of knowledge, as in the behavioural area.

The citizen/user perceives the review and continuous improvement, a permanent search for greater efficiency, simplicity, speed and quality of service, with attitudes and innovative procedures, example of this is the extended hours of service in some existing PAC and highly valued by citizens, so that it can serve a greater number of people, in their spare time, it is imperative to extend the opening hours beyond the normal working hours of the vast majority of the population.

Disclosure of services is definitely the weak point of this service, through information provided by the AMA, it appears that a portion of the population does not know the existence of such a service in his area, so the strong use of the media, with extensive informative advertising that enables the citizen to be informed of all the features and types of services offered in the PAC, that was never properly implemented, it remains a bad example for the process that the AMA is to be undertaken and already in very advanced stage, that is transforming the PAC in Multiservice Counter-Citizen Shops 2nd Generation, in order to a proper disclosure will be made. Since this type of service is even more important for the citizen, the number of valences in BMS more than doubled compared to the PAC, so, disclosure is vital for citizens.

When the services provided meet or exceed the desires and needs, responding to their expectations with value many times higher than expected, the user is satisfied and acknowledges what is being provided, such as 'Dazzling of Customer' (Kotler, 2009). Thus, the citizens' satisfaction with public services is improved governance in order to place it in the centre of attention of the public organization. Thus, the citizen is anyone (person or entity) seen as the beginning and end of public sector activity. Another very important aspect to understand the complexity of the role of public administration, are the periodic changes of leadership, which requires greater effort to manage public machine.

Relevant also is to involve stakeholders in the process, either in the internal environment (those within the organization, whether departments or employees) and external environment (those receiving services: citizens, public partnerships, etc.) , is an important strategy to achieve the desired results (Drucker, 2001), since, as is well known face of so many unfulfilled promises many citizens were inflexible, suspicious

and resistant to discourses of a public sector more interested in services more modern efficient (Klibsberg, 2009).

In this respect, the public organization must disclose to the society in fact what can be done and, in particular, what it has done to achieve citizen satisfaction, attract him to participate in the change process to improve it, for it is through him that many disorders are identified, and thus coherent measures can be applied.

However satisfy the requirements of its users has been an on-going concern of private and public organizations, which come from the late twentieth century, to adapt their structures, changing their management practices and invest in training their employees (Brady & Cronin, 2001). In this context, appear each time administrative and technological innovations that result in improved quality of products and services offered to citizens who are increasingly demanding and aware of their rights, especially in developing countries.

As regards the public sector, the Portuguese government, according to a retrospective compiled from the Citizen Shops, initiated efforts to enter the public administration in the context of quality management through a number of initiatives where the most outstanding successive openings of Citizen Service Points, Citizen Shops and Portals, managing sow some methods and techniques of Quality Management, which served to sensitize public organizations to focus on the citizen.

The PAC project arose to dictate alternatives, to change the image of public administration characterized by excessive formalism, units unable to meet the demand for services, poor and uncomfortable physical facilities attendance by privilege and servers disinterested and unmotivated. This outlook reflects what was characterized as the dysfunctions of bureaucracy. Too much formality and impersonality bring as a result an inefficient system, dominated by paperwork and narrow minded professionals, unable to make decisions and think for themselves. The increasing demand for services and the public satisfaction and compliment signalised the feasibility of transforming what was temporary into permanent. The PAC project has become an organizer and conductor of a proximity public service to citizens who perceived their quality. The first PAC was inaugurated in the municipality of Cascais in July 2004. This type of service has become a showcase where the successes and mistakes are common knowledge. Transparency strengthens the commitment of employees and partners,

and alert to the need to review and adapt the adopted procedures.

Networks are new forms of organizational life that are incorporated into all organizational levels, to meet the challenges of today, since traditional forms of organization, hierarchy and bureaucracy, are not sufficient to overcome them, as said Lipnack (1994) and Berry (1980). The Citizen Service Points cover the whole Portuguese territory, as already mentioned this study included the referenced posts in Portuguese mainland. These multiservice posts with personalized service are located in places with lower population density. The services available at the PAC want to respond to the specific needs of populations in relation to services provided by central authorities.

The PAC are installed in autarchies, they indicate in which physical space the citizen can take added value service, as already mentioned, with the creation of the Municipal Assistance Offices, the two services have appreciated even more because the Municipal services centralization also began also to contemplate, in the same space, the central state services.

Employees assigned to PAC service are human resources from the entities that receive the PAC, i.e. Local Administration human resources, these people are who, because of their proximity to the citizen, do a remarkable job of answering and routing, some training gaps, unfamiliarity with new tools in portals, imprecise information about some central services and poor leadership, do not prevent them from turning the gaps into challenges and in favour of the best citizen interests, provide a friendly and effective work, in which citizens perceive the quality and effort and apprehends satisfaction.

This is another example of how the People Management not being brought to its real meaning, which is to work with people and not use them passively as mere objects to obtain results, makes this large set of collaborators overcome many constraints, and being themselves aware of their responsibilities and public function, take the initiative to equip themselves with skills to serve the citizen.

3. THE EFFECTIVENESS OF PUBLIC SERVICES IN CONTINENTAL PORTUGAL – THE PAC CASE

3.1. Research methodology

The main objective of this work is based on assure the satisfaction of citizens using PAC, in its many valences, studying in a systematic way what the actual impacts of implementing a set of services in Citizen Service Points are reflected in citizens satisfaction. To such, it was opted to select as its subject one of the 54 Citizen Service Points users in Portuguese mainland. Emphasized that the services offered through the Citizen Service Points reflect the concern to answer to the needs felt by most people living in areas far from the Central Administration.

In order to assist and guide the empirical study and taking into account the above objectives as a way to respond to the latent variable, overall satisfaction with the services provided, it was made up a division by 4 of the same components, namely: Global Image Organization, Involvement and Participation, Accessibility and Products and Services.

In this sense and to meet the main goal of the study were formulated and tested the following research hypotheses:

Hypothesis 1: The citizens are generally satisfied with the services provided in the PAC.

Hypothesis 2: The components of Global Image Organization, Involvement and Participation, Accessibility and Products and Services are correlated with Citizens Global Satisfaction.

The data collection instrument used in this empirical study was the CAF Model 2006, Common Assessment Framework, for Quality Public Administrations Quality on the European Union. Note that the CAF analyses the organization from different perspectives, providing a holistic analysis of its performance. In the present study was based on the perspective of citizens/customers.

The application of the questionnaire survey allowed the collection a sample of the knowledge, attitudes, values and behaviours of the respondents. The questionnaire consists of 40 questions and is divided into two large groups, one group is composed by all the 4 components (total of 35 items) and related items, namely: Global Organization Image with 7 items, Involvement and Participation with 5 items, Accessibility with 15 items and Products and Services with 8 items. A 2nd group with 5 socio demographic questions, which aims to characterize the citizens,

name, age, sex, occupation and qualifications.

Aiming the measurement of different items it was used the Likert five points scale that is to say 5 possible answers. Thus, the scale requires respondents to indicate their level of satisfaction or dissatisfaction with statements regarding the situation that is being measured through numeric values, since the answers reflect the strength and direction of the respondent's reaction to the statement. The statements of satisfaction should receive high values while the statements of dissatisfaction should receive low values, so the scale in this questionnaire comprises: 1 = Very Dissatisfied, 2 = Dissatisfied, 3 = Moderately Satisfied, 4 = Satisfied and 5 = Very Satisfied.

As for the process of data collection, it took place between April and December 2011. The questionnaires were distributed proportionally in districts where they are installed the 54 PAC. In total 306 inquiries were collected corresponding approximately to 57% of the 557 and 70% of the initial sample of 450 inquiries. Note that a first approach to the issue of the size of the initial sample of 450 citizens having taken was a sample error of 4.62% and a confidence interval of 95%. Later and since it was not possible to collect the 450 questionnaires but only 306, the final sample error was 5.6% assuming a significance level of 5%.

After the data collection and its creation of the database was necessary to assess the degree of internal consistency of data collection (Hill & Hill, 2002). For this we used the Cronbach's Alpha, having been obtained for the present study an internal consistency coefficient of 0.958, which according to the authors Gageiro and Pestana (2008) is a very good internal consistency allowing to note that the reliability of the questionnaire is very good.

Descriptive univariate analysis was performed, bivariate for the treatment of data collected and in order to meet the primary objective of the present study. Univariate analysis focused on descriptive statistical results related to the study sample socio demographic variables (*e.g.* gender, age, occupation, region and educational attainment). Moreover, the bivariate descriptive analysis aimed to explore the relationship between certain pairs of variables to realize the level of citizen involvement with the PAC. All inference analysis is performed to determine whether the differences and/or relationships between features found in the sample are extrapolated to the population, considering a confidence interval of 95%.

3.2. Sample Characterization

Regarding the distribution of the sample by geographic zone the data can be identified reading Fig. 1, where one can observe that the area of Portuguese Mainland with increased demand for services from what is demonstrated by the highest concentration of Citizen Service Points is the centre, with a percentage of 62.4%, clearly more than the sum of the other two zones, the North with 3,3% and the South with 4.2%.

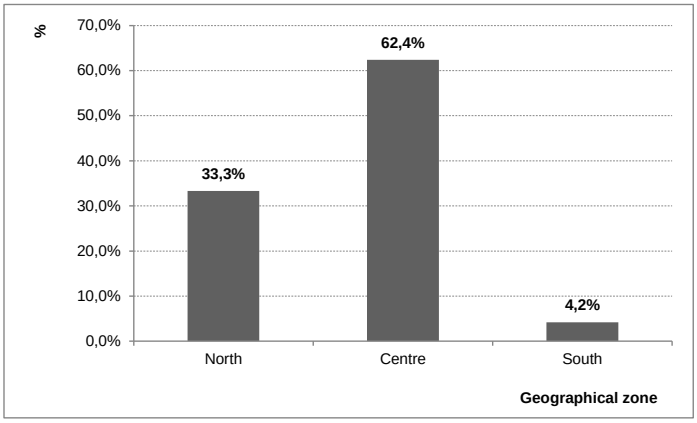

Figure 1. Percentage of citizens by geographical area.

Regarding the gender of users who demand the services of the PAC (Fig. 2), it can be seen that the sample consists of 58.1% female users and 41.9% male users.

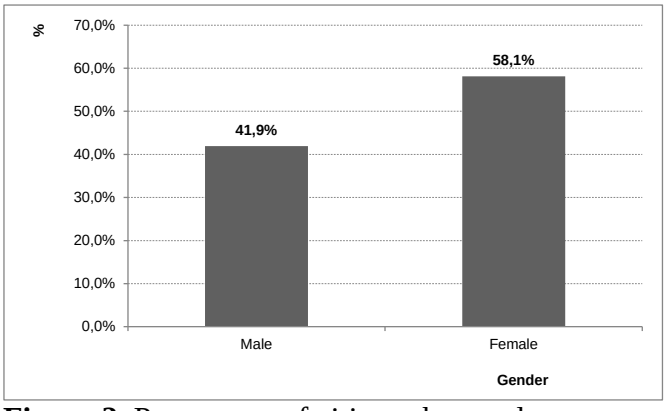

Figure 2. Percentage of citizens by gender.

The majority of the interviewed 41% have secondary education, including the ancient courses of Commercial and Industrial Schools and High Schools. Interestingly the fact that 24.3% of respondents have degrees or higher education or are attending university. Holders of basic education accounted 34.7%% of respondents (Fig. 3).

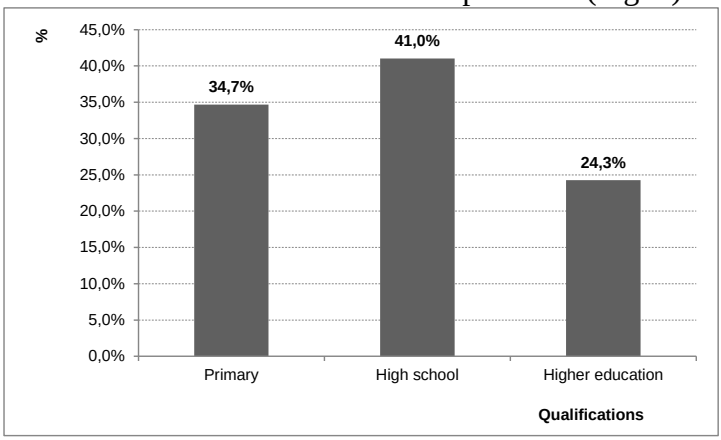

Figure 3. Percentage of citizens per academic qualifications.

According to the results it can be seen a diversified distribution of age of respondents (Fig. 4). Thus, the age bracket which has a higher concentration of respondents is between 31 to 40 years, 24.2%, followed by ages 41 to 50 years, with 22.1% the echelon 51to 60 registers 17.7% and the opposite between 21 to 30 points out 16%. The age of 61-70 shows a considerable percentage of users, 11.7%, and from 71 years and between 18 and 20 years are those who have a lower value, 6.5% and 1.7% respectively.

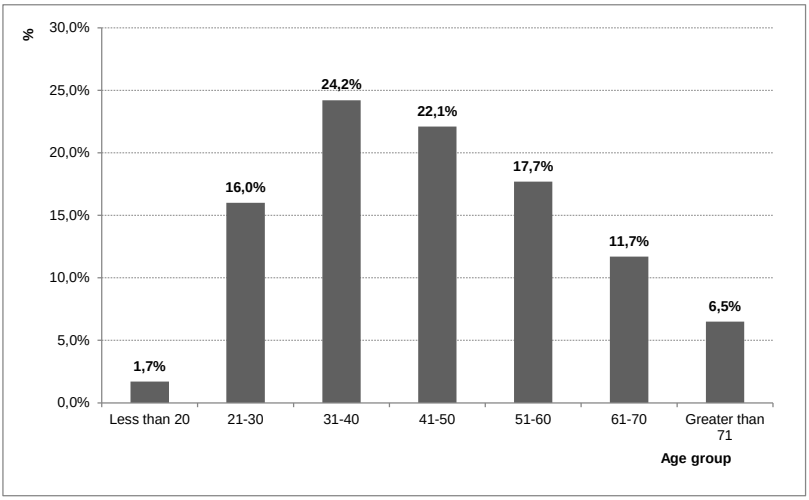

Figure 4. Percentage of citizens by age group.

4. DISCUSSION AND RESULTS INTERPRETATION

4.1. The citizen's satisfaction

In response to the latent variable global satisfaction of citizens with the PAC, the main hypothesis of this research study - hypothesis 1, it can be said that the analysis and interpretation of the data presented in Fig. 5, it is considered that the summary of a Mean value of 3.99 and standard deviation (SD) of 0.619, shows satisfactory results with respect to the satisfaction of citizens using the PAC.

In fact, the idea of a generalized inability of public entities to respond promptly and appropriately to requests from citizens seems to persist, partly attributed to the persistence of bureaucratic constraints and, in some cases, of abuse of power. Although it has been observed an increase in the level of demand from users for services provided by PAC, there is still the existence of a certain degree of compromise in situations less satisfactory, because users find that certain service aspects, including the physical concentration of services and the courtesy of the staff service, compensate, to some extent, the most unsatisfactory factors. However the citizens of a country, as a whole, are able to identify, or at least feel the quality of its service delivery system, when it is perceived and result on common benefits, derives also from this factor requirement of accessible, fair and equitable, quality, effective management in problem solving and efficient use of public resources, which the AP

responds as it is an example the PAC model although it displays a set of standard features, seeks to adapt to characteristics of the localities in which it operates, particularly in terms of physical facilities, type of care and communication, the results of all the synergies is that the citizen/customer wants and recognizes the public service.

According the values produced by t-Student test (t-Student = 28,012, p-value < 0,001) which was intended to see if the citizens are generally satisfied with the services provided in the PAC, it was possible to corroborate the research hypothesis, assuming a significance level of 5%. Thus it can be said that there are statistically significant evidence inferring that citizens are generally satisfied. For the analysis of Fig. 5 can be completed the answer to the first research hypothesis. The result referred to in the previous paragraph are the outcomes of the 4 components, especially those with higher averages, such as the component Products and Services and Global Image Organization that have a greater weight in satisfaction, which respectively have a mean of 4.29 and 4.26, with a SD of 0.77 and 0.82.

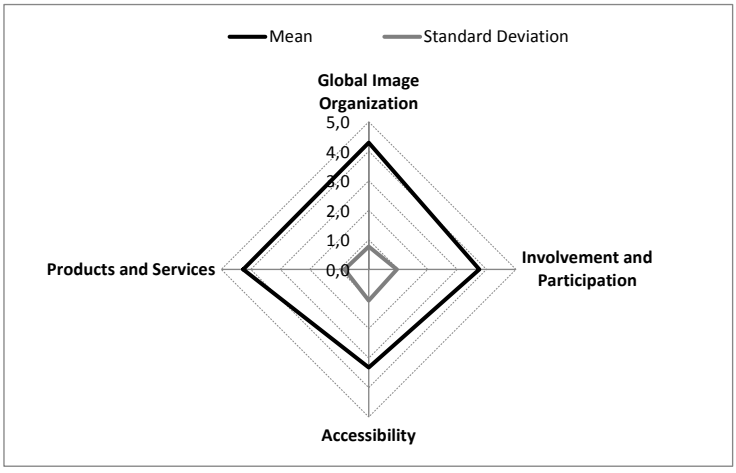

Figure 5. Summary of the Global Mean and Global Standard Deviation of Components.

Thus, all the analysis described above and displayed briefly in Fig. 5 allows us to confirm the first research hypothesis. Allows also to state that the optimum result of the satisfaction of PAC users shows that this study is indeed the result of a concentrated presence attendance model with an important place in the distribution of public service. As well as

the distribution model focused public service that reveals itself a catalyst for administrative modernization at various levels: promoting transparency and efficiency of public action, citizen orientation, promotion of technological innovation and working methods and adopting new models of leadership.

This research was guided by the purpose of reaching values of Global Satisfaction clearly identifiers from what the citizens think about the PAC, from these derive: positive perception of services, assertive behaviours, the notion of service quality and above all customer satisfaction and effectiveness.

4.2. Analysis of Existing Relationship between Components and Global Satisfaction.

In order to answer the second research hypothesis examined the correlation between the four major components that enabled investigation of citizens' satisfaction and ascertain the weight that each one contributes to the Global Satisfaction of citizens (Table 1). After the analysis of normality, where there was a violation of this assumption, it was necessary to resort to the Spearman correlation coefficient to measure the strength and direction of the relationship between the components, the closer to 1 are more correlated. All correlation coefficients are shown in Table 1 significant (*p-value* <0.001). Thus, the values shown in Table 1, it can be said that there is a strong correlation between all components, particularly between variables Accessibility and Involvement and Participation (r=0.7076), Products and Services with Global Image Organization (r=0.6595) and the Accessibility (r=0.6413). Although one can observe that any of the components have strong and statistically significant correlations with the Global Satisfaction, and the accessibility component (r=0.8908) is the largest contributor and which has a strong and direct correlation followed by component Products and Services (r=0.805). It should be noted that as the accessibility component that has the highest weight is the global component and that citizens are less satisfied, the PAC must begin to pay more attention to this component so that to not go against the citizens expectations . On the other hand the component with the lowest weight is the Global Satisfaction is the Global Image Organization because as we have found citizens showed a very high level of satisfaction, but should not overlook this situation because the image of an organization leads to reputation and brand and that is what is in the mind and ears of citizens. Still, this set of information

should be used to plot a strategy for quality improvement and to implement actions that actually improve citizen satisfaction generating a greater return on Global Image Organization. Contributes to effect a good measurement and monitoring system of citizen satisfaction, which can pass through, identification of expectation, satisfaction measurement, preparation of quality improvement strategies and their implementation of improvements. This study revealed that only the existence of a system of management of the effectiveness of services and satisfaction of its users allows the sustainability of implemented measures and implement administrative modernization. Moreover, the study also reveals that what is intended is nothing more than working with a new management culture focused for the citizen and for the improvement of organizational performance.

Table 1. Spearman Correlation Coefficient.

	Involvement and Participation	**Accessibility**	**Global Image Organization**	**Products and Services**	**Global Satisfaction**
Involvement and Participation	1	0,7076	0,5011	0,5492	**0,7826**
Accessibility		1	0,5338	0,6413	**0,8908**
Global Image Organization			1	0,6595	**0,6849**
Products and Services				1	**0,8050**
Global Satisfaction					**1**

MAIN CONCLUSIONS

The empirical study accomplished infers that at this time is not possible, just, make the legislative initiative the only engine of change in the public service, is the way of good management and proximity to the citizen who gives this, trust us services and in public institutions. In addition to building a modern legal structure, implement, monitor and promote good practices and invest in the training of human resources, it is necessary to reassess their own administrative processes and procedures, build networks to support modernization initiatives, share

knowledge and join it to new technologies, the simplification of regulatory environments and streamlining administrative practices.

Thus, all the analysis described above and displayed briefly proves the first research hypothesis and allows also to state that the optimum result for the satisfaction of users of PAC this study shows that this is indeed the result of a model focused to an important place in the distribution of public service, as well as the concentrated distribution model utility that reveals itself a catalyst for administrative modernization at various levels: promoting transparency and efficiency of public action, citizen orientation, promotion of innovation technology and working methods and adopting new models of leadership.

The results declared also that the variables related to Accessibility, Products and Services and Involvement and Participation have the greatest weight when you want to measure PAC user Citizen Global Satisfaction. From the research now ended, and by the results obtained, it can be said that the effectiveness of the Citizen Service Points, spread across Portuguese mainland, determine the satisfaction of their clients and that the path for the public administration modernization must continue to be considered as an essential part of the growth strategy for the country, a tool that should help to improve the relationship with citizens and reduce the costs of context for all interveners. The results are very satisfactory with citizens who use the PAC.

The present study reinforces the idea that is not new, a Brand Image for Public Administration, an image translated above all, in a new attitude. The main objective should be a culture of service determined by the effectiveness and quality of what is offered as a final product. The brand 'Public Administration' that would enhance its recognition should to be identical to that of other renowned brands from the private sector, as is the case of wine, oil, shoes, textiles, among others. The concept of branding 'Public Administration' assume a strategic dimension, not only as a way to honour the mission of public administration, but also as a way to attract the best human resources to carry out the strategies and objectives defined in different sectors.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE MONISTIC CHARACTERISTIC OF EUROPEAN UNION LAW

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Abstract

In the contemporary law, there is an increasingly distinct influence of the international law over the internal law, without the two theories to have fully validated each other. However, there is not a consistent practice of the States to this effect, the precedence of one or of the other of the two legal systems being assessed for each individual situation, in the grounds of the provisions of the national Constitutions and of the Vienna Convention. The European law laid down the theory of monism and imposes the compliance thereof by all Members States, because monism arises from the very nature of the Communities because the legal system of the European Union can only function based on monism, the only one compatible with the idea of integration. The legal system of the European Union operates based on the principle of the application thereof in the internal legal order of the Member States as adopted, without its transposition or transformation thereof in the internal law being necessary.

Keywords: *monistic character, legal system of the European Union, international law, internal law.*

INTRODUCTION

The European Union law grants rights and imposes obligations not only to Member States, but also to the citizens and legal persons to which specific rules apply. [1] This new type of law forms an integral part of the legal system of Member States, which are, first of all, liable for the appropriate application of such regulations. As a result, any citizen of the Member States is entitled to expect from national authorities all over the European Union to correctly enforce the rights to which they are entitled in capacity of European citizens. Each Member State is responsible for

[1] O.Manolache, *Community law*, All Publishing House, Bucharest, 1996, pp. 39 and following.

the application of the European Union law within the national legal system thereof by transposing it within the specified deadlines, in terms of conformity and of correct application.

By the very nature thereof, the European Union law has specific force for being undertaken in the internal legal order of the Member States, given that the rules of the European law: automatically acquire the status of positive law in the internal legal order of the Member States based on the immediate application principle; they are capable of creating, in themselves, rights and obligations for individuals based on the direct application principle; they are prevalent over any national law, based on the priority application principle. [1]

The European Union law constitutes a *legal order*[2] because it is a set of legal rules having their own sources and own bodies, which are needed for the adoption and application of the rules, with the compliance thereof being ensured by way of an autonomous jurisdictional apparatus also establishing the relations between the European Union bodies and Member States.

Starting from the relations between the international law and the internal law, the architecture of the relations between the European Union law and the internal law[3] may also be explained. Thus, the starting point is the existence of two theories relating to the integration of the international law in the national legal order: *dualism* and *monism.*

Dualism: this theory advocates that the international legal order and the national one are equal but totally independent and separated, and coexisting in parallel[4], without being subordinated to one another.

Monism: it considers[5] the internal rule of law as being in the same sphere as the international one, being super/subordinated one another, according to the version adopted. This theory considers the internal law as deriving from the international law.

[1] J.-V. Louis, *L'ordre juridique communitaire* (6-ème edition), Bruxelles, 1993, p. 164.
[2] I.Guy, *Droit communitaire général*, Paris, Masson, 1983, p. 111.
[3] M.Tutunaru, *European Union Law*, Scrisul Romanesc Publishing House,, Craiova, 2012, p.125.
[4] A.Fuerea, *Community Business Law*, second edition reviewed and supplemented, Universul Juridic Publishing House, Bucharest, 2006, p. 34.
[5] E.Gh.Moroianu, *Legal monism (I)*, the Review Law and Society no.1/2003, Constantin Brancusi University, Tg-Jiu, 2003.

The establishing treaties consecrate the monism and impose the compliance with the European Union law by the Member States. [1]

The rules of the European Union law are integrated in the internal law of the Member States, which do not have the option of selecting between dualism and monism, *because the monism is mandatory*.

Each Member State is responsible for the application of the European Union law within the national legal system thereof – transposition within the specified deadlines, conformity and correct application. [2] By virtue of the treaties, the European Union watches to the correct application of the European Union law. As a result, when a Member State fails to comply with EU law, the Commission has powers of its own (action for non-compliance), as provided by the EC Treaty and the Euratom Treaty, to try to bring such infringement to an end and, where necessary, may refer the case to the Court of Justice of the European Communities.

Non-compliance means failure by a Member State to fulfil its obligations under the European Union law. It may consist either of action or omission. The term State is taken to mean the Member State which infringes European Union law, irrespective of the authority - central, regional or local - to which the compliance is attributable.

MONISTIC THEORY

Unlike the international law, the European Union law is not indifferent towards the relations that must be established between the European Union law and the national law. It postulates monism and imposes the compliance thereof by the Member States.

Monism derives from the very nature of the Communities, therefore from the overall Treaty system, as underlined by the Court of Justice.[3] The European Union system, particularly to the extent into

[1] A.Fuerea, *European Community Law. General part.*, All.Beck Piblishing House,, Bucharest, 2004, p.154 and following.
[2] R.Duminica, *The crisis of contemporary law*, C.H. Beck Publishing House, Bucharest, 2014, pp. 60-61.
[3] C.J.C.E., Decision of 15 July 1964. Costa Flaminii against E.N.E.L. Request references for a preliminary ruling: Giudice conciliatore di Milano Italy in M.Voicu, *Introduction to European law*, Universul Juridic Publishing House, Bucharest, 2007, pp. 88-90.

which it has attributions of normative power for institutions, can only function in monism, the only principle that is compatible with the idea of an integration system: "by the set-up of a Community on a definite duration and vested with own attributions, with a personality and with legal capacity… and, particularly, with real powers deriving from a limitation on competence or from a transfer of attributions from Member States towards the Union, they have limited their sovereign rights, although in restricted areas, thereby creating a law applicable to the nationals thereof and to themselves". The affirmation is very straightforward: "different from the usual international treaties, the Treaty establishing the E.E.C. set-up an own legal order, integrated in the legal system of Member States from the entering into force of the Treaty and imposing the jurisdictions thereof".

The monistic theory is based on the idea that there is only one legal order having as components the national law and the international law and one of these components is prevalent over the other[1], and includes two versions: the prevalence of the international law over the internal law; the prevalence of the internal law over the international law.

The first version, i.e., the prevalence of the international law over the internal law, developed after World War I, according to which, based on the natural law conceptions, it is advocated that there would be an universal legal order that is prevalent over the internal legal order of different states, implying that the international legal rule is immediately enforced, by full right, without receipt or transformation, in the internal legal order of the State that is a party in the Treaty[2], and, in case of contradiction between the internal rule, as a source of law[3], and the international one, the latter will apply, the international rule being inapplicable over the period when the Treaty is in force.

Most European States have laid-down, in the Constitutions thereof, the recognition of the international rules[4] as part of the internal system thereof. Such a receipt system can be found in Austria, Italy,

[1] A.Fuerea, *see above.*, p. 34.
[2] *Idem*, p. 35.
[3] I.Friedmann-Nicolescu I., *Considerations on the Interpretation of Article no. 1 of the Civil Code from the Perspective on the Theory of Law*, National Conference The New Romanian Civil Code, two years after its entry into force *Theoretical and practical problems* - Bucharest, Monduzzi editore, Bologna, Italy, 2013, pp. 22-23.
[4] G.W.Hegel, *Principles of philosophy of law*, Paideia Publishing House, Bucharest, 1998, pp. 46-49.

France and Germany. The Constitution of the Netherlands additionally provides that the international treaties to which the State is a party prevail over the internal laws that include contrary provisions (the monistic system involving the prevalence of the international law over the internal law).

The second version has been developed in response to the first one, advocating for full independence and sovereignty of the States, and has attempted to prove that the international law represented a projection of certain internal law rules in inter-State relations, therefore, the international law deriving from the internal law of each State.

Dominating at the end of the 20th Century, with the internal law prevailing over the international law, the Treaty acquires legal force to the extent such is provided in the internal law and, when there is conflict between the internal and international rules, the internal normative document prevails.

In the contemporary law, there is an increasingly distinct influence of the international law over the internal law, without the two theories to have fully validated each other. However, there is not a consistent practice of the States to this effect, the precedence of one or of the other of the two legal systems being assessed for each individual situation, in the grounds of the provisions of the national Constitutions and of the Vienna Convention, where, in Art. 27 provides that: „A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." [1]

MONISM OR THE PRINCIPLE OF IMMEDIATE APPLICATION OF THE EUROPEAN UNION LAW

The legal system of the European Union operates based on the principle of the application thereof in the internal legal order as adopted, without its transposition or transformation thereof in the internal law being necessary.

The principle of the immediate applicability of the European Union law[2] signifies the automatic integration of the European Union

[1] *Vienna Convention on the Law of Treaties*, concluded in Vienna on the 23rd of May 1969.
[2] R.Duminica, *A short reflection on the European constraint of domestic law*, in Agora International Journal of Juridical Sciences, no 2/2010, pp. 109-115.

rules into the internal legal order of the Member States without a nation introduction rule being necessary (this is even prohibited because it affects the status of the European Union law).

The immediate applicability does not cover the time aspect and, as a result the word *immediate* is to be interpreted as *i-mediate* namely *acting without an intermediary*. The following are immediately applicable: the provisions of the establishing treaties; the provisions of the international agreements that include a clear and specific obligation the execution and effects of which are not subordinated to the adoption of a subsequent act; the Regulations (based on art. 249, paragraph 2, TEC)

The decision is immediately and directly applicable as follows: the decision is integrated in the internal law from the time of the adoption thereof; there is not a need for national receipt measures; it has a direct effect in the person of the addressees thereof and of the third parties that can use such.

The principle of immediate application does not allow the judges from a dualist country to consider a European Union treaty as being as applicable as the internal law under the pretext of its admission according to the procedures for international treaty admission having turned it into a national right.

Moreover, it cannot be evaded by way of applying a European Union treaty regularly ratified under the pretext of not having met the admission procedures for international treaties as provided by the Constitution.

The establishing treaties were regularly ratified and translated by each of the charter members into their own internal legal order, according to the national provisions concerning the usual treaties.

Therefore, by the Decision of the 3rd of April 1968 in the case of Firma Molkerei[1], the Court of Justice "consecrated the monistic conception judging that the legal rules of the European Union law are translated into the internal legal order without the need for any national measure to be taken and, therefore, the European Union law – either initial o derived therefrom – is *immediately applicable* in the internal legal order of the European Communities." [2]

[1] C.J.E.C., Decision of the 3rd of April 1968, Cse 28/67 the Molkerei-Zentrale Westfalen/Lippe GmbH Company versus Hauptzollamt Paderborn.
[2] D.Mazilu, *European Integration. Community law and European institutions, edition II*, Lumina Lex Publishing House, Bucharest, 2004, p.96.

According to the principle of immediate applicability, the European Union rule automatically acquire the status of positive law in the internal legal order of the Member States, being prohibited to make any transformation of the European Union rules into the national law rules, as well as any procedure for the receipt thereof, and all internal execution measures capable of altering the integrity of the European Union rules.

In terms of the primary European Union law, the immediate applicability does signify the suppression of the formal receipt but, rather, the neutralisation of the effects thereof.

In terms of derived law and of the law arising from the international relations of the Communities, it represents the field in which the suppression of dualism acts extensively: the law deriving from the normative activity of the European Union institutions is prevalent in the legal order of the Member States without any transformation, receipt or execution measures.

EXEMPLIFICATIONS

The establishing treaties with immediate applicability have this feature because of the very fact that they were regularly ratified and translated by each of the charter members into their own internal legal order, according to the national provisions concerning the usual treaties.

In 1972, with the extension of the Communities to other three dualist countries (Denmark, Ireland and the United Kingdom), the applicability feature of the European Union law (which, meanwhile, had been expressly granted by the CJEC) was appropriately taken into consideration under the monistic theory.

Any economic or commercial case judged automatically acquires the power of *immediate applicability* in the Member States and in Romania. Any directives adopted by the commission in Brussels will have *immediate applicability* and the publication of such a rule in the Official Journal of the European Union will have an impact equal or, sometimes, superior to the publication thereof in the Romanian Official Journal.

Examples of the Principle of Immediate Application in Italy

The Court condemned the dualist techniques used by Italy for the European Union Regulations, for the system of the order for

execution in the internal law, having as an effect the transformation of the international law source into an internal source (the 7th of January 197, Commission/Italy 39/72 [1], and the 10th of October 1973, Variola, 34/73 [2]).

By Decision Costa, the Court categorically dismissed the objection of *absolute non-receipt* put forward by the Italian Government which, according to the dualist logic, claimed that the Italian judge could only apply the internal law and, as a result, could not apply Article 177 of the E.E.C. Treaty.

The Constitutional Court of Italy allowed the *immediate applicability* of the European Union law by Decision Frontini (the 18th of December 1973), the grounds of which are very clear: the fact that the E.E.C. Regulations are not needed as an immediate source of rights and obligations in order to be subject to State measures that recopy the provisions of the European Union, able to amend or condition in any manner the entering into force and, even less, to substitute, derogate or abrogate, even in part, of the European Union acts, is compliant with the logic European Union system.

The Constitutional Court allowed the abandoning of the dualist system for the benefit of the European Union law. However, it decided that any Italian judged before whom proceedings are initiated for an incompatibility between a law and the European Union law cannot judge himself/herself and should refer such difficulty to the Constitutional Court.

Examples of the Principle of Immediate Application in Great Britain.

The monistic theory (immediate applicability) [3], on which the integration principle is grounded, may be subject to an application by the courts of law. The integration principle may be of the competence of the lawmaker, and the most obvious example of the use of a dualist procedure with a view to ensuring the application of the integration principle at the time of the establishing treaty ratification is represented

[1] C.J.E.C. Decision of 7 February 1973. Commission of the European Communities vs Italian Republic. Case 39-72.

[2] C.J.E.C. Decision of 10 October 1973. Fratelli Variola S.p.A. against the administration des finances italienne. Application for a preliminary ruling: Tribunale civile e penale di Triste - Italy. Case 34-73.

[3] A.Bolintineanu, A.Nastase, *International law compared,* All Beck Publishing House, Bucharest, 2000, pp.14-15.

by the *European Communities Act* as voted by the British Parliament while also authorising the ratification of the act of accession.

This way, the constitutional practise of Great Britain, which provided for the formal introduction of the international treaty through the entire Parliamentary procedure and the transformation thereof in an internal regulation, was willingly eliminated under the European Communities Act of 1972, which regulates the issue of the immediate application as follows: All these rights, powers, responsibilities, obligations and restrictions created or arising from or by virtue of the Treaties, and any other such legal remedies and procedures awarded under or by virtue of the Treaties have legal juridical force without needing other formalities and may be invoked in Great Britain; they will be recognised as being in effect and will be implemented, fulfilled and followed as such; and the wording *European Union law in effect* and the similar wordings will be interpreted as referring to the law to which this sub-section applies.

The Act represents, for all British authorities and particularly for the courts of law, an order for permanent execution of the overall European Union law.

Ireland also adopted, from the time of the accession thereof and based on the Constitution revised for this purpose, a *European Communities Act*, however less detailed but having an effect analogous to that of the British Act.

Examples of the Principle of Immediate Application in France

In France, a monistic State, the Council of the State accepted that the European Union Regulation, on the grounds of Article 189, is integrated, from the time of the publication thereof, into the Member States' law – the 22nd of December 1978, Syndicat des Hautes Graves de Bordeaux.

Also, the Constitutional Council was very clear by the two Decisions of the 30th of December 1977 accepting that the mandatory character of the European Union Regulation is not subordinated to the intervention of Member States' authorities.

Another example is the fact that the Supreme Courts of France decided in favour of the European Union law supremacy, by the Decision of 1975 Cafes Jacques Vabre by which the Court of Cassation asserted that the Treaty of the 25th of March 1975, which, by virtue of Article 55

of the Constitution, has authority superior to that of the laws, establishes an own legal order, integrated to that of the Member States; due to this specificity, the legal order it has created is directly applicable to the nationals of these States and is imposed in the jurisdictions thereof.

For these reasons, the Court of Appeal legitimately decided that Article 95 of the Treaty was to be applied by eliminating Article 265 of the Customs Code, even though the latter text was posterior, while the Council of State, by its Nicolo Decision, joined this opinion.

Examples of the Principle of Immediate Application in Belgium

In Belgium, a dualist State, there is constant jurisprudence according to which the provisions of an international treaty could be disregarded on the basis of a contrary posterior law. In the absence of the constitutional consecration of the European Union law prevalence, the first jurisprudential solutions continued to be consistent with the practice defined in terms of international treaties. The turning point was the Decision of the Court of Cassation of the 27th of May 1971, issued in the Société des Fromageries Franco-Suisse Le Ski case. In this case, the Belgian Government was punished by the Court of Justice of the Communities for the introduction, in 1958, a tax contrary to the provisions of Article 12 of the EEC Treaty. Following this Decision, the tax was eliminated on the 1st of November 1964, however, without having a retroactive effect.

CONCLUSIONS

In conclusion, unlike the international law, the European Union law is not indifferent towards the relations that must be established between the European Union law and the national law. It postulates the monism and imposes the compliance thereof by the Member States. The European Union law monism is based on the unity of the juridical ordering, but it does not exclude any continuity between the legal order of the European Union and the national legal order of the Member States. The Treaties, as primary sources for European law, are integrated in full in the system of the regulations that need to be applied by the national courts of law, and the provisions thereof are applicable in their initial capacity as European Union regulations. However, this autonomy in

respect to the legal order of the Member States is not absolute. Since the moment when the States set-up the European Union, it has not become a foreign entity, exterior to them, because the legal European and national systems apply to the same individuals, in their dual capacity as citizens of the Member States and of the Union, but also, because the European law is consecrated and attains the objectives thereof only to the extent it is accepted in the legal order of the Member States.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE EUROPEAN AGENCIES AND ORGANIZED CRIME

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***Abstract**:*

Establishment of the European Union marked the beginning of a new era in which European countries have identified the need to move forward together. Economic, political, social, technical, financial and military common interest brought together the majority of the European countries. Evolution of these countries in the last decades is more than visible. Working and living together means a lot of advantages for the people of European Union. The freedom and free movement of the European citizens is a fact and brought plenty of benefits to Member States. Unfortunately, the erasure of the internal borders brought some serious problems. Among them, the most serious one is the internationalization of the crime. To prevent and to fight against organized crime is one of the top priorities of EU. To carry out an efficient fight against trans-border organized crime, EU established important agencies, specialized in this area – EUROPOL (office for police cooperation), FRONTEX (office for management of external border of EU) or EUROJUST (office for judicial cooperation).

***Key words**: European Union; law enforcement agencies; EUROPOL; FRONTEX;*

1. SHORT HISTORY OF EU EMERGENCE.

Start of unification was given six European countries, namely Belgium, France, Germany, Italy and the Netherlands Luxemburg that, by the Treaty of Paris signed on 18 April 1951, established the European Coal and Steel Community, designed to manage the production of coal and steel under a common market including the removal of customs barriers. On March 25, 1957, the same signatories decided by a treaty signed in Rome, creating the European Economic Community, EEC and the European Atomic Energy Community - Euratom. Following changes and improvements in institutional and organizational level the number increased to nine members, linking Great Britain, Denmark and Ireland in 1979. In 1981, Greece joined, followed in 1986 by Spain and Portugal. Early 1980s was a manifestation of European current opinion on the importance of freedom of movement as a fundamental right. After

numerous discussions, representatives of the same European countries, namely France, Luxembourg, Germany, Belgium and the Netherlands have decided to create an area without internal frontiers. The agreement between these countries was signed on June 14, 1985 in the town of Schengen in Luxembourg, and on June 19, 1990 was signed the Convention implementing the Schengen Agreement. All these documents consecrating the abolition of controls at internal borders of the signatory states and creating a single external frontier, where checks and carried out according to a strict set of rules. Were also established common rules on visas, migrants, asylum seekers and measures concerning police, judicial and customs cooperation, from the entry into force in 1999. In 1992 was signed the Maastricht Treaty, establishing the European Union consisting of 12 states, the concept of community as one of the European Union. The Treaty provisions sought implementation of a common foreign and security policy, while defining a common defense policy, the expansion of economic integration in the context of the monetary and political duties established by the European Parliament, the European Council, the European Commission, the Court of Justice and the Court of Auditors. In 1995, the EU accession process continued with the admission of Austria, Finland and Sweden. Treaty of Amsterdam, signed on 2 October 1997, introduces four areas: freedom, security and justice, the Union and its citizens, effective and coherent foreign policy, institutional issues. By a protocol attached to the Treaty has been incorporated the Schengen acquis in the legislative and institutional framework of the European Union. Year 2004, brings the accession of the following countries: Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Czech Republic, Slovakia, Slovenia and Hungary in 2007 marking the accession of Romania and Bulgaria. Today, the European Union is consisting of 28 Member States, five candidate countries (Iceland, Montenegro, Turkey, Serbia, and Macedonia) and 3 potential candidates (Albania, Kosovo and Bosnia and Herzegovina). The European Union is required to provide all its citizens an area of freedom, security and justice, in which no account of the internal borders of the Member States. With complex rules of European law, European citizens are guaranteed freedom of movement, being adopted common measures regarding border control, asylum and specific measures in fighting crime. EU has created the internal market and created a space for the sustainable development of Europe, fostering scientific and technical progress,

economic, social and territorial cohesion, with solidarity among Member States. The European institutions are in the light of the European treaties true fundamental for European development. The structure and aims of these institutions are accomplished in accordance with the procedures and provisions of the European law. In this context, the action of specialized agencies cooperation to combat crime and border security becomes paramount in achieving the purposes for which the European Union was created.

2. INSTITUTIONS, BODIES AND AGENCIES OF THE EUROPEAN UNION.

European Union has a unique institutional framework in the world and is based on institutions, institutional bodies, specialized agencies and decentralized bodies that allow its operation as a whole, under optimum conditions. The powers and responsibilities of the European institutions, rules and function procedures are set in the European treaties and normative acts elaborated by the European legislator. Parliament is composed of representatives of EU citizens directly elected by them through a national election process. MEPs are elected by direct, free and secret ballot for a term of five years. The European Council is consisting of all the Heads of State or Government of the Member States, plus the President of the Council and High Representative of the Union for Foreign Affairs and Security Policy. The *European Commission* is the European institution which constantly promotes the general interest of the Union and takes all necessary steps in this regard. So, the Commission has the powers to monitor how legal norms of the European treaties are implemented in national law and applied in the Member States. The Commission has legislative initiative in almost all areas of action, and coordinates overall activities unit.

European Union's Council consists of all Ministers of Foreign Affairs of governments, representing each Member State. This is a decision making body that coordinates the economic policies of the Union, having common legislative and budgetary powers together with the European Parliament.

EU Court of Justice interprets EU law to ensure that it is applied in the same way in all EU countries.

European Central Bank is responsible for defining and implementing the Union's economic and monetary policy. However, the bank is managing the unique European currency and monitories the prices stability in the Union, with the role of maintaining financial system stability.
European Court of Auditors shall examine how EU funds are managed; this Court is aiming to guarantee European citizens that public money is spent effectively.

European Parliament, European Council and European Commission shall be assisted by the Economic and Social Committee and the Committee of the Regions, both in an advisory. Among the specialized institutional bodies are: the European External Action Service, the European Economic and Social Committee, European Investment Bank, the European Data Protection Supervisor. Specialized agencies are numerous, and they are divided according to their competence in decentralized agencies - (EUROPOL, FRONTEX, the European Aviation Safety Agency, the European Environment Agency, the European Chemicals Agency, etc.) and executive agencies: (Executive Agency for Education, Audiovisual and Culture, Research Executive Agency, Executive Agency for Small and Medium Enterprises). For the implementation of the measures set out in the Treaties concerning police and judicial cooperation in criminal matters, an important role presents specialized agencies, namely the European Police Office - EUROPOL and the European Agency for the Management of Operational Cooperation at the External Borders the Member States of the European Union - FRONTEX.

3. EUROPOL

European Police Office, Europol is the European Union agency responsible for ensuring European cooperation between law enforcement agencies by facilitating the exchange of information between Member States [1]. Its mission is to streamline and boost cooperation between the competent national authorities in preventing and combating serious forms of international crime and terrorism, to ensure the safety of European citizens across Europe. The idea of a European Police Office was first launched at the European Council in Luxembourg on 28 and 29 June 1991. Then plan envisaged the creation of a new body to provide the framework for development cooperation of the police in the Member

Union member states to prevent and combat international organized crime, including terrorism and drug trafficking. EUROPOL became operational on 01 July 1999 after all the EU Member States have ratified convention concerning the establishment of the European Police Office. On 1 January 2010, under Council Decision replacing the Convention, Europol became an agency of the European Union with a new legal framework and a broad mandate based in The Hague, Netherlands. Agency has about 800 employees and is financed by the EU community; the amount allocated in 2011 was about 85 million EUROS.

Europol supports the Member States' activities to law enforcement in the following areas:

• illegal trafficking of drugs;
• terrorism;
• illegal immigration, human trafficking and sexual exploitation of children;
• counterfeiting and piracy of the products;
• money laundering;
• forgery of the money and means of payment, while fulfilling the role of the Central Office for combating euro counterfeiting.

Europol supports the Member States by:

• facilitate the exchange of information between the authorities of the European Union and law enforcement agencies through information systems and analysis of EUROPOL, using SIENA application that provides secure information exchange network;
• conducting operational analysis to support investigations in the Member States;
• preparation of reports and policy analyzes (eg threat assessments) based on information provided by Member States, of Europol or from other sources;
• providing expertise and technical assistance on investigations conducted in the European Union, under the supervision and legal responsibility of the Member States authorities. Europol offers a unique set of operational services for the Member States of the European Union and acts as a center of support for the enforcement of criminal intelligence center and a center of expertise on law enforcement. Somehow, EUROPOL works in the same way as a company centered on best quality management based on the latest marketing principles [2].

Europol officers have no direct powers of arrest and investigation. Their task is to assist law enforcement colleagues from across Europe by collecting, analyzing and disseminating criminal intelligence and coordinating international police operations. EUROPOL partners use this information to prevent, detect and investigate crime, and to locate and put under criminal offenders.

Agency provides the following types of assistance:

• operational analysis;
• assistance on site by mobile office;
• technical assistance in forensic matters.

Within Europol work over 100 analysts in criminal matters among the best trained in the world. They use cutting-edge tools for discovering some of the most dangerous activities of organized crime and terrorist networks operating in Europe. This activity is conducted in an Analysis Work File (AWF - Analysis Work File) EUROPOL unique instrument in which analysts work in teams with specialists in the area of organized crime and terrorism for collecting and analyzing information.

Permanent Operations Center is the focal point where EUROPOL criminal information from many sources in Europe is subject to complex checks in order to assist law enforcement agencies in connection with investigations they carry. Application Secure Information Exchange Network SIENA is a safe and innovative tool that communication needs are met in maximum security among law enforcement institutions of the European Union. SIENA is used to manage operational and strategic information exchange in criminal matters between the Member States, Europol and third parties who concluded cooperation agreements being met all legal requirements regarding data protection and privacy. Europol Information System allows the implementation, storing, searching, viewing and making connections between information on cross-border crimes. This allows law enforcement agencies throughout Europe to cooperate with international investigations being automatically detected similarities between elements of different ongoing investigations. It thus facilitates the sharing of sensitive information in a secure manner. Cooperation is achieved through the 145 liaison officers who work at the headquarters of Europol. They are posted on agency law enforcement authorities within and outside the EU, ensuring through their rapid and effective cooperation based on personal contacts and mutual trust. They are actively involved in all projects analytical and operational meetings,

liaising with experts from countries of origin to support the establishment of joint investigation teams.

EUROPOL manage and program tracking terrorist financing as a result of the agreement between the United States and the European Union. Thus, are permanently checked by a special unit of experts and specialists in the fight against terrorist, financing requests transfer between the European Union and the U.S. To the same aim, the program "Check the web" on monitoring of the Internet, is providing valuable information in this regard. The agency provides technical assistance in areas such as forensic payment card fraud, counterfeiting of the euro and the production of counterfeit goods, computer crime, dismantling centers of drug production and storage. The Europol Illicit Laboratory Comparison System and Europol Program for Synthetic Drugs includes detailed, photographic and technical details about production and storage spaces on drugs, mode of operation and important catches, allowing the identification of common elements between the equipment, materials and chemicals seized, profiling and tracing criminal groups. In Romania, the Europol National Unit operates within the International Police Cooperation Centre General Inspectorate of Romanian Police. According to the Decision of the Council of Europe nr.371/2009, Europol national units have the following duties [3]:

• supply Europol on their own initiative and intelligence information necessary to perform his duties;
• respond to requests for public information, intelligence or advice of Europol;
• update information and intelligence;
• addresses EUROPOL requests for advice, information, intelligence and analysis;
• ensures compliance with the law in every exchange of information between themselves and Europol;

Cooperation with INTERPOL and EUROPOL and other EU agencies such as Eurojust, CEPOL and FRONTEX, substantially increase the efficiency of the operations.

4. FRONTEX

European Agency Frontex (European Agency for the Management of Operational Cooperation at the External Borders of the

Member States of the European Union) was founded in 2005 under the provisions of Council Regulation no. 2007/26 October 2004, is based in Warsaw, Poland , and its objectives are [4]:
• ensuring operational coordination between Member States in the area of management of external borders;
• assisting Member States in the preparation of border guard officers;
• developing and issuing risk analysis;
• development of the research relevant for the control and surveillance of external borders;
• assisting Member States at the external borders and ensure the necessary support in organizing joint operations. FRONTEX agency ensures the coordination of Member States in the implementation of Community measures concerning the management of external borders. FRONTEX operations are based on risk analysis for combating illegal migration, which attracts confidence, support and active participation of representatives of the Member States. FRONTEX aim is to coordinate cooperation in securing the external borders of the European Union. For developing and enhancing partnerships between Romania and FRONTEX have been took several important steps. The operational cooperation is one of the most important priorities. Romania has been accepted as an observer state to assist in the work of FRONTEX in 2005. Along with obtaining of membership of the European Union, the Romanian Border Police became a full member the FRONTEX Agency in January 2007. Partnership Framework Agreement was signed on 13.06.2007 by the Minister of Interior and Executive Director of the Agency. Communication between the Romanian Border Police and other institutions in Romania showing interest in promoting and ensuring a smooth management of the external borders of the European Union is performed by the National Contact Point FRONTEX, operating at the General Inspectorate of the Border Police Romanian.
Cooperation with FRONTEX is done mainly on the following levels:
• participation of Romanian experts in joint operations;
• rapid operational assistance for a limited period of time in the Rapid Border Intervention Teams (RABIT);
• European Patrols Network (European Patrol Network);
• risk analysis carried out by Romanian Border Police;
• training for the border police officers;
• technical equipment offered by the agency for special operations;

Since the beginning of 2008, based on an agreement between the General Inspectorate of the Border Police and the FRONTEX, Initial and Continuing Training School for Border Police from Iasi has been certified as partner of FRONTEX (Partner Academy). These institutions organize training of border guards from various European countries under the aegis of FRONTEX, which allows to sharing experiences on border matters [5]. Since the accession to the present time, the Romanian Border Police participated in many joint operations under the aegis of FRONTEX, both by sending officers and by sending equipment or vessels, our country is appreciated as one of the most active participants. From the position of the host State or sending State in all types of border missions, Romanian border guards have proven professionalism, receiving high acclaim.

5. CONCLUSIONS

As shown, the structure of the Union is based on European legal rules, which are designed to operate and maintain a complex mechanism that provides multiple benefits to European citizens [6]. Proper functioning of the institutions and agencies charged with the fight against crime and border security guarantees the security of citizens in all Member States. Institutions with legislative role within European Union created the necessary operations of the specialized agencies. Cooperation of the Member States under umbrella of EUROPOL has proved effective and successful. The outcome of joint operations conducted under the aegis of FRONTEX provided security of the external borders European Union and efficiently tackled the illegal immigration. From this perspective, it is worth mentioning rigorous selection of the EU officials and national experts operating or participating in FROTEX and EUROPOL agencies. The professional competence and quality of the human factor have a crucial role in the successful achievement of the objectives of these agencies. Until now, the need for security has been fulfilled and these specialized agencies - EUROPOL and FRONTEX ensuring efficient support to law enforcement agencies of the Member States of the European Union in preventing and combating organized crime and border threats.

On short and medium term, it is necessary to maintain the same rate of the activity of these agencies, taking into account the symmetrical and

asymmetrical threats manifested on the European level to the national security of the Member States of the European Union.

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THE INTERMEDIARY PLURALITY OF OFFENCES IN THE NEW CRIMINAL CODE

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Abstract: *The author, as a doctrinaire and a practitioner in the area of the criminal law, analyzes in the present study the third form of the plurality of offences, namely the intermediary plurality. After defining the concept of intermediary plurality as stated by the New Criminal Code, the author emphasizes the differences between the intermediary plurality and the basic forms of the plurality of offences, namely the concurrence of offences and relapse. Also, the author expresses certain reservations about this notion, considering the principle of tertium non datur.*

Key words: *intermediary plurality, concurrence of offences, relapse, penalty.*

Art 44 of the New Criminal Code states the intermediary plurality, which is a form of the plurality of offences, alongside the concurrence of offences and relapse.

According to the above mentioned law "there is intermediary plurality of offences when the conviction decision remains final to the complete execution of a penalty or it is considered to have been executed, the defendant commits a new offence which does not meet all the conditions stated by the law for relapse".

As noticed, by its structure and specificity, the intermediary plurality is different than the concurrence of offences, because of the conviction involved, and the relapse, due to the fact that its conditions are not met, assuming that the commission of offences after a final conviction and before its execution, but in reduced gravity conditions, so that the requirements for relapse are not met, either regarding its first term, or its second term[1].

[1] V. Paşca, *Drept penal. Partea generală*, Universul Juridic Publishing-house, Bucharest, 2011, p.312.

Thus, the intermediary plurality concerns a situation which apparently would be placed between the two main forms of the plurality of offences.

It is questionable if there could be such form of plurality[1]. The so-called intermediary plurality is nothing but a de facto and not de jure *post-conviction relapse*[2]. Apparently the phrase "situation where there is no relapse" chosen by certain authors is closer to reality[3].

The French doctrine knows this situation as "reiteration".

In fact, the New Criminal Code uses the regulation from the Criminal Code of 1968 (Art 40), which has as secondary title "the penalty for cases where there is no relapse". Though the content is the same, the New Criminal Code uses the name given by the doctrine, namely "intermediary plurality".

According to some authors[4] the marginal name is debatable because there is no real distinct plurality between concurrence and relapse. This name can be used for didactic purposes, and not as a technical term established by the criminal law. In this regards, it is appreciated as more correct the marginal name used by the Criminal Code of 1968 "penalty in cases where there is no relapse".

The sanctioning regime of the intermediary plurality is identical to that of the concurrence of offences, as stated by Art 44 Para 2 of the New Criminal Code, thus the penalty for the new and for the previous offence are merged, according to the rules of the concurrence of offences.

The intermediary plurality has become in the conditions of the New Criminal Code a mandatory aggravating circumstance, unlike the Criminal Code of 1968, which stated it as an optional aggravating

[1] Gh. Ivan în G. Antoniu (coord.), C. Bulai, C. Duvac, I. Griga, C. Mitrache, I. Molnar, I. Pascu, V. Paşca, O. Predescu, *Explicaţii preliminare ale noului Cod penal,* 1st Volume, Universul juridic Publishing-house, Bucharest, 2010, p.472.

[2] G. Antoniu, *Reflecţii asupra pluralităţii de infracţiuni*, in the Criminal Law Review, No 4/1999, p.19-20; Gh. Ivan, *Drept penal. Partea generală*, p.90.

[3] V. Dongoroz et al., *Explicaţii teoretice ale Codului penal român. Partea generală*, 1st Volume, Bucharest Academy Publishing-house 1969, pp.319 – 320.

[4] G. Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (I),* in the Criminal Law Review No 4/2007, p. 20; Gh. Ivan (author), *Explicaţii preliminare ale noului Cod penal,* 1st Volume, Universul Juridic Publishing-house, Bucharest, 2010, p.471.

circumstance, in this regard the latter being considered a more favorable law[1].

Legal practice aspects. In courts' practice has been decided that there is a plurality of offences and are applicable the rules of the concurrence of offences, as stated by Art 40 of the actual Criminal Code, if after only a fine was initially established, then replaced with 5 months imprisonment, the offender commits a murder[2] or, if after a conviction for 6 months or more of imprisonment for an offence committed with intent, the offender commits a new offence out of negligence[3], or if, during the service of a forced labor penalty, the convicted commits a new offence which does not met the requirements for relapse, even if the penalty for the previous offence has been entirely served until the moment when the inferior offence is trialed[4]; if after a definitive conviction for one or more concurrent offences, the offender commits one or more concurrent offences which cannot be considered relapse[5].

All the above solutions are considered as fair[6].

The plurality stated by Art 44 of the New Criminal Code (Art 40 of the Criminal Code of 1968) is possible if the offences committed by the convicted person do not meet the requirements for the post-conviction relapse. In this case there should be a previous definitive conviction for one or more offences, after which the convicted person committed one or more offences. Also, the successive offences must not fulfill the legal requirements for the post-conviction relapse, referring either to the first or the second condition of the above mentioned plurality.

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[1] V. Paşca, Drept penal. Partea generală, Universul juridic Publishin-house, Bucharest, 2011, p.313.

[2] Suceava Court, Penal Decision No 206/1983 in the Romanian Law Review No 7/1984, p.112.

[3] Suceava Court, Penal Section, Penal Decision No 950/1982 în R.R.D. nr. 4/1983, p. 76; Suceava Court, Penal Decision No 118/1980 in V. Papadopol, Şt. Daneş, *Repertoriu de practică judiciară în materie penală pe anii 1981 – 1985*, op. cit., p.247.

[4] Bucharest Court, 1st Penal Section, Decision No 1352/1978 in V. Papadopol, M. Popovici – *Repertoriu alfabetic de practică judiciară în materie penală pe anii 1976 – 1980*, p.88.

[5] Suceava Court, Penal Section, Decision No 218/1981 in the Criminal Law Review, No 10/1981.

[6] Gh. Ivan (co-author), *Explicaţii preliminare ale noului Cod penal*, 1st Volume, (Art 1-52), p. 473.

It must be emphasized the fact that the New Criminal Code no longer states the institution of the penalty service at the workplace.

In all the cases of the intermediary plurality, the penalty for the previous offence and that for the subsequent offence are merged according to the rules of the concurrence of offences[1]. It is not possible that the subsequent penalty to be merged with the entire penalty applied for the previous offence[2]. If the previous penalty has been entirely or partially served at the moment of the conviction for the latest offence, after merging, the penalty already served shall be decreased from the resulting penalty, according to Art 40 Para 3 of the New Criminal Cod (Art 36 Para 3 of the Criminal Code of 1968)[3].

If the defendant previously committed two non-concurrent offences, which does not fulfill the requirements for relapse, and the penalties applicable have been pardoned with certain conditions, the commitment of a new offence within the term of the pardon causes this measure to be revoked, and to the resulting penalty shall be added the penalty applicable for the subsequent offence[4]. If during the serving of the penalty of forced labor, the defendant commits two offences which do not fulfill the requirements for the post-conviction relapse the court shall revoke the forced labor and shall merge the entire previous penalty with the penalty resulting from the merger of the subsequent offences[5]. If certain penalties have been applied for previous concurrent offences, established by a definitive decision of the court, and other for subsequent offences, but which do not met the conditions for post-conviction relapse, the court shall merge all the penalties, regardless of the shown situation[6].

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[1] Suceava Court, Criminal Section, Decision No 206/1983, p. 197; Suceava Court, Criminal Section, Decision No 950/1982 in Romanian Law Review No 4/1982, p.76.

[2] Suceava Court, Penal Section, Decision No 218/1981 in the Romanian Law Review No 10/1981, p. 74.

[3] Bucharest Court,1st Penal Section, Decision No 1352/1978 in V. Papadopol şi M. Popovici, *Repertoriu alfabetic de practică judiciară în materie penală pe anii 1976 – 1980*, op. cit., p.88; Suceava Court, Penal Decision No 118/1980 in V.Papadopol, M. Popovici, *Repertoriu alfabetic de practică judiciară pe anii 1969 – 1975*, p.247.

[4] Timiş Court, Penal Decision No 1283/1973 in the Romanian Law Review No 12/1974, p.73.

[5] Suceava Court, Penal Decision No 218/1981 in the Romanian Law Review No 10/1981, p.74.

[6] Sibiu Court, Penal Decision No 127/1979 in the Romanian Law Review No 10/1981, p.48.

If the defendant subsequently committed more concurrent offences which, in relation to the previous offence(s) committed, conditions stated by the law for the post-conviction relapse, some courts decided that, in this case, the previous penalty shall be merged with the penalty resulting from the merger of the penalties established for the subsequent offences. Therefore, in this situation were firstly applied the rules of the concurrence of offences and after that the rules of the intermediary plurality. Other courts merged all penalties, without any distinction between them. This solution has been criticized reproaching to the courts that they did not merged separately the penalties established for concurrent offences, and separately the penalties established for offences placed under the assumption of the intermediary plurality, after which merging the two results.

It is also suggested another solution[1] for solving this situation, namely that the court to analyze the circumstances of each offence, in relation to the previous one, in order to identify the existence of the relation implied by the intermediary plurality, followed by the application of Art 44 of the New Criminal Code (Art 40 of the Criminal Code of 1968) in relation to each of the subsequent offences which are in the above mentioned relationship. After this, the court shall merge the results[2].

Another suggested solution would be that of firstly applying the rules of the concurrence regarding the second condition of the post-conviction relapse and after that those of the intermediary plurality[3].

Or, in any of the proposed solutions it is excluded the possibility of an indistinguishable merger of the penalty for the previous offence with the penalties for the subsequent concurrent offences, these joining the first analyzed solution, giving priority to the rules regarding the concurrence[4].

The rule of the merger stated by Art 44 of the New Criminal Code (Art 40 of the Criminal Code of 1968) operates when are not incident other criminal law institutions, such as the pardon, the parole or the

[1] Gh. Ivan, op. cit., p.474.
[2] In the same regard, G. Antoniu (coord) et al., Noul Cod penal, 1st Volume, C. H. Beck Publishing-house, Bucharest, 2006, p.560.
[3] Gh. Ivan, op. cit., p.474.
[4] In this regard, G. Antoniu (coord.), C. Bulai (coord.) et al., *Practică judiciară penală, vol.I, Partea generală,* Romanian Academy Publishing-house, Bucharest, 1988, p.189, 2nd comment.

conditional suspension of the penalty, namely when the legislator did not stated other conditions and are applicable only the provisions regarding the concurrence of offences (stated by Art 33-36 of the Criminal Code of 1968)[1]. For instance, the commission of a new offence during the conditional suspension of the penalty of more than 6 months determines an intermediary plurality of offences (according to Art 40 of the Criminal Code of 1968), but in relation with the special provision stated by Art 83 of the same Code, the penalty shall not be established according to the rules of the concurrence of offences, but according to the special norm which states the revocation and the execution of the penalty together with the penalty applied for the new offence[2].

The New Criminal Code did not took these rules, but stated in the case of parole and of the supervised conditional suspension of the penalty if the defendant commits a new offence and if are fulfilled the other conditions stated by Art 96 Para 4 and Art 104 Para 2, the court shall revoke the conditional suspension or parole and shall decide for the execution of the penalty; the main penalty for the new offence shall be established and served according to the provisions regarding relapse or intermediary plurality (Art 96 Para 5 and Art 104 Para 2 of the New Criminal Code).

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THE INTERNATIONAL CONFERENCE
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Pitesti, 23 - 24 May 2014

LIBERTY OF KNOWING, OBLIGATION OF KNOWLEDGE

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Summary:

The topic of the present paper is the connection between the right to be informed – the liberty of knowing – and the obligation of being acquainted to the responsibilities which accompany the right of freedom of speech. The right to be informed is a citizen's freedom, as well as an obligation for the authorities. The public interest information covers a wide range of topics, from the data and elements regarding the activities of the authorities and public institutions to every aspect of the community or society, in general, which may interest the citizens. By using the information of public interest which the citizen has the right to know, he can figure out a critical opinion about the authorities, who make the decisions for their benefit, an adequate image of the society he lives in or a motivation for his involving in the matters of public interest. There is confusion between the right to be informed and the freedom of speech which represents a trick and affects the perception of right and responsibility.

Keywords: *citizen, right to be informed, freedom of speech, public authority, ombudsman.*

The communication triad – public authority, citizen, mass media – brings together three entities that represent the stability area, the foundation criteria and the indispensable resources of the democratic evolution of any community.

The access at information shapes the attitude and the changes in a society, as well as the balance between the governed people and the governors, the preservation of regulations in any democratic state.

PUBLIC AUTHORITY

In any evaluation of the public administration management, the fundamental criterion is represented by the citizen and his perception of the public services which he is offered.

On the one hand, there is a series of rules and regulations specific to bureaucracy, which occurs in any democratic administrative

organization. On the other hand, the citizens' opinion that the administrative procedures, even if they are based on rules and regulations, are still reluctant to changes that should make them more adequate to the diversifying requests remains dominant.

The efforts for modernizing the public services and for bringing the decision closer to the citizens by consulting them and by adapting the bureaucratic procedures to the modern citizen's expectations, as he is informed and exacting, can be useful only if there is a permanent communication between the public services provider and the beneficiary, by honest, effective and reliable means. Communication is the privileged area where the public authority management can show creativity, initiative and, most of all, a lot of good faith. No political constraint of the decisions can obstruct the development of a permanent and consistent communicational relation between citizens and the systems of public administration management.

In this perspective, an efficient management is that which allows the rules and the behavior to be flexible within its procedures, according to the citizens' feedback. This is not just as simple, because, according to a remark of Max Weber's, especially the officials `have vocation and manifest loyalty to their career and their office`, as they are not elected, but designated.

If, due to evident electoral interests, the decisional power is declaratively more open to the citizens whom are expected to vote, the executive, proper managerial power is more open to itself, taking care especially of `its career and its office`. This difference of priorities explains a reason of the bureaucratic lack of interest in facilitating the access at information to the citizen.

The right to be informed is considered to be a (citizens') liberty, as well as an authorities' obligation, as it is guaranteed by the article 31 in Romanian Constitution and it is implemented by the Law no. 544/2001 regarding the free access at the public interest information. The public interest information covers a wide area, from the data and elements regarding the activities of the authorities and public institutions to each aspect of civic interest involving a community or the whole society. The generality of this category creates the paradox of the `liberty` assumed by the authorities to decide what represents such a piece of information, using their own criteria. A juridical limitation in this respect refers only

to the means of protecting the young people or to those aspects related to the national security.

The constitutional dispositions that regulate the right to be informed refer to *any public interest information* and establish that the public authorities have *to provide the citizens correct information about the public affairs and about the private interest issues*. The accomplishment of these constitutional obligations may be considered realized when the citizens are correctly informed about the public interest issues, as well as about the private interest issues which may involve aspects of public interest.

A really democratic state offers the complex necessary frame for achieving the access at public interest information. In this respect, the Resolution no. 1003/(1993), article 9 regarding the journalistic ethics, adopted by the Parliamentary Assembly of the Council of Europe, regulates that *`public authorities should not consider themselves the owner of the information`*.

The good governance which is more and more often spoken about includes the political class degree of interest in having a correctly and completely informed citizen among its criteria, so a permissive, unrestricted level of access at the public interest information should be guaranteed.

CITIZEN

Through information, a citizen can get a critical opinion on the authorities that accomplish the decision to their benefit, an adequate image of the society he lives in and, last but not least, a motivation for his involvement in the public interest issues. Information is the main way and resource for connecting the individual to the community issues, by allowing every citizen to move from solitude to solidarity, as Camus said.

The well informed citizen should be offered both the opportunity to participate in making the decisions that affect him and the guarantee that he has access to the vital information.

A complementary right to the right to be informed is that of freedom of speech to the citizens of any democratic state, which is defined by the European Convention on Human Rights, article 10, to be the freedom of opinions, of receiving and communicating information or ideas.

The Constitution of Romania, article 30, regulates the right to freedom of speech in public area: *`Freedom of expressing thoughts, opinions or beliefs and freedom of creations of any kind, orally or in writing, by means of images, sounds or by other means of mass communication are inviolable.`* Along this rule, the fundamental law interdicts the censorship, but it also regulates the juridical coordinates according to which the freedom of speech can not be absolute, as it has formulated interdictions for those expressions that affect a person's honor, dignity and private life, as well as his/her right to his/her own image. Each one's liberty stops when the other one's liberty is affected – this seems to be the foundation binder in any democratic community.

The right to freedom of speech is dual and structurally connected to the right to receive information, since expressing opinions, attitude, and thoughts can correctly rely only on information that has been received previously.

The materialization of the constitutional right which guarantees the freedom of speech is very important to the freedom of press, but it is also associated to certain obligations and responsibilities. The most important and the most considerable limitation which the European Convention on Human Rights added to the freedom of speech is stipulated in article 17 where the abuse of right is disallowed, so the rights and liberties are protected for all: *`No disposition in the present Convention can be interpreted for a state, a group or an individual to involve a certain right to develop an activity or to perform an act which aims to destroy the rights or the liberties recognized by the present Convention or to add further limitation to these rights and liberties than the present Convention regulates.`* A particular, but very suggestive form of this reciprocity in respecting the other's rights have been synthesized in a true saying of Albert Camus' that should be adopted by the journalists' guild: *`Liberty is the right not to lie`*.

MASS- MEDIA

The main obligation of mass media is to encourage the public to request information, giving information to them, during a process of mutual communicational dependency. The right to information implies a dynamic relation, which changes permanently, in which the citizen and mass media are complementary connected, having specific functions in

the stimulation of informing and communicating with the public authorities.

Sometimes, mass media have also the decisive role in making aware the beneficiaries and their public, especially the vulnerable citizen, who is discriminated and marginalized when the access at information is limited. *`Liberty is nothing else but an opportunity to be better`*, Camus teaches us.

Mass media have the liberty to disseminate any information proportionally to their degree of independency, competence and responsibility. The importance and the necessity of freedom of speech is regulated by the famous article 19 in the Universal Declaration of Human Rights, which stipulates that *`Any human being has the right to freedom of speech and opinions; this right includes the liberty to have opinions without any external interventions, as well as the liberty to search, to receive and to spread information and ideas by any means and disregarding the state borders`*. In other words, a major effect of the responsibility involved in exerting this right, freedom of speech, is not compatible to any form of surveillance, in any respect, except those boundlessly accepted. `The surveillance` of the communication should belong exclusively to the open public, to the chosen partners, to the addressees who have been transparently assumed.

Mass media represent, by their very specific, the most effective factor for educating the need of information, for stimulating and developing the communicational abilities of any citizen, for placing him/her in a correct position related to the public authorities, with respect to getting qualitative information, based on truth and honesty.

The connection between the right to be informed that is guaranteed both to the citizens and to the media, on the one hand and the freedom of speech, guaranteed to any citizen and to the journalists, adding some deontological specific aspects, on the other hand, represents the civilizing mixture of any democratic society. The journalistic act involves a specific professional responsibility regarding the correct, honest and complete informing the citizens. The editorial responsibility, the selection of the topics of public interest, the relevance and their way of communication belong to mass media, but their deontological legitimacy can be achieved and validated only by a permanent feedback from the citizen and from the public authorities, too.

NOTES FROM OMBUDSMAN' EXPERIENCE

Overall, it might be said that, during the democratic evolution of Romanian society, little progress in developing a *culture of institutional* transparency at every level – individual, public, private etc.- which has been aimed at by citizens and public authorities has been achieved, disregarding the fact that we are promoters of the access at public interest information, beneficiaries or just administrators of it. It is sure that the public information could not be the property of any authority, as it has been already shown. Even if this right to be informed and to transparency is considered very differently by politicians or officials and by the citizen who claims it. But politicians and officials are, in their turn, citizens involved in the social devices who could be not only administrators, but also beneficiaries of the public interest information in other domains or areas. Sooner or later any of them reach the position of the claimer of a right. As a consequence, this is another reason of relational nature which might contribute to the public awareness and to our actively encouraging the exertion of this right.

The partnership which the Ombudsman developed with mass media, formally or not, aims to those very particularities mentioned above.

The constant discourse of our institution is in favor of developing a culture of communication and transparency in local administration which we deal with immediately. We consider that *the transparency of the administration act* is a condition for a progressive improvement of the relations between the citizens and the authorities, as well as for strengthening the trust in the latter. The authorities are compelled to motivate their refusal and the violation of this principle of institutional transparency. If they do not so, then there is a matter that affects a principle, limits a right and triggers a risk for the democracy.

Taking into account the immediate experience, we appreciate that an important condition which the achievement of the mission of our institution depends on is the capacity of communication and realizing a full transparency in drawing up the documents required by the laws, in presenting the cases and in formulating the possible variants of solutions.

The transparency of our institution manifests in two directions, both towards the petitioner and towards the authorities:

- the petitioner should be openly convinced of the rightness of his request, of the limits of our attributions and of the possibilities of solving the formulated issue;
- the authorities should be informed transparently about each aspect of the respective case, about the legal support of the case and about the possible solutions which may be configured.

The current activity of Ombudsman provides enough evidence that the observation of the right to be informed is affected, and the citizens are vulnerable to an opaque or `hermetic` authority that should protect and respect them.

The casuistry analyzed by the Ombudsman confirms the general truth that a citizen who has no access at communication technology and information is marginalized, has little knowledge, so it is easy to manipulate him.

The citizen often proves to be a passive receiver of the information offered by the media either because he lost his interest or because he lost his trust in authorities. The deeply rooted practice of `sending` people from an authority to another, even if they are completely right, contributes to this situation. This is not only a result of the lack of information and involvement of the citizen in making the decisions which regards their rights, but also an effect of a bad management of the public informing process.

To have an efficient and effective public administration, with a body of loyal and professional, even dedicated, officials is not the same thing with theorizing this desiderate to an abstract degree. The permanent process of mobilizing the forces and the institutional resources with a view to standardizing and raising the management quality in public administration is counterbalanced by the lack of principles, the violation of the regulations, the lack of professionalism and the negative consequences of the diminished investment in human resource.

The respect for citizen's right to be informed does not begin with the effort to solve the main existential problems, but it begins with the attention and the receptivity towards the simple issues related to a certificate or an authorization for building. This is the only way the public management may give the citizens a certainty regarding the liability and the mutual responsibility which belongs to them and the authorities, improving the way that citizens perceive their functioning.

The numerous divergences of decisions and the different approaches in public administration in Romania, compared to the European Union, regarding the right to be informed, make us think about *a process of evaluation of the European standards degree of the public administration performance and the institutional transparency in our country*.

The relatively low degree of our country adaptation to certain European concepts and principles affects the common practice and makes the solutions dissemination or the actions meant to improve the abusive aspects in the Romanian public administration to be more difficult. Speaking continuously about our membership to the European Union, we will accept that this membership really manifests in assuming this set of concepts and principles that refer to the right to be informed and to the freedom of speech, which are preferred exactly in the community area.

However, more than respect for the `custom` of the house we entered, we must accept that the thorough knowledge and application of these principles related to a correct management has benefic effects on the relations between citizens and authorities, making the formers' lives easier and strengthening the latter's reliability.

AS A CONCLUSION

A real democratic state should want to have informed citizens in order to guarantee its democratic development and to consolidate its authority, especially in a world where the information and communication technology produced major changes both in mass media and in the liberalized market of information. `Social media` and `new media` became terrible weapons in the offensive process of making the information democratic and the process of rendering the level of knowledge, involvement and solidarity of large categories of citizens, that are impossible to be separated by age, religion, geographical or political borders, more homogeneous.

To mass media it is not enough to be the voice the citizens use to express their discontent. Media should represent a factor which makes the attitudes more responsible and stimulates the capacity of reaction, they should create the space for public debates, and they should use their valuable role in consolidating the community, especially by approaching the delicate issues which directly concern people's lives.

Efficient governance is the one which communicates with the governed ones in multiple ways and which assigns supremacy to Citizen. If this loses his confidence in his rights – and the authorities contribute to this regrettable situation – we will witness the deterioration of what we try hard to build, by means of huge efforts: democracy and democratic state.

Montesquieu seem to be so actual and to be so right, as long as citizens delegate certain authorities to use the power and the money it is natural to pretend institutional transparency, quality services, respect, decency and unrestricted access at public information instead.

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Pitesti, 23 - 24 May 2014

LEGAL TABOOS VS. ECONOMIC CHANGES OF 21ST CENTURY

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Abstract

Every century brings its time on humans and - of course - on their relations with other persons and goods. In this paradigm, legal system had been influenced by any new invention, and private law was the most active on this. The legal system of 21st century is changed by the internet actions: higher speed of information brings fundamental changes on economy and private sphere.

For sure, legal system answer to the internet changes, because business are now much easy to be done.

There is a question: public law is influenced or not about these economic development? If the positive answer is, we must separate these changes in two parts: some normal and usual changes, when law just follow technological development and some controversial, about some legal taboos.

Our text will try to open this page - controversial changes of law, because some ideas must be put into discussions today, to not be surprised tomorrow by the necessity of changes enforced by the modern technologies.

Key-words: Legal taboos, economic changes, necessity, disproportion

INTRODUCTION

We cannot speak about legal changes in 21st century if we don't understand the limits of the new century. Those limits are made especially by the technology, because the last decade brings to use a real feeling of modernization.

In fact, world history is considered to be separated in many sub-divisions, but among them, there is a red wire who decide the fundamental changes in daily life and in the legal characteristics. These differences are settled by the speed of human actions, and they were able to change in a big part the complex paradigm of life. Engine brings more changes in commercial law; airplane influenced in more parts the public law and so on; the 21st century is a result of former scientific and legal experiences of human race, adding all consequences.

Human history is separated into 4 parts:

a) Horse era, when the faster way to send information and goods was given by the horse power. The speed was limited and the legal systems was adopted to this main locomotion instrument. Commercial law was less important than the civil one, because a horse didn't allowed a big circulation of merchandise and companies was not so big as number of workers.

b) Engine and train era. In this time, during the 18th and 19th century, the speed of the transport increase, the railways was able to transport a lot of goods and people with higher speed than a horse. On this time the biggest companies appeared in Western Europe, introducing new developments in industrial technology and new innovations of legal branches. The commercial law start to be separated by the civil law and the banking law started to be more creative too. On this age the main civil codes and commercial codes of European countries was adopted (France in 1804 and after, a lot of countries influenced by this state; Germany in 1896, Romania in 1864 etc). the 18th and 19th century can be named the codification centuries and the society started to be settled into strong regulations, in private branch mostly, but also in public law too.

c) Aero transport era. Starting with the third decade of 20th century and after a strong world war, the speed of transport increase with a high level, which made the possibility of business to flourish. The laws was more changed now to express the possibility of having economic agreements. Meanwhile, the whole human mentality was changed, because countries started to be very close and the labour law felt also main pressures on it, because it was the first time when big groups of citizens was able to migrate for a job in different countries and to remain there. Aero transport era was joined also by the waves supremacy on information acces – radio and television – who change mentalities of everyone, because every citizens was close – at just few hours – by any event. Normal person was replaced from a spectator to a citizen who can start to ask for some changes in his country, because now he start to know more about the benefits of good administration from other states. All these characteristics prepare a new kind of citizen, and the last era of humanity brings to him more power:

d) Internet era. On this case, the citizens become more powerful, because they are able to find almost in real time about a lot of things and their attitude is able now to influence a good part of administrative

behaviour of state and local administrations. Internet is perfect for commercial law, the speed of contracts increased a lot and the possibility to find partners everywhere had the same higher level.

If we want to analyze internet's role on the new century, we must recognize its potential for development. Today it is impossible to act normal and with profit in any branch of industry, economy and education without a facile acces to internet, because here we can find in not an expensive way a lot of information which are necessary for our activity, and not just "profitable".

Internet offers also an important argument for rule of law and democracy, because these state characteristics are not only a result of a legal framework, but also the result of practices.

In fact, we cannot understand rule of law without examples, when state institutions and dignitaries are forced to follow the rules adopted for every citizen and for every legal person. In this paradigm, we can observe that in any Constitution the rule of law characteristic is settled before the democratic one.

Internet brings modernity and its ideas in every house – on this case, we must understand a bit what means modernity and where is law on this case.

If we see modernity in its simplest, temporal sense, then it is absolute contemporary. But in this sense, modernity is not an historical era; it is *now*, this minute, no time past, and its content is always changing. What was absolutely contemporary in 1900 will obviously be very different from the contemporary of 2013[1] or 2100. Understood in this way, it could also be seen as a state of mind – one does not *have* to be modern in this sense; one can choose to be old-fashioned. And for this, there is also a concept who explain the dimensions of today's modernisation: globalisation.

Globalization is the phenomenon of our times. In almost every area of human activity, the international interconnectedness of peoples, institutions, states and systems is increasing exponentially. This applies whether the activities are economic, social, cultural, technological, environmental or political. The issues and problems that arise in each of these spheres are also becoming increasingly global in scale. The huge cross-border flows of peoples, swift and massive movements of capital,

[1] Sionaidh Douglas-Scott, *Law after Modernity*, Hart Publishing, Oxford and Portland, 2013, p. 8.

the spread of disease, environmental degradation, the widening poverty gap between North and South, the development of terrorist networks, the abuse of human rights and the inter-state arms race are but some of the more notable examples[1].

These global changes, which we effect and by which we are affected, give pause for thought about whether and how legal values, traditionally held dear within nations, may be preserved and re-institutionalized in the international arena. If everything is different, so must our thinking be. If everything is more complex and difficult, so too must our knowledge, attitudes and values adapt and progress.

On this paradigm, we should ask what is modern now and what it will be modern for tomorrow, because legal system follows also the economic tendencies, trying to build a perfect partnership between innovation on industry and innovation is legal sciences.

The perfect answer on this question we'll have it analyzing the labour market in last two decades. In fact, in Romania and former communist countries this phenomenon is much easy to be observed and understood, because unemployment rate is different in our space looking to ages and internet skills.

In last years the job description contain the special skills of that position, but also the foreign language ones and, of course, computer and internet use skills.

Is quite normal for an employer to search the best workers for his business, because his existence depends by their skills: less money to spend for workers education, but more money brought by their skills. Their is no contradiction on this law today, because the globalisation – made by the help of internet – destroyed the national borders and your position can be easy replaced by a foreign (and sometimes bigger) company who make the same products as you do.

So, we can separate now the labour job market into 2 parts:

a) The part who don't count too much for internet in his activity. Here we can find especially manual jobs, without high level of qualification and less paid. There are dedicated for people who are can retire at a smaller age, because in many cases their work conditions are influenced by meteorologic conditions;

[1] Christine E. J. Schwöbel, *Global Constitutionalism in International Legal Perspective*, Martinus Nijhoff, Leiden and Boston, 2011, p. 16.

b) The part where internet is part of the activity, the office of person who work having always a computer. On this case, we must underline that the climate of job is less influenced by weather (or completely not), the age of retiring is higher and the possibilities of salaries are higher too. On this case, we must ask any new young person who graduate higher schools: are you ready for the job market? Are you ready meaning here is they are competitive. The lack of competitiveness means that for them the best jobs are not allowed – or, in fact, are not able to be obtain, because the big companies request for special skills.

On this labour problem, we can observe that the world is separated now between people who work for big companies – with better potential for a high standard of income – and people who work in small potential firms, being more vulnerable to any changes.

In the same time, we must accept that big companies have now a stronger influence on legislation and juridica practice, because they have the capacity to make an efficient propaganda for their purposes.

We are also forced to note that today's standards for state rulers and local administration must increase, because in global competition for jobs and investments a low profile of these people condamne a state or an important community to poorness.

Much more, globalisation decrease the power of state to defend its administrators, because internet increase the level of transparency, who create much more public pressure on politicians and public servants. Internet helps citizens to find good practices of political and administration. In that moment, they can use internet information as a pressure against the state rulers. In fact, internet is the main enemy of lazy politicians and also against incompetent them, because it shows very easy different ways **to solve** the problems. To solve is one of the most important verb of legislation, which is also present in Romanian Constitution (art. 121, paragraph 2, dedicated to local administration), but in other fundamenatal laws too.

But to create legal standards for people who want to enter in politics and to candidate for a higher position in state can be considered as a violation of a legal taboo, who express that every person with minimum legal skills can be able to fulfil at a reasonable level the special job description.

In fact, it is considered that politics and the interest for it is continuous – thus, the citizens will know before who is good and who is not.

We cannot accept this argument, because media is able today to cover a lot of things and to present a candidate as a white pigeon. In the same time, when you see the white candidate after few years in prison, you must understand there is a difference between public image and its behaviour.

On this case, we consider that is necessary to adopt educational standards – by level of studies and an exam about legal knowledge, because modern times – globalised and competitive – force us today or tomorrow to change the legal framework on public law, for this aspect.

CONCLUSIONS

Globalisation is made by internet – in a big part of it. Internet means more information, means also the possibility for every citizen to be informed about good practices in political and in public administration.

Globalisation means also that competition is at a higher level and the consequences of a less competent state administrator are worse, in a less time that before, because national state can protect less its administrative mistakes.

On this case, we consider that is necessary to introduce in every Constitution some educational standards for every person who try to candidate for a public political dignity, in a specific task to stop a good part of less prepared people for modern society.

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Pitesti, 23 - 24 May 2014

WHERE LAWS RANK IN THE NORMATIVE HIERARCHY - CONVENTIONALITY AND CONSTITUTIONALITY

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***Abstract*:**
Traditionally, in our legal system based on a Constitution that many see as rigid, the law ranks at the top of the normative hierarchy, right behind the Constitution. Therefore, it has an infra-constitutional rank, which enforces the distinction between the supremacy of the Constitution and the supremacy of law. The latter is emphasized not by its relation to the Constitution but with all other normative acts. Beyond its infra-constitutional ranking, the law is also shaped by international treaties, ever-expanding European Union law and other such aspects which will be analysed in this paper.
***Key-words*:** *the law, the Constitution, European Union law, normative hierarchy.*

1. INTRODUCTORY ASPECTS

Determining the place occupied by the law in a legal system depends on two aspects: the rigid or flexible nature of the constitution and the system relating the national law to the international law, monist or dualist. Thus, in the case of flexible constitutions, laws are on the same ranking as the Constitution. Such a system of law in which the idea of constitutional supremacy is not sanctioned and therefore no hierarchy of normative acts, emphasizes the reality that constitutional supremacy is included in the rule of law. However, in legal systems that have a rigid constitution, meaning it cannot be modified by an ordinary law, laws have an infra-constitutional position. If the system relating domestic law to international law is dualist, then the problem of hierarchy of laws and treaties does not occur. However, if the system is monistic, meaning priority is given to international law, then laws rank below the treaties, being necessary to comply with this latter category of documents, aspect

[*] This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013.

which imposes conventional control. If we are currently in a monist system which gives priority to national law, then laws rank above treaties and the case of contradiction the law will carry the argument. Often, especially in human rights, mixed systems can be found, i.e., that the treaty ranks higher, in principle, however, exceptionally, if the law contains provisions which are more favorable to the person, then it will rank first.

2. THE SUPERIORITY OF LAW

In our legal system based on a Constitution which is seen as rigid, the law ranks at the top of the hierarchy of norms, right below the Constitution, thus having an infra-constitutional position. It is for this reason that the distinction between the supremacy of the Constitution and the supremacy of law is made. The supremacy of law is emphasized when compared to the rest of the normative acts, and not to the Constitution.

In the literature[1], by starting from the fact that the rule established through law should not correspond to any other rule, obviously, apart from those contained in the Constitution and that all other laws enacted by state bodies cannot amend it to modify or derogate from it, the supremacy of law has been defined as "the characteristic of the law expressed in the fact that the rules which it lays down do not have to correspond to any of the other rules apart from the constitutional ones, and the other legal acts issued by state bodies are subordinate in terms of their legal effectiveness."[2]

Therefore, the supremacy of law represents a quality, a trait, based on which the law developed in respecting a procedure Constitution is superior to all other legal acts existing in the system of law which must comply with this legal standards established by it cannot be modified, suspended or terminated by normative legal acts enacted by other state bodies. At the same time, the law is able to intervene at any time to modify, suspend or terminate a legal norm established by an administrative act.

[1] I. Muraru, E.S. Tănăsescu, *Drept constituţional şi instituţii politice*, vol. II, Editura All Beck, Bucureşti, 2004, p. 209; A. Varga, *Constituţionalitatea procesului legislativ*, Editura Hamangiu, Bucureşti, 2007, p. 113 and others.
[2] T. Drăganu, *Supremaţia legii în dreptul Republicii Socialiste România*, Editura Dacia, Ciuj-Napoca, 1982, p. 5.

The scientific basis of the rule of law is certainly primarily a historical basis, namely the recognition of this rule as an expression of the general will, or otherwise, as an expression of national sovereignty, the natural rules of conduct established by it to have the greatest force in relation to other legal acts which may be accomplished by means of coercive force of the state. Even if this view was stirred up profound developments that suffered a hierarchy of legal norms in the contemporary period, however it has left deep traces in positive law. Thus, although the Government acts directly competed law retained a certain primacy over acts of the Executive, guaranteed prominence through judicial review. The principle of legality to ensure compliance with the law ranks the lowest, especially acts of the Executive. The term 'legality' is used in a general manner, to indicate whether a lower legal standards to a higher legal standard. Judicial review , meaning the strict sense , i.e. respect for the law , retains an essential place for that on the one hand, it leads to compliance to all administrative acts of law and to that extent, the provisions of private law and the other must fall within constitutional boundaries .

3. LAW SUBJECT TO COMPLIANCE WITH THE CONSTITUTION

The mere reading of law books, without going into the depth of things could cause ordinary people without legal training, ignorant of developments in law to believe that the law is *ultimo ratio* in national law. Likewise, in a flexible way, recent French doctrine states that "litigants should have the honor or curiosity to enter the Grand Chamber of the Court of Cassation, could not but be impressed by the show of greatness the Law offers in the grandiose court of the cassation judge. If concerned with their own problems, they will only rest their eyes contemplating the paintings that adorn the ceiling or the floor, without forgetting that they are in the temple of the Law, and its name adorns flags surrounding them saying... *Lex imperat.* The impression that time stands still in the decor Republican Palace corresponds to the semi-immutability of the constitutional text that proclaims that national sovereignty belongs to the people who exercise (primarily) through its representatives."[1] A similar provision is found in our Constitution in Article 2. Yet, today, the concept of sovereignty must be redefined in the

[1] B. Mathieu, *La loi*, Dalloz, Paris, 2010, p. 5.

context of the integration of our country into the European Union[1], whereby it gave up certain prerogatives of power, that some attributes of national state delegated to supranational authorities. This raises the pertinent question if indeed this 'cult' of the law is consistent with what is today the law. Certainly, the answer is no. The law retains a fundamentally superior in the hierarchy of norms, as mentioned above, but also subject to other rules of respect.

First, the law must be consistent with the Constitution. To ensure such compliance was regulated control *a priori*, *a posteriori* that the constitutionality of laws[2]. The law can not be an expression of the general will than by constitutional principles[3]. The constitutionality of laws is a task of verifying compliance with the Constitution law, representing a sanctioning of the supremacy carried out by a special authority established for this purpose, namely the Constitutional Court. Therefore, to strengthen the supremacy of the Constitution, attempts to find a means to ensure compliance with them, not only by the administration and justice, but also the legislative power. This means was the establishment of a body which has jurisdiction to make laws contrary to an inapplicable constitutional principle.[4] The character of the powers of the Constitutional Court of Romania are conferred by Article 144 of the 1991 Constitution and completed following the 2003 constitutional review, Article 146 depicts a politico - judicial public authority as the only constitutional jurisdictional authority, independent from any other public authority, whose power cannot be challenged by any public authority.[5]

Preliminary control (a priori) is performed on the laws voted by Parliament before their promulgation by the President of Romania, as the Court may conduct a review of the constitutionality of laws but only one notification of public authorities envisaged by the Constitution, namely:

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[1] E. Ciongaru, *Comparative law. Europe Union Law,* Volume of 7th edition of the Annual International Conference, „European Integration - Realities and Perspectives", Danubius University Press, Galati, 2012, pp. 123-124.
[2] To see: M. Andreescu, A. Puran, *Instituţii constituţionale şi politice. Curs universitar*, Editura Sitech, Craiova, 2014, p. 215.
[3] To see: C.C. Nenu, *Labor Code Amendments - Between Necessity and the Reality of the Labor Market in Romania and in the European Union, în* Jurnalul de Studii Juridice 2012, volumul 1-2, issue 1, pp 81-82
[4] A. Varga, *op. cit*., p. 122.
[5] I. Muraru, E. S. Tănăsescu, *op. cit*., p. 261.

Romanian President presidents of the two Chambers, Government, High Court of Cassation and Justice, Ombudsman, at least 50 deputies or at least 25 senators. Therefore, it is not possible to control automatically.[1] Such control is preventive in that it seeks to prevent by exercising its introduction into law of conflicting constitutional norms[2]. Law can be declared contrary to the Constitution consistent times. If the law was found unconstitutional, the decision shall be communicated to Parliament must reconsider those provisions to bring them into line with the constitutional rules. Declaration of unconstitutionality may be partial, if the provisions concerned can be taken out of context. In this case the law may be promulgated without them otherwise.

Subsequent verification, i.e. after the law comes into force, is done as a result of raising the objection in court or Commercial Arbitration of one of Patiala in dispute by the court of its own motion or by Ombudsman. Therefore, each litigant may raise the objection of unconstitutionality regarding relevant legislative provision in its proceedings in any court when it considers that the rule that affects the rights and freedoms that the Constitution recognizes. If that rule is contrary to the Constitution, the Constitutional Court declared unconstitutional. The ruling of unconstitutionality, from the moment it is published in the Official Gazette has a generally binding effect (*erga omnes*) in the future. The review by the Constitutional Court will be a review of the law and not its application. But before there is a constitutional review, the political system was based on the myth of the government – governed relation, on confusing the people with their representatives, representatives of the general will and the will. Constitutionality is a progress towards democracy support as leading to verify institutions representatives, powers established in the Constitution as an expression of national sovereignty exercised such people. This promotion of judges, especially constitutional judge, raised questions about the legitimacy of its power over time[3], but now the legitimacy of

[1] I. Muraru, E. S. Tănăsescu, *op. cit*., p. 261.
[2] To see: Decizia CCR nr. 24/2203 (M.Of. 72 din 5 februarie 2003) in C. Nenu, *Contractul individual de muncă,* Editura C.H.Beck, Bucureşti, 2014, p. 165.
[3] For a more developed presentation of the arguments brought against the legitimacy of constitutional justice, namely the priority of representation, the confusion between power and authority, the hierarchical understanding of separate powers in the state, please refer to D. C. Dănişor, *Drept constituţional şi instituţii politice. Teoria generală*, vol. I, Editura C.H. Beck, Bucureşti, 2007, pp. 625-628.

constitutional justice seems to be increasingly difficult to challenge. Constitutional verification finds its legitimacy in the decline of political representation in the consecration of fundamental rights and freedoms and limiting power.

Although highly disputed at one time the political appointing of constitutional judges the controversy has lost its potency today, on the one hand, because it is difficult to find a more convenient way, on the other hand, the constitutional judges, regardless of political orientation of those who appointed them, tried not to put his imprint on political decisions, and more, to maintain a coherent and consistent case law even amid existing political separations. Thus, in this case, shows the French doctrine that "the legitimacy of the constitutional judge is in how it exercises control. Controlling law in relation to the text of the Constitution, requires power was to respect the will of the constituent power, i.e. the power of the people. Constitutional Council, himself, is an established power, subject to the Constitution."[1] Moreover, we consider, along with other authors,[2] that constitutional judges exhibit some form of representation in the sense that they are appointed to court as the result of a vote, this confers to them a degree of legitimacy: the voters elect representatives, lawmakers and the head of the nominating state constitutional court judges then basically we are in the presence of indirect voting.

4. LAW SUBJECT TO INTERNATIONAL TREATIES AND LAW UNION

Beyond its infra-constitutional position of the law, in Romanian society the law is obliged to respect international treaties and the expanding European Union law. As shown above, Article 11 of the Constitution[3] establishes the monist conventional international law system which requires that all treaties have so over-legislative position in the internal hierarchy of legal norms. Following the ratification by parliament, they become part of the law, meaning that they are required

[1] B. Mathieu, *op. cit*., pp. 37-38.
[2] D. C. Dănişor, *op. cit*., pp. 643-644.
[3] Article 11 from the Constitution of Romanias states " The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to. Treaties ratified by Parliament, according to the law, are part of national law. If Romania is to become a party to a treaty that comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution."

to state not only generic, but for all its organs. Ratification of treaties makes the rules will be based on national representation. Not devote such a hierarchy of wills, but a hierarchy of functions of Parliament, diplomatic function is superior to that legislation. The judge is required to apply treaties ratified simultaneously is required to check the conformity of laws with treaties when they decide the case before the applicable standard. Realizing that direct application of the Treaty , it is given to a foreign wills to the will of the law as contained internal to the applicability of the treaty basis is Parliament will ratify the will to confer the ratification Constituent character overrides internal rules and laws[1]. Report under the law, a treaty is called the conventional.

Also the Article 20 of the Constitution enshrines the supremacy of human rights treaties in relation to the laws. However, it establishes an exception, namely the law will apply if the priority contains more favorable provisions[2]. Application of priority of treaties on human rights is an obligation for all state bodies and control the fulfillment of this obligation and, therefore, compliance with laws human rights treaties to which Romania is a part is made by the judge. The Constitutional Court has exclusive jurisdiction in this matter as it has in the control of constitutionality, which consistently recognized by case law. This control is not an optional, but it is an obligation of the judge. It is always the judge who decides that domestic law contains more favorable provisions. The legislature may not impose any interpretation on courts in this area through interpretive regulations. If a state authority finds that the law is inconsistent with international human rights treaty, it is obliged to apply the law and not directly apply the treaty. No other legal provision must expressly authorize doing so because it would only be able to apply the Constitution. No application has any effect on the validity of the law[3] or on it remaining in force.[4] Provisions similar to those in the Article 20 of

[1] D. C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului*, Ediţia a 2-a, Editura C.H. Beck, Bucureşti, 2008.p. 202.
[2] To seee: M. Andreescu, A. Puran, *Drept constituţional. Teoria generală. Drepturi, libertăţi şi îndatoriri fundamentale. Instituţia cetăţeniei*, Ed. Sitech, Craiova, 2013, pp. 155-156.
[3] E. Ciongaru, *Unele aspecte privind validitatea dreptului*, Volumul Sesiunii de comunicări ştiinţifice a Institutului de Cercetări Juridice „Acad. Andrei Rădulescu" al Academiei Române, cu tema „Dinamica dreptului românesc după aderarea la Uniunea Europeană", Editura Universul Juridic, Bucureşti, 2010, pp. 594-596.
[4] D. C. Dănişor, I. Dogaru, Gh. Dănişor, *op. cit.*, pp. 203-204.

the Constitution can be found in the Civil Code Article 4[1] which priority application of international human rights treaties to the provisions of the Code[2]. At the same time, the law is obliged to abide by union rights. In this sense, the Constitution expressly provides its priority through Article. 148. 2: "by reason of accession, EU constitutive treaties and other binding Community rules take precedence over the provisions of the national laws with the provisions of the Act of Accession." Similar regulations found in the Civil Code in force in the Article 5 where it states that "in matters governed by this Code, the rules of EU law applies in priority, regardless of the quality or status of the parties." This principle of EU law primacy is now enshrined in Declaration no. 17 - annex to the Treaty of Lisbon, entitled "Declaration concerning primacy" which expressly provides that "...the Treaties and the laws adopted by the Union on the basis of the Treaties have primacy over the law of Member States..." As such, the principle of priority, union legal rules will be ineffective any subsequent national law or rules in force, under which would, of course, and if we are in the presence of legal relations that fall within the regulatory Union.

Article 148 from the Romanian Constitution does not give too much detail about the power of the Constitutional Court to verify the conformity of a provision of domestic law with the Treaty Establishing the European Community (Treaty on the Functioning of the European Union) which implies that such an authority belongs to courts of law. As such, verifying a law's constitutionality is not the same as verifying its conformity to European Union law. Symmetrically, the European Court of Justice shall not rule on the legality/constitutionality of domestic law,

[1] Article 4 from the current Civil Code states: *„in regulating the present code, provisions pertaining to the rights and liberties of people shall be interpreted and applied in accordance with the Constitution, the Universal Declaration of Human Rights, the treaties and agreements that Romania has signed. If there are any discrepancies between the agreements and the treaties concerning fundamental human rights to which Romania is a co-signatory, and the present code, the international regulations take priority, apart from the case when the present code contains more favourable provisions.*"

[2] To see: Andreea Tabacu, Andreea Drăghici, *Asistenţa judiciară internaţională*, Editura Universul Juridic, Bucuresti, 2011, pp. 16-17.

but solely on the interpretation of provisions from the Treaty, of Union rules which are mandatory for Member States.[1]

Law is ranked below European Union law and the conventional international law, being necessary to comply with it. Without disputing the benefits of EU integration and of conventional international law, accomplished in compliance with constitutional requirements, we cannot escape the fact that we are in the presence of factors that constrain the law and contribute to a deepening decline in the present.

CONCLUSIONS

Even if constitutional texts concern the concept of law as an expression of the general will, and regardless of the fact that it has an essential role in protecting the rights and liberties, it no longer retains the quality of a fundamental rule in current society. Two of the sources of law rival and even replace it: the Constitution on the national front and international treaties i.e. European Union rules. In the context of compared laws, this invasion of over-legislative rules into national law appears favorable. Two main reasons are emphasized. On the one hand, the principles concerning the protection of human rights have substituted representative democracy, in other words, they have gone beyond the will of the national representatives and imposed the idea that it is important to protect a certain category of rights, even in detriment to parliamentary decisions. These rights that must be protected are in fact principles taken from constitutional texts and international conventions (particularly the European Convention on Human Rights). On the other hand, the idea of the nation has been gradually diluted in the context of reforming the European Union in which the construction of the Union demanded the development of a proper legal system, likely to to be imposed on the Member states.[2]

Subject to such strong normative disturbances, the law has become a subordinate norm. Thus, the law does not convey the general will unless it complies with constitutional principles and at the same time, this expression is not effective unless it complies with international treaties and law union.

[1] L. Barac, *Despre jurisdicţii şi competenţe. Exigenţele statului de drept*, article published online: www.juridice.ro from 26 July 2011.
[2] B. Mathieu, *op. cit.*, pp. 25-26.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

CONSTITUTIONAL IMMUNITIES IN THE REPUBLIC OF MOLDOVA AND OTHER COUNTRIES

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Abstract:

The concept of privileges and their system, tendencies of their classification as well as international experience in this sphere represents an actual problem which has many question marks. The criteria of attributing a certain type of legal privilege to the constitutional law seem especially difficult as all social relations are more or less effected by the regulations of constitutional law. This fact is conditioned by special feature of constitutional and legal regulation of social relations which, as it is stated in special literature, lies in the fact that the constitutional law regulates social relations directly and to the full extent in some spheres of society life and it is only fundamental in other spheres i.e. it predetermines the content of other relations in these spheres. We consider it necessary to analyze all constitutional privileges provided for in both national and foreign laws, their similarities and differences and possibility of introducing or withdrawing some constitutional privileges from the higher state law.

Key Words: *Constitution, privilege, constitutional privilege, parliamentary immunity, presidential immunity, judicial immunity.*

The institution of immunities and their system, their classification tendencies, as well as the international experience in this field is an actual issue that generates many questions. In particular, the criteria of assigning a certain type of legal immunity to the constitutional law are complicated, as all social relations in one way or another are influenced by the norms of the constitutional law. This fact is due to the peculiar feature of the constitutional and legal regulation of social relations which, as it is noted in the specialty literature, lies in the fact that in some areas of society's life, the constitutional law regulates social relations directly and fully, and it is only fundamental in relation to others, that predetermine the content of other relationships in these fields. We consider that it is necessary to make an analysis of all the constitutional immunities provided both in national and foreign law, the similarities and differences between them, as well as the possibility of entering or removing some constitutional immunities from the supreme law of the state.

The idea of a generalized liability, although it would fully meet social morality, is not always implemented in practice; there are some limits in the involvement of legal liability, limitations imposed either by the legal provisions or by some shortcomings of the legal system.[1]

Thus, in the constitutional law, there are limitations of the liability of the Head of the State, of the Parliament Members; in the international law, we can mention the immunity as to jurisdiction of the diplomatic representatives and international officials; we can meet such limitations both in civil law (having an impact on those who cannot exercise their full mental abilities, either because of age or because of health condition), and criminal law.[2]

The criteria of assigning a certain type of legal immunity to the constitutional law are complicated, as all social relations in one way or another are influenced by the norms of the constitutional law. This fact is due to the peculiar feature of the constitutional and legal regulation of social relations which, as it is noted in the specialty literature, lies in the fact that in some areas of society's life, the constitutional law regulates social relations directly and fully, and it is only fundamental in relation to others, that predetermine the content of other relationships in these fields . In other words, any object, any area of the social life is subject to the action of the constitutional legal norms, but these norms do not have a direct regulatory influence on all social relations that occur in that field[3].

The Constitution of the Republic of Moldova[4] mentions directly three types of legal immunity: the immunity of the President, the parliamentary immunity and the immunity of judges. The immunity of the President of the Republic of Moldova is incompatible with the fulfilment of any other remunerated position. The Head of the state enjoys immunity and cannot be held legally liable for the opinions expressed while fulfilling his mandate. Parliament may decide to indict

[1] И.А. Кравец Правовой статус депутатов Государственной думы Журнал российского права 2000 №8

[2] S. Lenuţa, *Imunitatea juridică ca formă de liberare de răspundere juridică ,"Legea şi viaţa", 2009, nr.2, pag.40*

[3] Уманский Я. Н. Советское государственное право. М., 1970; Кутафин О. Е. Конституционное право России. М., 1998; Кравец И. А.

[4] Constitutia RM 29.07.1994 Publicat : 12.08.1994 în Monitorul Oficial Nr. 1

[5] Legea despre statutul deputatului in ParlamentNr.39-XIII din 07.04.94 Publicat 15.04.2005 în Monitorul Oficial Nr. 59-61

the President of the Republic of Moldova, by a vote of at least two-thirds of the elected deputies, in the event when he/she commits an offense and the judging power belongs to the Supreme Court of Justice, according to the conditions of the law. The President is removed from office, in law, on the date when the sentence of conviction becomes final. The immunity of deputies is incompatible with the fulfilment of any other remunerated position, except for the didactic and scientific activity. Other incompatibilities shall be established by the organic law. The deputy may not be detained, arrested, searched unless caught in the act, or prosecuted without the consent of the Parliament, after hearing him/her. Law on the Status of Parliament's Deputy No.39-XIII of 07.04.94[1]. Parliamentary immunity is intended to protect a parliamentary deputy against the legal consequences and to guarantee his/her freedom of thought and action. The deputy cannot be prosecuted or held legally responsible in any way for the political opinions or votes cast while fulfilling his/her mandate. A deputy may not be detained, arrested, searched except in cases of flagrante delicto or prosecuted on criminal or contravention case without the prior approval of the Parliament, after hearing him/her.Art.70 of the Constitution: immunity of court judges, who are independent, impartial, and irremovable according to the law. The position of a judge is incompatible with any other remunerated office. Unlike deputies, the deprivation of immunity of the President of the Republic of Moldova is almost impossible according to Article 81, paragraph 2 of the Constitution, which gives absolute immunity to the President of the Republic of Moldova during his/her mandate.

In the legislation of Romania, the immunity of the President of Romania is regulated under Section (2), Article 84 of the Romanian Constitution, republished[2] (hereinafter referred to as the Constitution), which states that "The President of Romania shall enjoy immunity". Despite the criticisms of most authors of constitutional law on the lapidary means of regulation of the institution of presidential immunity, in a single paragraph and with a questionable reference made to the institution of parliamentary immunity, the legal text remained unchanged even after the review of the Constitution in 2003. Deputies and senators

[6] Constitutia României actualizată si republicată in Monitorul oficial nr. 767 din 31 octombrie 2003

cannot be held legally liable for the votes cast or political opinions expressed in the course of fulfilling their mandate, they cannot be searched, detained or arrested without the consent of the Chamber to which they belong after, hearing them. Prosecution and referral to court shall be made only by the Prosecutor's Office under the High Court of Cassation and Justice. The judging power belongs to the High Court of Cassation and Justice. In case of flagrant violation, deputies or senators may be detained and searched. The Minister of Justice shall promptly inform the Chairman/President of the Chamber of the detention and search. If the notified Chamber finds no grounds for the detention, it shall immediately order the revocation of this measure.

Immunities in the Russian law, conferred by the Decree of the Acting President of the Russian Federation of the 31st of December, 1999 " On guarantees of the President of the Russian Federation, who stopped the exercise of his powers and his family members"[1] . The Decree provides that the President of the Russian Federation, whose mandate has ceased, enjoys inviolability and "cannot be held criminally or administratively liable, detained, arrested, searched, questioned or subjected to body search". In accordance with Art. 16 of the RF Law "On the Status of Judges in the Russian Federation", [2]the person of the judge is inviolable. The criminal case against him may be brought only by the Attorney General or the person acting in this position, if there is an approval of the properly qualified board of judges. Despite the importance and responsibility of the office of the judge, however, the transformation of the judiciary group in a class of persons who do not conform to any laws, "secured" by the presence of immunity in the case of all antisocial acts, seems unacceptable.

The definition of the legal and constitutional immunity by combining the elements of the inviolability and lack of liability allows, firstly, to find out various methods of ensuring a greater legal protection of certain persons (either by exempting the person from the rules of law on liability in general, or by establishing special complicated procedures of holding liable), secondly, it is a criterion for determining the

[1] Указ Президента Российской Федерации Об исполнении полномочий Президента Российской Федерации от Москва Кремль № 1761 от 1 декабря 1999
[2] Закон Российской Федерации от 26 июня 1992 года N 3132-1 "О статусе судей в Российской Федерации" (Ведомости Съезда народных депутатов Российской Федерации и Верховного Совета Российской Федерации, 1992, N 30, ст. 1792

reliableness of the legal immunity and finding the optimal variant to its limits[1].

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

BRIEF ANALYSIS OF THE ADMINISTRATIVE DOCUMENTATION

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Abstract:
The performance of the public administration's tasks entails an efficient documentation, well organized, more precisely an ensemble of data, documents and information indispensable to the efficient use of the public administration.

Key words: *documentation, positions, document, stages, means*

1. GENERAL CONSIDERATIONS

Among the main functions of the public administration, alongside the execution, we find the functions of information and preparation[1].

The information function has as main purpose the information of the political power regarding the situation of the entire social system. It ensures the contract between the governors and citizens.

The preparation function resides in the elaboration of the political decisions, projects for normative acts and for administrative acts, as well as in the collaboration to adopt and issue these acts.

The performance of the public administration's functions mandatorily imposes a very good documentation, namely an ensemble of data, documents and information indispensable for the efficient functioning of the public administration.

Documentation represents an administrative activity with the purpose to reassembly all possible data, their preservation and their accessible and fast rendering to the public authorities or institutions.

The administrative documentation is extremely important for the good function of the public administration and for the achievement of the general goal.

[1] C. Manda, *Drept administrativ, tratat elementar*, 1st Volume, 2nd Edition revised and amended, Lumina Lex Publ. House, 2002, p.51 and next

Without the contribution of documentation, both the administrative authorities, as well as the civil servants could not benefit from information absolutely necessary for their activity, nor of the possibility to deeply known the social issues in order to correctly and operatively solve them.

Civil servants, beside the documentation well organized by the administrative authority for which they work, usually unfold a personal documentation, necessary for the performance of the civil service.

The administrative documentation must be scientifically organized, systematically catalogued, depending on the content of the documents, alphabetically, chronologically and numbered so that the civil servants must not waste their time searching for documents or trying to create an expensively personal documentation[1].

Currently, the utility of the administrative documentation is proven, the science of administration, as well as the other administrative sciences performing researches with the support of the discipline – administrative documentation.

2. THE NOTION OF DOCUMENT; THE DEFINITION OF THE DOCUMENT

The notion of "document" comes from the Latin word documentum, which means what serves to teach as, and from the verb docere, meaning to learn.

The document represents any object which contains the elements of knowledge or all it serve to be preserved and to disseminate the memory of a fact, in an usable form, regardless if it has been conceived or not in this purpose[2].

One can state that the administrative documentation is an ensemble of all basic documents necessary for the function of a service[3].

In this context, the administrative documentation aims to identify and disseminate all knowledge regarding certain subjects established

[1] C. Manda, C.C. Manda, *op.cit.*, p.256
[2] Henri Charnier, *La documentation administrative*, in *Traite de science administrative*, p.585
[3] H.L. Baratin, *Organisation et méthodes dans l'administration publique*, Paris, Berger-Lavrault, 1961, p.152

according to the purposes of the actions or tasks that the public administration must perform.

The administrative documentation has a very well defined domain circumscribed to more areas: political, economic, social, legal, technical.

The modern organization of the administrative documentation imposes the creation of a wider and complex system of organizations involving people and specialized institutions. These specialized institutions have at their disposal numerous instruments such as: information publications, files, Internet programs, which participate to the establishment of fast and efficient relations between the researcher and documentation.

All the above mentioned converge towards the obligation of the authorities or public institutions to establish documentations divisions, staffed by specialized servants formed as documentaries.

The meaning of the term "administrative documentation" aims more acceptations: the quantity of the gathered documents, the action to document and a scientific discipline.

As a scientific discipline, the administrative documentation may be defined as a discipline auxiliary to the science of administration with its own principles and technical means, having as object the identification, collection, preservation and dissemination of documents necessary to be used by the public authorities, with the purpose of performing a reasonable and efficient activity[1].

3. THE STAGES OF THE ADMINISTRATIVE DOCUMENTATION

The administrative documentation activity involves crossing different stages and technical phases which must insure its rapidity, precision, exclusivity, flexibility and efficiency.

The stages of the administrative documentation are:

a) Identification and collection of documents – it is required the knowledge and capitalization of all the existing sources referring to the issues that are the object of the administrative activity;

In this stage are found, selected and valorized all data, facts and documents.

[1] M.T. Oroveanu, *op.cit.*, p.596 and next

b) Preservation – entails procedures and material means with the purpose to insure the preservation and classification of the documents;

c) Dissemination – lies in the disclosure of the document either by multiplication, or by the information on its existence;

d) The use of the administrative documentation – the final stage, the very purpose of documentation.

4. THE MEANS OF THE ADMINISTRATIVE DOCUMENTATION

The means of the administrative documentation are: the personnel, profitability and efficiency, documentation and the mechanical use of documents.

a) The personnel. The quality of the documents depends to a large extent on the quality of the personnel covering this activity.

This is why it is necessary the existence within the public administration of personnel specialized in the activity of documentation.

The documentaries, besides their training necessary for any position, must possess knowledge about archivists, biblioteconomy[1], bibliography[2], documentation techniques.

b) Profitability and efficiency consider the profitability of human, material and financial resources used for its achievement.

The profitability of the administrative documentation is determined by the volume of knowledge explored, by the means of investigation, by the actions unfolded.

In order to obtain a maximum profit, the administrative documentation must cumulatively fulfil two requirements:

- The correspond to the purpose for which it has been created;
- To present an economic solution.

c) Documentation and mechanical and computerized treatment of documents

Public administration may and must use mechanical and computerized systems through which disseminate information both

[1] *Biblioteconomy* is a branch of bibliology, science of the organization and management of libraries; bibliology is the science that studies the book as a phenomenon of the social-cultural life.

[2] *Bibliography* is also a branch of bibliology, which deals with the description, systematization and dissemination of publications.

within the administrative authorities, as well as in the relation with the citizens.

The computerized system (Internet) supposes for the administrative documentation the adjustment of the public administration's activity to the current standards of science and technique.

The administrative documentation has as end the dissemination of information. Informations are selected, studies and disseminated by the public administration's personnel in order to perform their competences and attributions, but also for the effective foundation of decisions adopted by the management.

The widespread of computers saves time, but assumes a certain rigor for the civil servants that use them. The latest researches in this area lead to the emergence of a new discipline – documentary information.

EUROPE 2020 - YOUTH EMPLOYMENT

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Abstract

The paper aims to underline the importance of traineeships within the European Union. This policy has become an important step towards the labour market for young people. On March 10, 2014 the EU's Council of Minister adopted a Quality Framework on Traineeships that enables trainees to acquire high-quality work experience under safe and fair conditions, and to increase their chances of finding a good quality job. This follows the targets set by the Europe 2020 strategy adopted in 2010. In the present paper will be analyzed the EU objectives in the field of youth employment for the next period and their importance for the EU policies and also for the Member States.

Key words *Europe 2020, Youth employment, traineeships.*

PRELIMINARIES

The Europe 2020 strategy establishes three very important priorities in order to have a smarter, more sustainable and more inclusive economy within the European Union. In following these three important goals, the headline targets for the EU in 2020 have been established.

The first target mentioned is the employment and is established an ambitious goal: 75% of 20 to 64 year old men and women to be employed.

The second target regards the research and development and establishes a percentage of 3% of GDP to be invested in the research and development sector.

The third target mentioned is climate change and energy sustainability. The European officials have as aim to reduce greenhouse gas emissions by 20% in comparison to 1990 levels and also to increase the energy efficiency with 20%.

The fourth target is the education and in this field the main goal is to reduce early school leaving rates below 10 %.

The fifth and the last target mentioned by the Europe 2020 strategy regards the fight against poverty and social exclusion by „lifting

at least 20 million people out of the risk of poverty and social exclusion"[1].

In our study we will analyze the first target mentioned in the Europe 2020, the employment and because it is a present issue in the EU and in the Member States we based our analysis on the youth employment and on the solutions that the European Commission emphasises.

The economical and political context of the Europe 2020 strategy is well known – the economic crises, considered one without precedent and that weakened the progress within the European Union and this is considered to be a „moment of transformation" according to the European Commission Communication from 2010. We can observe the pro-active and positive attitude that the European Commission has when trying to get the best out of a hard situation and when establishes the „several lesson we have to learn out of this crisis"[2].

On 14 March 2014 the EU's Council of Minister adopted a Quality Framework on Traineeships to enable trainees to acquire high-quality work experience under safe and fair conditions, and to increase their chances to find a good quality job. In this context, we can understand that this is one of the most important solutions for the youth employment crisis.

1. THE YOUTH EMPLOYMENT FRAMEWORK

The youth employment framework can be envisaged only by analyzing the way the Member States understand to implement the EU legislation in the field. This was the first step that led to several EU legal acts adoption.

The EU's Council of Minister`s Recommendation on the Quality Framework on Traineeships from 10 March 2014 was adopted in a period when the economical crisis effects were more and more visible and the need for a solution arise.

The first paragraph of the above mentioned Recommendation is very illustrative for the economical and social context „*Young people*

[1] Communication from the European Commission, *Europe 2020 – A strategy for smart, sustainable and inclusive growth'* published on 3 March 2010, available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF
[2] idem, p. 8

have been hit particularly hard during the crisis. Youth unemployment rates have reached historical peaks in the past years in several Member States, without any sign of decrease in the short term. Fostering the employability and productivity of young people is key to bringing them onto the labour market".

This conclusion represents the final response after analyzing the situation in the field of youth employment within all the 28 Member States and after setting a very clear task for them in the European Commission Communication from 2010: *„At national level, Member States will need:*

– To ensure efficient investment in education and training systems at all levels (pre-school to tertiary);

– To improve educational outcomes, addressing each segment (pre-school, primary, secondary, vocational and tertiary) within an integrated approach, encompassing key competences and aiming at reducing early school leaving;

– To enhance the openness and relevance of education systems by building national qualification frameworks and better gearing learning outcomes towards labour market needs.

– To improve young people's entry into the labour market through integrated action covering i.a guidance, counselling and apprenticeships."[1]

Unfortunately, the statistics published by the Eurostat[2] after those assignments were in line for the Member States are not very reassuring.

Thus, this is the framework that forces the European officials to set up new standards in this field.

2. TRAINEESHIPS, A POSSIBLE SOLUTION FOR THE YOUTH EMPLOYMENT CRISES?

This is a question that certainly needs an answer. In order to find an answer there are some important elements that have to be emphasised.

The first one regards the quality of traineeships and the fact that quality traineeships ease the transition to employment. The quality of traineeships is given by the learning content and also by the working

[1] Communication from the European Commission, *Europe 2020 – A strategy for smart, sustainable and inclusive growth'*, p. 13
[2] http://ec.europa.eu/eurostat

conditions. To this end, EU Member States have to implement the Council Recommendation on Establishing a Youth Guarantee[1]. In the first paragraph of the mentioned Recommendation the Member States are invited to *„ensure that all young people up to the age of 25 years receive a good-quality offer of employment, continued education, an apprenticeship or a traineeship within four months of becoming unemployed or leaving formal education"*.

The second important element in finding an answer concerns the transparency of traineeships regarding the learning content and the working condition. When the transparency exits, certainly we find ourselves in the presence of an activity that will create an important professional experience for the young trainee.

We also take into account a third element that concerns the activity of organizing the traineeships. Are they just formal activities or they are considered an important step before the employment within the Member States? The answer to this question needs harmonization within the Member States. Unfortunately, the view regarding traineeships is not uniform and we believe that this have to become a priority at EU level[2].

Also, we have to take into account the vast legislation in the labour field at EU level. To this regard we can mention the regulations contained in the EU treaties[3], The Charter for Fundamental Rights of the EU[4] and an impressive number of Regulations and Directives[5] some of

[1] Published in the Official Journal C 120, 26.4.2013, p.1.

[2] *„Traineeships are currently unregulated in some Member States and sectors and, where regulation exists, it is very diverse and provides different quality elements or different implementing practices"*- The EU's Council of Minister`s Recommendation on the Quality Framework on Traineeships from 10 March 2014, p. 3

[3] Employment is regulated in Articles 145 to 150 of the Treaty on the functioning of the EU (TFEU), and in Articles 125 to 130 of the former treaty establishing the European Community (TEC)

[4] The Charter regulates: workers' rights to be informed and consulted by their employers; the right to bargain and strike; the right to access placement services; the right to protection in the event of unfair dismissal; the right to fair and decent working conditions; the prohibition of child labour; the protection of young people at work; the reconciliation of family and professional life; the right to receive social security, housing assistance and healthcare.

[5] We mention some of the secondary legislation in the field to evidence the legislative inflation: Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation, Directive 75/117/EC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, Directive 76/207/EC on the implementation of the principle of equal treatment

them repeatedly amended. In this context, applying these regulations in a uniform manner in all Member States represents almost an impossible mission. Obviously, if we can identify a problem we can try to find its solution. We believe that the solution for simplifying the legislation in this field is the codification that will create a friendly legal environment for the employers, for the young employees and also for the national and European authorities[1].

Thus, after analyzing the elements mentioned we can definitely say that when all conditions are met traineeships represent an excellent solution for all parties involved in resolving the youth employment crises.

CONCLUSIONS

Europe 2020 strategy represents an ambitious goal for the European Union and also for the Member States. If all targets are achieved, we will definitely have a „moment of transformation". For the moment, the European authorities are focused to find the best ways to exit from the economic crisis in order to achieve the objectives for 2020.

We consider the employment an important target to be obtained, because this will have a domino effect and all other targets will be more easily achieved. The youth employment crises can only remain a bad memory if all recommendations are followed. In this respect, the authorities have to understand that traineeships are extremely important in fighting the youth employment crises and also they have to find a way to simplify the vast legislation in the field.

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for men and women as regards access to employment, vocational training and working conditions, Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, Regulation (EEC) No 1408/71 regulating the application of social security schemes to employed persons and their families moving within the Community.

[1] For more details regarding the advantages of the codification see S. Serban-Barbu, *Codificarea normelor privind administrația publică în Uniunea Europeană*, Sitech Publishing House, Craiova, 2013, p.170

Some may say that the strategy for 2020 is just wishful thinking but we consider this strategy a positive attitude that will bring excellent results.

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THE INTERNATIONAL CONFERENCE
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Pitesti, 23 - 24 May 2014

BRIEF CONSIDERATIONS REGARDING ROMANIAN COURTS JURISDICTION IN LITIGATIONS WITH FOREIGN ELEMENTS

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Abstract

The basic principles of jurisdiction have been imposed by the European Community through binding rules, the New Code of Civil Procedure correlate with the Community regulations. The general rules on territorial jurisdiction shows that it is competent the court from the country of domicile of the defendant, but the legislature provide access to justice for certain applications to the Romanian court and courts of other states ; is also provided the preferential jurisdiction of the Romanian courts.

Key-words: *jurisdiction, reports with foreign elements, European regulation, internal law.*

The book VII of the new Code of Civil Procedure, absent in the previous regulation, is formed by bringing together chapters 12 of Law no. 105/1992 regarding the regulation of private international law, also X and XI of Book IV of the Civil Procedure Code from 1865.

In the context of Romania's accession to the European Union, should be noted that our state apply Regulation No 44/2001 of 22 December 2000 regarding the jurisdiction, the recognition and enforcement of judgments in civil and commercial matters in relation to the Member States of the European Union, and after 2015 Regulation No 1215 / 2012 regarding the jurisdiction, the recognition and enforcement of judgments in civil and commercial matters.

Rules of the new Code of Civil Procedure comply also with the provisions of the new Civil Code, which refers to the Article 2557 paragraph (2), applicable to the legal relations of private international law, qualifying them "the civil reports, trade and other reports of private international law with *foreign* element".

At the same time, in matrimonial matters and parental liability[1], Romania aplies Regulation No 2201/2003 concerning the jurisdiction, the recognition and enforcement of judgments in family and parental liability in relations with the European Union Member States.

1. GENERAL PROVISIONS INTERNATIONAL JURISDICTION OF ROMANIAN COURTS

The provisions of Book VII are applicable to the processes goerned by private law with a foreign element[2]. The foreign element that speaks about the new Code of Civil Procedure is a legal fact of attaching regarding the elements of the legal report and has the ability to generate conflict of laws (positive conflict of laws) - drawing within two or more legal systems - or giving vocation of application materials or the unified rules, as appropriate[3].

The dispositions of this book not refers only to private processes with foreign element taking place in the Romanian courts, also to the effects of foreign judgments in Romania[4], but it is easy to understand that this settlement does not include the fate and effects of judgments issued by Romanian courts abroad.

So, whenever we are in the presence of a legal report on which can be applied to two or more laws belonging to different states, Book VII of the new Civil Procedure Code will show that particular regulation will apply[5].

1.1. INTERNATIONAL JURISDICTION OF THE ROMANIAN COURTS

Establishing the jurisdiction of the Romanian courts in terms of Chapter I of Title I of the new Code of Civil Procedure, distinguished as

[1] For details concerning parental liability see A. Drăghici, *Protecţia juridică a drepturilor copilului*, Universul Juridic Publishing House, Bucuresti, 2013, p. 48-49

[2] I. Deleanu, V. Mitea, S. Deleanu, *Noul Cod de procedură civilă - Vol. II. Comentarii pe articole*, Universul Juridic Publishing House, Bucuresti, 2013, p. 1351.

[3] R. Duminică, L. Olah, *Drept internaţional privat-partea generală*, Sitech, Craiova, 2014, p. 21.

[4] G. Boroi, s.a., *Noul Cod de procedură civilă - comentariu pe articole, vol. II*, Bucuresti, 2013, p. 679.

[5] A. Tabacu, *Drept procesual civil*, Universul Juridic Publishing House, Bucuresti, 2013, p. 28.

jurisdiction is based on the defendant's residence or headquarters[1], voluntary prorogation of jurisdiction, choice of court, except arbitration, forum of necessity, internal jurisdiction, setting claims incidental, international lis pendens and international connectedness.

1.1.1. Article 1064 of the new Code of Civil Procedure has the merit of removing any possibility of contrary interpretation, expressly enshrines the subsidiary character of the settlements of Book VII in relation to European Union law and in relation to treaties to which Romania is a party. From this point of view, the new law is in line with European legislation in the field[2].

1.1.2. Subject to the Article 1065 NCPC is observed similarity of granting jurisdiction to the Romanian courts of common law procedure, specifying the text mentioned, the existence of foreign element.

The fundamental criterion for determining the international jurisdiction is the domicile or residence of the defendant and the head office and in his absence of a secondary establishment or goodwill (trade fund) from Romania[3].

It is seen that compared to the previous regulation, besides respondent domicile was added also the head office or secondary establishment or goodwill if the domicile is not identified, as elements that serve to determine the competence of the Romanian court to solve the dispute.

Although the above provisions relating to the person of the defendant, we note that in some litigation - due to their nature or quality of the person - the general rule of jurisdiction is determined by other people, as children, missing person, deceased, etc[4]. These notions of habitual residence, domicile, head office or secondary establishment will remain to be interpreted according to the *lex fori*.

In no event, however, a Romanian court is unable to determine, according to the internal procedural rules, the competent courts in Romania are the only reason that the defendant has his domicile or head office in another state, that because it would return jurisdiction to the

[1] For derogating provisions, respectively for court in whose jurisdiction the plaintiff resides or head, see C.Nenu, *Dreptul muncii,* Sitech Publishing House, Craiova, p. 309
[2] S. Popovici, *Procesul civil internaţional în reglementarea Noului Cod de procedură civilă*, in RRDA nr. 6/2013, Wolters Kluwer Publishing House, Bucuresti, p. 84.
[3] I. Deleanu, V. Mitea, S. Deleanu, *op. cit.*, 2013, p. 1352.
[4] G. Boroi, s.a., *op. cit.*, p. 683.

courts of another state dispute[1].

The provision of Article (9) of Council Regulation no. 44/2001 provides that the defendants which are not domiciled in a Member State are in general subjects to national rules on jurisdiction applicable in the Member State of the court seised, and the defendants domiciled in a Member State to which this Regulation does binding must remain still subjects to the provisions of the Brussels Convention[2].

Problems may arise in the existence of CP-trial passive, the solution is given by paragraph (2) of article 1065 NCPC, which shows that if the co-participation passive Romanian courts determined whether at least one of the defendants is domiciled or habitually resident headquarters or secondary or, in their absence, trade fund in Romania.

1.1.3. Prorogation of jurisdiction in favor of the Romanian court, under Article 1066 NCPC, aims rather the exclusive jurisdiction thereof[3].

The parties may choose by convention a court of a third state which hear a dispute with a foreign element between them, present or future[4]. If the parties choose subjecting existing or future dispute of them of beeing deducted before the Romanian courts, materials that may be concluded choice of court agreement should be in those in which the parties may freely dispose of their rights.

1.1.4. Choice of court, possibility indicated by art. 1067, specifically refers to the choice of jurisdiction in patrimonial litigations[5].

When the choice of the by prorogation in favor of another court, in the premise of art. 1067, they waive jurisdiction of the court. The conditions of validity of agreements are checked according to *lex fori derogati* and remain even in the absence of similar conditions in the *lex fori prorogati*[6].

Can also be observed the possibility very generally outlined that have Romanian courts to maintain jurisdiction, contrary to the choice of court agreement, if one party would be deprived of protection under

[1] S. Popovici, *op. cit.*, p. 86.
[2] REGULAMENT (CE) Nr. 44*) din 22 decembrie 2000 privind *Competenţa judiciară, recunoaşterea şi executarea hotărârilor în materie civilă şi comercială.*
[3] I. Deleanu, V. Mitea, S. Deleanu, *op. cit.*, p. 1353.
[4] G. Boroi, s.a., *op. cit.*, p. 986.
[5] I. Deleanu, V. Mitea, S. Deleanu, *op. cit.*, p. 1354.
[6] G. Boroi, s.a., *op. cit.*, p. 689.

abusive provides an instance provided by the Romanian law[1]. It is clear however that the assumption excludes the protected party vitiating consent.

1.1.5. Arbitration exception provided by art. 1068 envisages disclaimer of jurisdiction of Romanian courts seised of a dispute arbitrators, unless the parties have entered into such a convention.

Since the settlement of disputes between the parties by arbitration is an acceptable solution increasingly more often also in the relations with foreign elements and particularly in trade ratios, the legislature understood the need to grant the attention to this procedure too. Disclaimer competence is usually on, but it can be ordered only if the dispute in question is arbitrated according to Romanian law[2].

Regulation No 44/2001 must be correlated with the provision of the Code of Civil Procedure governing arbitration exception and find that article (1) paragraph (2) provides that: "This Regulation shall not apply to: (...) (d) arbitration."

1.1.6. Regarding the forum of necessity in the new Code of Civil Procedure, in Article 1069 the Romanian legislature significantly expanded opportunity Romanian courts to retain jurisdiction when there is no other way leading to the solution[3].

Being not possible declination of jurisdiction in international civil procedural law, as well as not to deprive litigants of access to justice, it recourse to legal fiction of the forum of necessity (*forum necessitatis*)[4].

But there are exceptional circumstances described in paragraph 2 of the text in question. It covers the situation where the application is promoted by a Romanian citizen or stateless person domiciled in Romania or by Romanian legal person, in these circumstances, Romanian court is obligatory[5].

1.1.7. Internal jurisdiction governed by Article 1071 NCPC is a solution supplementing the rules which determine Romanian courts that settle disputes with a foreign element. In the event that, in accordance with paragraph 1 by failure to identify court remains without solving skills, paragraph 2 establishes a special procedure in that court

[1] S. Popovici, op. cit., p. 93.
[2] I. Deleanu, V. Mitea, S. Deleanu, *op. cit.*, p. 1355.
[3] S. Popovici, *op. cit.*, p. 96.
[4] G. Boroi, s.a., *op. cit.*, p. 690.
[5] I. Deleanu, V. Mitea, S. Deleanu, *op. cit.*, p. 1356.

determines jurisdiction of District 1 of Bucharest, the Bucharest Court respectively. It is clear to understand that such a procedure is the exception to the rule of the provision in question.

1.1.8. Incidental requests to which it relates the provision of Article 1073 are intervention and counterclaim, and the text contains no rules considered exceptional and different from common law procedure, given that demand incidentally be solved by the court invested with the main request. In respect of intervention claims it is both forms - voluntary and force, in the case of the last being about processes that parties and the thirds do not usually live in the same state, the extended application of this competence could lead to chaos[1].

Regarding the counterclaim, it needs fulfill the requirements of the *lex fori*. According to this law is appreciated also the existence of a connection between the counterclaim and the main application, connection that justifies such an prorogation of jurisdiction[2].

1.1.9. International lis pendens (article 1075 NCPC) is the institution of proceedings in order to avoid delivery of two final judgment in one and the same case with the triple identity - object, cause and parts, of two or more different jurisdictions in the same reason as res judicata. The commented text determine the conditions of international lis pendens, referring to a case *pending* before a foreign court and subsequent referral of a Romanian court with the same request [3].

When invoking the existence of lis pendens Romanian court has the power to decide to suspend the process until the judgment of the foreign jurisdiction[4].

Article 27 of Regulation no. 44/2001 in the point 1 provides that the court seised of a case on the same matter, the same issue between the same parties, suspends automatically the action, until the jurisdiction first seised is established[5].

In case the court first seised shall establish its jurisdiction, the court subsequently seised shall decline compulsory the jurisdiction in favor of it. Suspending judgment is not binding, it intervened to prevent the

[1] G. Boroi, s.a., *op. cit.*, p. 694.
[2] I. Deleanu, V. Mitea, S. Deleanu, *op. cit.*, p. 1358.
[3] *Ibidem*, p. 1359.
[4] G. Boroi, s.a., *op. cit.*, p. 697.
[5] REGULAMENT (CE) Nr. 44*) din 22 decembrie 2000 privind *Competenţa judiciară, recunoaşterea şi executarea hotărârilor în materie civilă şi comercială*

delivery of two solutions in the same case with provisions contrary.

1.2. Connectedness established by Article 1076 NCPC INTERNATIONAL is regulated in the same sense as the internal connection between the common law to avoid decisions being antagonistic or irreconcilable. The purpose of this rule follows from the actual text of the discussion in the the final sentence, which directly indicates the intention of the legislature of judging separate application and pronunciation solutions that can not be kept congruent.

The procedure to be followed when connected claims is governed by the lex fori, the court before which obviously is the joinder of dossiers.

Although the Romanian legislator accepts the connectedness[1], it should be noted that it is necessary for states in which the other processes to allow themselves or to have a common conventional frame, European or international[2].

2. SPECIAL PROVISIONS ON INTERNATIONAL JURISDICTION OF ROMANIAN COURTS

2.1. *EXCLUSIVE PERSONAL JURISDICTION (ART. 1078 NCPC)*

The text in question provides for exclusive jurisdiction of the Romanian courts in disputes with foreign elements in personal relationships and status. Exclusive jurisdiction rules due to personal status, are public policy remit and can not be removed in any way.

Such cases are those concerning : disclaimers of civil status made in Romania concerning persons who are domiciled in Romania and Romanian nationals or stateless persons residing in Romania, approval of adoption, if the person to be adopted is a Romanian citizen or stateless person residing in Romania, guardianship and trusteeship to protect persons under judicial interdiction of persons domicilied in Romania, dissolution, nullity or the annulment of marriage, and other disputes between spouses, except those relating to property situated abroad, if the date of submission of both spouses residing in Romania and one of them

[1] In European law, the notion of connectedness is interpreted broadly autonomous and to ensure proper administration of justice (in this regard see Court of Justice of the European Union in Case C-406/92 of 6 December 1994 paragraph 52-53)
[2] G. Boroi, s.a., *op. cit.*, p. 698.

is a Romanian citizen or stateless[1]. As a general rule, in the processes element concerning the civil status it comes to complaints concerning civil status documents concluded in Romania on Romanian nationals or stateless persons residing in Romania, brought by plaintiffs who domiciled in another state[2].

2.2. EXCLUSIVE JURISDICTION IN THE MATTERS OF PATRIMONIAL ACTIONS (ART. 1079 NCPC)

Situation envisaged by invoked text gives exclusive jurisdiction of the Romanian courts in disputes with a foreign element regarding some actions with patrimonial character this time.

Article 22 paragraph (1)of Regulation C.E. No 44/2001: „The following courts shall have exclusive jurisdiction, regardless of domicile: (...) in terms of interests in land or tenancies of immovable property, the courts of the Member State in which the property is situated[3]."

The new Code of Civil Procedure Romanian courts in real estate matters was cleared of internally, meaning that art. 117 NCPC established a case of absolute territorial jurisdiction only for "claims relating to interests in rights in rem in immovable property"[4].

The code aimed at three hypotheses in this regard, namely:

- the immobiles situated in Romania. In private international law is universally admitted that the legal status of real estate is governed by the law of the place where the property is situated (*lex rei sitae*)[5]. From this rule results also the application of the court law enforcement good at was situated (*forum lex sitae*).

-property left in Romania by the deceased with last address in Romania. In succession matter, both old and current regulation kept the divided jurisdiction of the courts[6]. Criteria considered by the Code are the place where the goods are or last domicile of the deceased.

-contracts with consumers domiciled or habitually resident in Romania for Consumer benefits for personal or family use of consumers

[1] A. Tabacu, *op. cit.*, p. 29.
[2] G. Boroi, s.a., *op. cit.*, p. 700.
[3] REGULAMENT (CE) Nr. 44*) din 22 decembrie 2000 privind *Competenţa judiciară, recunoaşterea şi executarea hotărârilor în materie civilă şi comercială.*
[4] S. Popovici, *Procesul civil internaţional în reglementarea Noului Cod de procedura civilă*, în RRDA nr. 9/2013, Wolters Kluwer Publishing House, Bucuresti, p. 93.
[5] I. Deleanu, V. Mitea, S. Deleanu, *op. cit.*, p. 1364.
[6] G. Boroi, s.a., *op. cit.*, p. 707.

and unrelated to the professional activity or trade it.

2.3. PREFERENTIAL JURISIDCTION OF THE ROMANIAN COURTS.(ARTICLE 1080)

Text comment is entitled marginal "preferential jurisdiction of the Romanian courts," although from the wording of the law given that the situations they evoke are concerning to alternative competence[1].

It is noted that some of the situations envisioned by the provision in question are provided also by the common law rules on jurisdiction alternative.

In the case of competencies covered by this article, the Romanian legislature intended to provide access to justice in respect of application in matters where are equally competent courts of other states[2].

II. THE LAW IN THE INTERNATIONAL CIVIL PROCESS

1. CAPACITY AND RIGHTS OF PARTIES IN PROCESS

Romanian procedural law applies throughout the country, regardless of the each person status, as has the law[3]. Thus, it applies to Romanian citizens, but also to the foreigners or stateless persons on the territory of the country[4].

Reported to the foreign people who are to the country, to obey the laws of Romania in the same way as Romanian citizens, with rights and obligations code assigns the direct beneficiaries of its rules.

Regarding diplomatic immunity is raised the issue of jurisdiction, which is an exception to the principle that every person is subject to the jurisdiction of the State where it is located[5]. Should be made clear that this is not a total exception from liability before the courts, but only a dimension of the rules of the Vienna Convention.

2. APPLICABLE LAW IN PROCEDURAL MATTER

Article 1087 of NCPC provide clear and concise that Romanian civil procedure law will apply to international civil trial, unless provided

[1] I. Deleanu, V. Mitea, S. Deleanu, *op. cit.*, p. 1365.
[2] G. Boroi, s.a., *op. cit.*, p. 710.
[3] O.U.G. nr. 105/2001 privind *Regimul juridic al frontierei de stat*, art. 3 din Constituţie care face trimitere la acest act normativ special.
[4] A. Tabacu, *op. cit.*, p. 26.
[5] *Ibidem*, p. 27.

otherwise in this regard, expressly providedin other words will apply its own law *(lex fori)*.

Among the possible solutions, crystallized form of the principle that the judge applies yhe national procedural law (*forum regit processum*)[1].

The text in question governs the jurisdiction of Romanian courts in applying the Romanian procedural law throughout its starting phase *limine litis* writing, inquiry, debate on the merits, deliberation, judgment, judicial remedies, and ultimately the final decision.

III. EFFECTIVENESS OF FOREIGN JUDGMENTS

1. THE JURISDICTION OF ROMANIAN COURTS IN RECOGNIZING FOREIGN JUDGMENTS

Article 1094 NCPC shows that foreign judgments are recognized in Romanian courts if they concern personal status of citizen of the State where the decision are in accordance with Romanian private international law, are not contrary to public policy Romanian private international law and been respected the right of defense .

Jurisdiction to hear the application for recognition belongs to the circumscription court in which he is domiciled or headquartered who refused recognition of the foreign judgment if it is made on the principal[2].

The second way involves recognition of the foreign judgment to the Romanian court referral a trial which raises exception of res judicata to a foreign judgment, thus tending to paralyze Romanian court proceedings[3].

Romanian court is entitled only to the conditions set out in Article 1095 and Article 1096 and can not proceed to substantive examination the foreign judgment nor to change them.[4].

2. THE ROMANIAN COURT JURISDICTION ENFORCEMENT OF FOREIGN JUDGMENTS

Regarding the European Union Member States, shall be

[1] G. Boroi, s.a., *op. cit.*, p. 724.
[2] V.M. Ciobanu, C.T. Briciu, C.C. Dinu, *Drept procesual civil, Drept execuţional civil, Arbitraj, Drept notarial*, Ed. National, Bucureşti, 2013, p. 554
[3] A. Tabacu, *op. cit.*, p. 33.
[4] V.M. Ciobanu, C.T. Briciu, C.C. Dinu, *op. cit.*, p. 554.

applicable the provisions of Council Regulation nr.44/2001 (after January 2015 EU Regulation No. 1215/2012) . They aim at achieving uniform European Union member states recognition and enforcement of judgments in civil and commercial cases, ensuring the free movement of judgments in these matters .

In order to comply with foreign judgments in the event that they are not made voluntarily , it can appeal to the *exequatur* procedure whereby a foreign court order is declared enforceable by the courts where execution is to be done. Romanian Courts jurisdiction in *exequatur* matters are courts within the jurisdiction of which the execution is to be done .

The application for *exequatur* shall be made under the conditions established by art . 1099 for application for recognition, but will be accompanied by proof of the enforceability of the foreign judgment issued by the court which ruled it[1], in conjunction with the special provisions of the Council Regulation No. 44/2001 .

Regarding European titles not require prior recognition in the Member State in which enforcement is , they are enforceable without any prior formality - EC Regulation no. 805/2004 creating a European Enforcement Order for uncontested claims being eliminated *exequatur*.

CONCLUSIONS

New Code of Civil Procedure, perfecting monistic conception of the new Civil Code established by unifying civil law with the provisions of commercial law, in turn unifies the legal provisions governing the material rules of jurisdiction of courts, eliminating the differential regulation of competence standards in civil and commercial matters. However, the New Code of Civil Procedure is correlated with the Community regulations in order to strengthen the effect of their priority to domestic regulation.

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[1] *Ibidem*, p. 555.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THEORETICAL AND PRACTICAL ASPECTS OF THE CRIMINAL SANCTIONING SYSTEM OF THE REPUBLIC OF MOLDOVA

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Abstract:

The criminal policy of the Republic of Moldova and the punishment system, the tendencies regarding the criminality and the sanction, the applications of the detention alternatives, as well as the international experience in the domain of criminal policies represent the basic topic of the criminal reform that the Republic of Moldova follows. Essentially, the criminal sanctions are considered to be the coercive consequences that the criminal law binds with the precepts of criminal law violations. The Penal Settlement is inconceivable outside criminal sanctions, that are regulated within one of the three fundamental institutions of criminal law, along with crime and criminal liability. Within the criminal constraint mechanism the sanction appears as an inevitable consequence of criminal liability and the criminal liability as a necessary consequence of the offense. The primary purpose of all criminal sanctions is to defend the society against criminals and to prevent the committment of new crimes, as by those who apply, as well as by the others.

Key words: *criminal liability, penal sanction, punishment, safety measures, educational measures, major punishments, complementary punishments, accessory punishments etc.*

The sanctions have been an especially important component in all legal systems throughout the history of law. The law would have no substance and finality without penalty. The penalty is a subject matter of legal relationship of constraint. Compliance with democratic laws is an objective necessity of consolidation of law-governed state. Therefore, it is true that the law becomes effective only to the extent that its provisions are met.[1] Gh. Bobos states that "penalty whether it refers to the offender's personality, his/her property or validity of some juridical acts, always represents performance of state coercion with all negative

[1] I. Santai. Introduction to the Law Study. Sibiu University, 1996, p. 125.

consequences which the state imposes on the punished person".[1] Another definition is given by V. Dongoroz, according to this definition, penalty is "any measure, which a legal rule establishes as a consequence for the case when its provisions are ignored", "it is a consequence of failure to comply with provisions because its reason to be arises from the assumption that any provision may be ignored".[2] In the light of the foregoing, it is possible to make a conclusion that penalty appears to be a legal category which is found in different branches of law. Despite the role and place assigned to sanctions in our legal system, this concept has not been yet developed or outlined sufficiently from the theoretical point of view, as it has been fairly noted.[3] The legal sanctions acquire specific meanings depending on the subject matter of violated rules of law. Hence there is a need for correlating the legal sanctions and different branches of law.

Penal sanctions represent a fundamental institution of criminal law, which forms the basis of any criminal justice system along with the institution of offence and institution of criminal liability. Regulation of penal sanctions is important for the whole penal sphere, it is viewed as an essential aspect of fundamental principle of legality and contributes to execution of legal rules both by compliance and by coercion exercised upon those who have failed to comply with the provisions of criminal standards. Penal sanctions represent consequences of violating the rules of criminal law.

We can find few definitions of penal sanctions in the national and international doctrines and legislation. However, the institution of penal sanction has always been in the focus of attention of scientists engaged in this sphere. As it was stated by N. D. Sergheievschii, a famous Russian scientist, there were about 24 philosophical currents at the beginning of the 20th century, which justified the right of state to punish offenders and there were about 100 individual theories cited by the experts in law.[4] According to I. Ia. Foinischii, "penal sanction consists in a restraint imposed on the individual who has committed a criminal deed ... constraint which consists in producing some suffering or at least in

[1] Gh. Bobos. General Theory of Law. Cluj Napoca: Ed. Dacia, 1994, p. 215.
[2] V. Dongoroz. Criminal Law. Bucharest,1939, p.571.
[3] C. Oprişan. Sanctions in the Romanian Civil Law – a Possible Synthesis, in R.R.D. no. 1/1982, p. 11.
[4] http://ru.wikipedia.org/wiki/ Criminal penalty (visited on 28.03.2014).

promising to cause a deprivation of something so that any sanction is directed against a property belonging to the law breaker: his/her property, freedom, dignity, physical and moral integrity and event against his/her life sometimes". Marcel Ioan Rusu defines penal sanctions as measures of constraint and reeducation stipulated by criminal law and imposed on individuals who have committed offences in order to prevent from re-offending by their reeducation.[1] The lack of definitions of penal sanctions is explained by the reason that the accent is always placed on highlighting the notion of punishment which is considered to be the only penal sanction meant for ensuring the restoration of rule of law infringed by committing an offence and especially when a sanction is generally regarded to be a punishment applied when an individual violates the provisions of a legal rule.[2] While punishment has been regarded to be the only means of social reaction against offenders in the concept of classical school of criminal law, further development of criminal law has led to assimilation of other means as well, which have acquired educational or preventive purposes along with their coercive content. Therefore, injunctions are included in the system of penal sanctions or legal institution of penal sanctions along with penalties.

The penal sanctions are distinguished from other legal sanctions and have specific features which make them unique in the complex of legal sanctions. The number of these features differs in various doctrines and ranges from three to seven in some doctrines.[3] However, these features can be summed up as follows:

- The penal sanctions have a public nature, they are provided for in the criminal law standards and are applied by competent criminal prosecution authorities on behalf of state. The vestiges of imposing private punishment for crimes are found only in the Muslim law today: up to 10% of homicides were committed in Yemen for reasons of revenge at the end of the 20th century;[4]

[1] Marcel Ioan Rusu. Criminal Law Institutions. General Part. Bucharest: Hamangiu Publishing House, 2007, p. 138.
[2] Ioan Chis. Non-imprisonable Penal Sanctions of the 21st Century. Bucharest:Wolters Kluwer, 2009, p. 43.
[3] Russian Criminal Law. Practical Course/ endorsed by I. Bastrykina; under the scientific editorship of A. V. Naumov. M., 2007. p. 189.
[4]Russian Criminal Law. General and Special Part/edited by A. I. Raroga. M., 2008. p. 185.

- The penal sanctions have a retributive, punitive nature, which implies a repression, a restraint; this restraint is designed so that not to lead to physical suffering, moral humiliation of the convict as well as to providing opportunities to reintegrate into society as soon as possible;[1]
- Another defining feature of penal sanction is its personality consisting in its application only to a guilty person;[2]
- The penal sanctions are aimed at preventing from committing another offence both by those who have committed an offence and by those who tend to commit one, etc.

Some researchers such as V.V. Esipov and K.A. Sîci unite and combine the features of penal sanction in the composition of sanction – structure resembling the corpus delicti which includes object of sanction – offender or his/her legal property; objective aspect – constraint for committed offence determined by a concrete sanction; subject – state represented by its authorities; subjective aspect – aim of punishment and attitude of offender towards the applied sanction.

As a conclusion, it is worth mentioning that the criminal law emphasizes the achievement of four goals as a result of imposing sanctions on the convict:

1. Restoration of social equity;
2. Correction of the convict;
3. Specific prevention or prevention from re-offending by the convicts;
4. General prevention or prevention from committing an offence by other individuals.[3]

If we perform a comparative analysis of these goals, we have to emphasize that the French criminal doctrine considers the goals of penal sanction, especially of punishment, to be retribution, intimidation, prevention and correction while the British doctrine focuses on repressive element, restoration of social equity and protection of society against criminal attacks.[4] The goals of punishment are formulated indirectly in the legislation of many countries. Thus, Part II, Sect. 18 of the US Code

[1] Marcel Ioan Rusu. Op. cit, p. 138.
[2] Naumov, A.V. Russian Criminal Law. Course of Lectures. Two volumes. V. 1. General Part. M., 2004. p. 339.
[3] Botnaru Alina, Vladimir Grosu, Mariana Grama. Criminal Law. General Part. Vol.I. Chisinău: Cartier juridic, 2007, p. 427.
[4] Valerii Bujor, Larisa Buga. Comparative Criminal Law. Course Notes. Chişinău: Cartier juridic, 2003, P. 71.

of Laws sets forth the following factors determining imposition of penalty: participation in law observance, abstaining from committing an offence.[1] The penal sanctions have been developing from one decade to another, from one period of historical development to another one so that the content, nature and duration of penal sanctions has changed based on the principles accepted generally in a democratic society, some penalties have disappeared completely (death penalty), others have changed their content (forced labor into community work). However, some new crimes, as for instance cybercrimes, crimes in the banking system, terrorism, arise together with these changes. These new crimes involve new types of penalties adopted even at the international level. According to these requirements, other penal sanctions have been introduced in the criminal laws along with the punishments which have been considered the only effective penal sanctions in the struggle against criminals for a long time. These new sanctions have primarily a preventive, educational role.

The Criminal Code of the Republic of Moldova provides for two categories of penal sanctions: punishments and injunctions.[2]

The punishment has been defined in many ways for a long period of time. Hugo Grotius defines punishment as follows: "*Poena est malum passionis quod infligitur propter malum actionis*" (An evil is to be inflicted because an evil has been committed). The Romanian doctrine defines punishment as a measure of constraint, measure of repression, deprivation for the offender, „this is an evil which is imposed to indemnify the evil produced by committing the offence."[3] The legal definition of punishment in the Republic of Moldova is found in article 61 of the Criminal Code of the Republic of Moldova, "Penal sanction is a measure of state constraint and means of correction and reeducation of the convict which is imposed by courts in the name of law on individuals who have committed offences causing certain lacks and restrictions of their rights."[4] If we make a comparison between the above definitions,

[1] Nikiforov, B.S., Reshetnikov, F. M. Modern American Criminal Law. Moscow, 1990, p. 71.
[2] Criminal Code of the Republic of Moldova no.985 as of 18.04.2002. Published:14.04.2009 in the Monitorul Oficial no. 72-74.
[3] C. Bulai. Criminal Law – General Part. Bucharest: All Beck Publishing House, 1997, p. 283.
[4] Criminal Code of the Republic of Moldova no.985 as of 18.04.2002. Published:14.04.2009 in the Monitorul Oficial no. 72-74, art. 61.

we can evidently observe that the main character of punishments in the first definitions is profoundly retributive, the offender's punishment is aimed only at offender's exclusion from society and causing some suffering for the committed offence. The character of punishment is diversified in the legal definition so that the main features of punishment are not constraint and exclusion from society anymore, a very important aspect of reeducation is introduced. In the light of amendments to the Criminal Code, the major distinction of punishments is made according to the nature of person that is imposed the punishment: thus, we have punishments which are imposed on individuals and those which are imposed to legal entities. The new law sought to introduce criminal liability for legal entities as well, while they were not criminally liable under the old Code.

The doctrine classifies the penalties taking into consideration the following criteria:

- *according to the object which is their goal* – custodial penalties or penalties restricting liberty, pecuniary penalties, penalties depriving or restricting the moral rights;
- *according to their duration* – lifetime or unlimited penalties (for instance, for an individual – withdrawal of military rank, and for legal entity – its liquidation) and temporary punishments (the majority of punishments are temporary);
- *depending on the degree of their autonomy* – basic penalties, supplementary and mixed penalties.

Injunctions are penal sanctions aimed at extending the range of sanctions necessary for preventing the criminal phenomenon. The notion of injunctions has a common, general meaning and a technical meaning belonging to the legal language. Generally, injunctions are regarded to be measures taken to create a risk-free environment, measures of protection, preventive measures. Technically and legally, injunctions are meant to be a category of penalties with a purely preventive purpose imposed on persons that have committed offences provided for by criminal law and constitute a social danger.[1] The exponents of positivist and neo-positivist currents understand injunctions as measures of social protection meant to replace the obsolete concept of punishment, while the exponents of classical school of criminal law dispute the penal character of injunctions as they take place only in the sphere of administrative law. The character

[1] Viorel Pasca. Injunctions. Penal Sanctions. Lumina Lex, 1998, p. 27.

of penal sanction of injunctions is commonly acknowledged in the criminal doctrine at present. The legal definition of injunctions is found in article 98 of the Criminal Code of the Republic of Moldova, which stipulates that "the injunctions are aimed at eliminating a danger and preventing from committing offences stipulated by criminal law". When compared with other punishments, the injunctions are not consequences of criminal liability and do not depend on the gravity of offence committed, they can be imposed even when the offender is not imposed a punishment because application of injunctions is justified by existence of state of danger which represents the offender's personality. While being designed for preventing the state of danger revealed by committing an offence stipulated by criminal law and for preventing from committing new crimes, the injunctions are as a rule imposed for an indefinite period (for the period of duration of state of danger) and regardless imposition of a punishment on the offender.

According to article 98 of Criminal Code, the following measures are included in the category of injunctions:

a) medical measures of constraint;
b) educational measures of constraint;
c) expulsion;
d) special confiscation;
e) extended confiscation.

The special literature classifies the injunctions depending on their nature as follows:

- medical measures (compulsory medical treatment and hospitalization);
- measures restricting the rights (prohibition to hold certain positions or perform certain jobs, prohibition to stay in certain places, prohibition to come back to the family dwelling for a definite period and expulsion);
- restrictive working measures (special confiscation). Thorough knowledge of injunctions, their content and conditions of their imposition involves consideration of provisions which regulate them separately.

When viewing this subject as a whole, it is possible to make a conclusion that the penal sanctions have generally a punitive or retributive character implying certain deprivations or restrictions. Punishments have mainly this character while other penal sanctions, such as injunctions, have mainly preventive character. At the same time, penal sanctions have a necessary and inevitable nature. Moreover, they are

characterized by their *post delictum* action, having its cause in committing an offence provided for by criminal law.

The evolution of criminal law is marked by a continuous attempt to control the human aggression of criminal character and to legalize, control and humanize the aggressive response to it, including sanction. The scale of penalties, which is an angular scale of penal sanctions, has undergone major transformation lately both by extending the limits of punishments and by introducing new major punishments and elimination of others. In such a prospect, the legislator should put himself a question if the system of penal sanctions and all punitive measures, in the way they are regulated at present, are satisfactory to the full extent in correlation with the social requirements. In the light of these requirements, it is possible to make a conclusion that some measures of penal repression have become inefficient and other measures do not comply with the finality and functions of penal sanctions.

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THE INTERNATIONAL CONFERENCE
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Pitesti, 23 - 24 May 2014

GENERAL ASPECTS REGARDING THE DISCIPLINARY LIABILITY OF CIVIL SERVANTS IN SPAIN

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Abstract:

This paper proposes an analysis of disciplinary liability of civil servants in Spain, European Union's member state, to sense any similarities with our national legislation in this domain.

Disciplinary liability of civil servants or public employees, as Spanish law calls them, is governed by their status, as same as the Romanian civil servants, and by the Civil Service Laws which complement this status. Law no. 7/2007, General Status of public employees, regulates the ground of this form of juridical liability but also the disciplinary sanctions that can be disposed, not giving a detailed regulation to the disciplinary procedure nor to the act terminating this procedure.

Key words: *civil servant, disciplinary liability, misconduct, sanction.*

In Spain, labor law is stated by the Law on the Statute of workers[1] (Labor Code) and by numerous special laws regarding certain areas of the labor law, but also by collective labor contracts concluded in each area of activity and in which administrative province. The Spanish labor legislation has been in a legislative reform in 2012, which "*by its dimension and content has a wide range of applicability but, in the same time, it is a special incisive and profound mean because it contains*

* This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.

[1] "Ley del Estatuto de los Trabajadores", adopted on 10 March 1980 and published in the "Boletín Oficial del Estado" (Official Bulletin of the State) of 14 March 1980 and approved with modifications by the Royal Legislative Decree No 1/1995 of 24 March 1995, published in the BOE of 29 March 1995.

innovations which assume a rupture of the rules which have been considered quasi-structural for the system of the labor law"[1].

Legal regulations applicable for civil servants[2] in Spain are stated by the Law No 7/2007[3] on the General Statute of civil servants.

The disciplinary liability of this category of employees is stated by Title VII of the Statute and by the laws completing the statute.

Civil servants are disciplinary liable for the offences committed in the performance of their duties and functions, without affecting the patrimony or criminal liability which could be attracted by the offences committed. Also, civil servants are disciplinary liable if they assists the commission of disciplinary offences, their liability being the same as for the perpetrator. Disciplinary liability[4] shall be attracted also if the civil servant conceals the commission of serious and very serious offences, if these offences caused serious damages for the Administration or for the population.

According to Art 94 of the Statute, the disciplinary authority is exerted by the public administration where the perpetrator performs his activities.

The disciplinary authority is based on the following principles[5]:

a) The principle of legality and specificity of the disciplinary offences and sanctions, based on the normative predetermination;

b) The principle of non-retroactive application of the unfavorable sanctioning provisions and the principle of the retroactivity of the sanctioning provisions favorable for the one assumed to be the perpetrator;

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[1] M. Rodriguez-Piñero y Bravo-Ferrer, Prologue for the *Legislatión laboral y de Seguridad Social*, 14th Edition, Tecnos Publ. House, Madrid, 2012, pp.41-42.

[2] For the analysis of the notion of civil servants see A. Drăghici, R. Duminică, *Deontologia funcţiei publice*,University of Piteşti Publ. House, Piteşti, 2009, pp. 9-13.

[3] Published in the Official Bulletin of the State No 89/13 April 2007 with subsequent modifications and amendments.

[4] For a detailed analysis of the concept of disciplinary liability see C. Nenu, *Contractul individual de muncă*, CH Beck Publ. House, Bucureşti, 2014, pp 101-107.

[5] Also for the Romanian civil servants the disciplinary investigation is guided by a series of principles similar to the ones stated by the Spanish legislation. See also V. Vedinaş, *Valori europene în Statutul funcţionarilor publici*, in Studies of Romanian Law No 3-4/July-December 2002, Romanian Academy Publ. House, pp.329-330 and A. Mocanu- Suciu, *Deontologia funcţiei publice*, Techno Media Publ. House, Sibiu, 2010, pp.145-154.

c) The principle of proportionality applicable until the classification of the offences and sanctions, as well as for the application of the sanctions;
d) The principle of guilt;
e) The principle of the presumption of innocence.

Art 95 classifies the disciplinary offences in three categories: minor offences, serious offences and very serious offences. The actions representing very serious disciplinary offences are stated by Para 2 of the same article, among which are found: violation of the obligation to compel with the Constitution and Statutes of autonomy of the autonomous Communities, in the performance of the public service; discriminative actions of any type; abandoning the service; negligence in keeping official secrets if they get published, spread or known by unauthorized persons etc.

Serious offences are stated by law by the General Courts or by the legislative Assembly from each autonomous Community, considering: the measure in which the law was breached, the degree of the prejudices caused for the public interest, patrimony or goods of the Administration or citizens, discrediting the public image of the Administration.

Minor offences are established according to the same criteria above mentioned, by the laws of the public service amending the Statute.

Disciplinary sanctions which shall be ordered are[1]:
a) Separation of the civil servant's service, which in the case of the intermediary servants consists in revoking their appointment and can be ordered only for sanctioning very serious offences;
b) Disciplinary dismissal of the contractual staff, which can be ordered only for very serious offences and shall attract the disqualification of the person sanctioned, who will no longer be able to have an employment agreement on similar positions with the ones held at the moment when the sanction occurred;
c) Suspension of duties, work or remuneration, for the contractual staff, for maximum 6 years;
d) Forced transfer, with or without changing the residence, for an established period for each separate case;
e) Losing the merit, which attracts penalties for the career, promotion or voluntary mobility;
f) Warning;

[1] Sanctions are stated by Art 96 of the General Statute of civil servants, Law No 7/2007.

g) Other sanctions established by the law.

Individualizing sanctions regards the degree of intent, carelessness or negligence inferred from the behavior, damaging caused for the public interest, reiteration or repetition, as well as the degree of participation.

The prescription of the liability for disciplinary offences, as well as the cancellation of disciplinary sanctions is stated by Art 97 of the Statute. Thus, very serious offences are prescribed within 3 years, the serious ones within 2 years and the minor ones within 6 months from the moment when the offence was committed. Sanctions ordered for very serious offences are canceled[1] within 3 years, for serious offences within 2 years and for minor offences within one year since the decision for sanctioning remained permanent.

No penalty may be ordered for very serious or serious offences without going through the preliminary procedure[2] established by the law. For minor offences, sanctions shall be applied after a simplified procedure, with the hearing of the person investigated.

In the performance of the disciplinary procedure[3] established by the Statute shall be considered the following principles: efficiency, celerity and procedural economy, complying with the rights and guarantees of protection of the assumed to be the perpetrator.

During the disciplinary procedure may be ordered the temporary suspension[4] as measure of precaution. Suspension thus ordered cannot exceed 6 months, except the case in which the disciplinary suspension is ordered because of the person investigated. Temporary suspension may be ordered as well as during the performance of a judicial procedure and

[1] Also for Romanian civil servants the disciplinary sanctions are cancelled within different terms, unlike the common law where the cancelation intervenes in the same term regardless of the disciplinary sanction ordered. For more information see B. Vartolomei, *Radierea de drept a sancţiunilor disciplinare*, in the Romanian Labor Law Magazine, No 8/2011, p.52.

[2] General rules regarding the disciplinary procedures and the temporary measures are stated by Art 98 of the Statute.

[3] For an analysis of disciplinary procedure of civil servants in Romania see A. Puran, CC Nenu, *Brief considerations on some aspects of the procedure of disciplinary investigation of the civil servants in Romania*, in Agora International Journal of Juridical Sciences nr. 1/2014, pp 148-154.

[4] In our country also may be ordered the temporary suspension of legal relationship of employment or service during the disciplinary procedure. See for this C. Nenu. *Dreptul muncii -curs universitar*, Sitech Publ. House, Craiova, 2014, p. 117.

shall be maintained during remand or during other procedures ordered by the judge, which determines the impossibility of performing the professional duties. In this case, if the temporary suspension shall exceed 6 months it shall not attract the job loss.

The civil servant who is temporarily suspended has the right, during the entire suspension, to the basic salary and to the family benefits for dependent children. If the temporary suspension is not transformed into a disciplinary sanction, the civil servant is entitled to receive the difference between the amount received during suspension and the amount to which he was entitled to normally receive.

CONCLUSION

The general Statute of civil servants does not clearly states which is the preliminary disciplinary procedure, nor aspects regarding the decision for sanctioning and its appeal. These regulations shall be left either for the latitude of the autonomous Communities, or for the appreciation of the administrative authorities.

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THE INTERNATIONAL CONFERENCE
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Pitesti, 23 - 24 May 2014

THE SOCIO-HISTORICAL AND STATISTIC EVOLUTION OF THE RESIDENT FOREIGN POPULATION FROM BELGIUM IN THE 20TH CENTURY

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Abstract:

In the second part of the twentieth century, Belgium became permanent immigration ground. After thirty glorious and famous agreements for the migrant workers in Belgium, the phenomenon has gradually evolved into forms of family reunification and asylum, the Belgian population knowing the impact and the increased influence of intra-European mobility. To understand and identify the challenges of the immigrants to integrate into the Belgian society, it is important to quantify the migration, the objectives being to delineate the contours and track the major trends that Belgium face, concerning this phenomenon, in the years to come. This analysis presents the most synthetic reality behind the numbers.

Key words: *immigration, Belgian society, integration.*

INTRODUCTION

Belgium can be, for some Romanians, an experience outside the borders of their natural country. The adapting is done in time, for each side, and the way in which people entered the destination country bears a high importance. The circumstances and the knowledge of the host country's language are essential elements for acclimatization. It is extremely necessary to be recommended both to the private people and to those who work in the institutions from where might be needed necessary information for the case study.

The European Union encompasses among its basic principle the rights regarding the free circulation of people and, implicitly, of manpower. Even if Romania has been a member since 2007, not all the other agreed with the granting of these rights. Countries as Holland, Belgium and the United Kingdom maintained restrictions on the labour market for the Romanian citizens. Although, starting with the 1st of

January 2014, they should have been removed, the sceptics sustain that new regulations, which might discourage both the Romanians and the potential employers, will be introduced.

Although a small country, with 11 million dwellers, Belgium offers shelter for a great number of Romanians. In 2010, a study made by the sociologist Jan Hetogen announced the existence of 22.000 Romanians, most of them living in Brussels. Since 2010 and up until today, the situation has changed dramatically, especially due to the powerful economic crisis that affected Spain, Italy and Greece – many Romanians who worked in those countries chose the relocation in Belgium. Yet, there is not an exact number of the emigrant Romanian citizens from Belgium. The Census of the Romanian population from 2012, published only the amazing number of 11.611[1].

Mainly, the Romanians have the right to work in Belgium, by that meaning the freedom to look for an employer and to work in any domain that offers a labour contract to open their rights for social and health insurances. On the other side, the Belgium employers, sometimes, do not hire people with a labour contract, because of the very high taxes requested by the state. In a recent published study, Belgium is the country with the highest index of the tax rate for wages, a Belgian employer paying 2.45 euro for each net euro of his income.

The independent statute is something similar to the PFA (Authorized Physical Person) from the Romanian legislation. Although it is regarded with scepticism, it is the most convenient and used variant, even though it is not always legal.

To become independent, a Romanian has to present a High School Diploma, issued until 2000, including this year, or a Bachelor's Degree and a valid ID card. The diploma proves the ability to manage a business. If the person does not have such a document, he/she can be supported by a first degree relative who has the requested document, either from the Belgian territory or from any other country of the European Union.

The working permit is given in a relatively facile manner, but only for those who work in areas from "the red list", a list with branches where there are not enough specialists on the labour market, for example

[1] http://www.rombel.com/stiri-belgia/55895-httpmediascoproconditiile-de-munca-pentru-romanii-din-belgia.html

secretariat, IT, lathe men etc. The content of the list depends on the regions, being different in Brussels, Wallonia and Flanders (the three administrative regions of Belgium).

As a student, on the Belgian territory, any person has the right to work. The first 50 days from a contract like this are subjected to some reduced social taxes, the rest being regularly taxed. In order to be considered a student in Belgium, one must be enrolled to any type of classes, for at least one school year – language classes, master or college etc.

The Romanians who work in Belgium are employed, mainly, in areas as constructions, cleaning, IT and medicine. Moreover, a significant number also works in the European Institutions.

We have to mention that, generally, the degrees issued in Romania do not have to be validated. This procedure is applied only in few areas from the regulated jobs: doctor, psychologist, nurse, accountant, jobs related to the metallurgical sectors etc.

Along the legally registered Romanians, there is a significant number (there is not exact statistic data for it) of people who work illegally, without being declared at least residents on the territory of this country. Most of them are not aware of the danger they are subjected to: the lack of right to benefit by medical services in case of working accidents, the possibility of not being paid accordingly etc.

Brussels is a unique socio-professional space, in which any person can test at the highest level the abilities, the personal potential, being able to reach remarkable results when it comes of personal, social and professional development, according the one's aspirations, curiosity, energy and intellectual qualities. The Romanians who work in the EU institutions, especially in the European Commission, represent a socio-professional category that Romania can take proud in. They are intelligent people, very well trained in different universities and research centres from Romania or from abroad, open to any constructive suggestion.

Beyond the glass and steal walls of the EU institutions, the Romanian associations from Belgium are led by proficient people, who have unique visions on the needs of the community and methods to activate the varied resources they have at their disposal. In some associations, there is a wider opening than in others, on addressing a constructive dialogue and sound principles collaboration.

The progressive-minded ones have already joined the Progressive Diaspora, as active members. It is obvious that since Romania adhered to the European Union, the Romanian Diaspora from Belgium has had different characteristics from the other European states. We have a permanently growing community of Romanians who study or work here and more and more of them become employed in the European institutions. Taking into account the situation of the almost 55.000[1] Romanians from Belgium, we tried to find out more about their situation. Almost 1000 of them work in the European institutions, while the rest of 500 are in the private sector of the European businesses. [2]

FOREIGN POPULATION RESIDENT IN BELGIUM IN THE TWENTIETH CENTURY

If, as comparing to the trans-Atlantic countries or even to its direct neighbours, Belgium does not represent a historical immigration ground, along the 19th century, a big wave of migration is registered, at the 1890 Census being 170.000 foreigners in Belgium, 2.8% of the country's total population, most of them being the dwellers of the neighbouring countries. Later, a first wave of Italian and east-European immigrants appeared during the period between the two world wars. Although the import of manpower announced the beginning of other waves of immigration, after the World War II, these migratory movements remained insignificant, as comparing to the population of the country. At the end of the World War II, in 1947, almost 350.000 foreign citizens were living in Belgium, barely 4% of the total number of the population. [3]

The continuous period of economic growth, after World War II, from Belgium, determines the influence of the migration phenomenon.

[1]http://www.rombel.com/interviuri-rombel/55042-piata-muncii-pentru-romanii-din-belgia-in-2012.html (*An interview for the RomBel community by Dan Luca, the administrative director of EurActiv European network, created of Casa Europei foundation from Cluj and of „România-UE" Club, deputy-president of PSD Diaspora and member in the National Council of PSD)*

[2]http://www.rombel.com/interviuri-rombel/54586-despre-piata-muncii-in-inima-europei.html

[3] For more information on the immigrant population from Belgium, see the study De Eggerickx, Poulain & Kesteloot, *Populaţia imigrantă din Belgia, Recensământul monografic*, No 3, 2002.

The need for manpower during 1947-1974 led to a massive afflux of foreign workers, who, in a great extent, would induce migration experience in Belgium along the 20th century. In order to revive the economy of the country after World War II, Belgium concluded several bilateral agreements for attracting foreign workers on its territory. The first and the most important is the Belgian-Italian Protocol from the 20th of June 1946 that established the arrival of fifty thousand Italian for working in the Belgian mines. In the following years, there were signed many other protocols with Spain, Greece, turkey, Morocco and Tunisia. We can draw the conclusion that the economic migration functioned on the safety valve principle. The government opened the tap, facilitating the immigration process, when the lack of manpower started to make its presence in Belgium. A maximal number of immigrants was attained in 1964, after the bilateral agreement with Morocco and Turkey, where more than fifty thousand foreigners joined Belgium, almost 0.5% of the Belgium's population from that year.

After the breaking of the first oil crisis, the Belgian Government stopped the immigration of the unqualified workers in Belgium. The working licences for the unqualified ones have limited, from that date until nowadays, almost exclusively to the qualified workers, who enjoy all the rights. In the last twenty years, it has followed a long period of emigrational decline in Belgium, with a short period, in the 1980s, when the country was experiencing a new type of positive migration. Then, there was noticed the returning of the migratory fluxes, as a sequence of three distinct phenomena, although partially related to each other: a growth of the processes of reuniting the families who reached their second maturity, of the third generation of immigrants who had come in Belgium in the 1950s and 1960s and the importance of the European institutions and European capital that is Brussels.

Up until the 1995, when the statistics on the asylum of the requesters was not among the data regarding migration that had taken place since then, the people who asked for asylum were included in the statistics data as foreigners who live in Belgium, being recognized as refugees, without using the statistic databases on migration. The second part of the 20th century transformed Belgium in migration ground. This reality is still partially hidden, placing Belgium too often in "The Old Europe", as opposing to North America and Oceania. Nevertheless, in the

last ten years, Belgium has been receiving more immigrants than all the neighbouring countries, United States or Canada.

During the last decade, Belgium has known a net afflux of immigrants, not less than half of million people, or 4.5% of the country's population. In the annual statistic data bases, the most used is the rate of net immigration, OECD publishing yearly statistic numbers, for all the countries members of the organization. Although the OECD database on this subject are cautiously analysed, due to the important differences regarding the recognition of the migration phenomenon that might exist in certain countries, in 2012, Belgium registered a net immigration rate of 7.3 thousand dwellers, surpassing Canada and placing right behind Australia. The origin of the immigrants from Belgium is very diverse. As some data show, there can be identified two major tendencies such as: the migration, mainly from the old states members of the European Union, along with an increase, sustained by the arrival of the migrants from Eastern Europe, and the non-EU migration. Yet, we must take into consideration the fact that the European migration in Belgium is the major one and, also, durable. In other words, it is obvious a continuous augmentation of the intra-European mobility, Brussels and Belgium being the destination.

In conclusion, although it is difficult to measure, the net migration is probably extra-majority among the community countries, due to the existent statistic data on the subject of migration since 1995, the asylum procedure was excluded. Nonetheless, the reality behind the flux of migration outside EU is also a hybrid. If less than a half from the total number of migrants is constituted by the two people who want their family reunited, among the migrants, there are also students, workers, qualified of unqualified workers etc. Moreover, there is also a flux of the people who ask for asylum who, nowadays, represent a little more than 30.000 arrivals a year, the origin of these migrants being very diverse: Morocco, Turkey and Democrat Republic of Congo, China, Cameroon, India and Armenia.

In 2011, the Law on the reuniting of family was modified, having a great impact of the migratory fluxes. The territorial concentrated distribution of the immigrants from all the world show that, in Belgium, they mainly settle in cities as Brussels, Antwerp, Ghent, Liege, Leuven

and, in a smaller extent, Mons Charleroi.[1] Wallonia registered, over the years, a continuous decrease of the immigrants. There are certain characteristics, such as the settlement of the citizens from the countries near the frontiers (France, Holland, Germany) or the impact of some immigrant communities of a certain nationality, as the Turks, who have a strong presence in Gent or the Moroccans, who are gathered mainly in Brussels and Anvers. As it has been expected, the Brussels region is the most welcoming for the immigrants, because it has owned 355 of them for several years now. Anvers is also a city with very many immigrants because it received approximately 20% of all the immigrants from Belgium. We must notice the fact that the big cities are those that face the highest rate of migration. The exercise of measuring the population is a diverse and colourful aspect, leading, obviously, to illusions. Beyond the difficulty that the immigrants represent a population whose origin and motivation are almost as diverse as the number, qualification, the integration itself brings forward some problems.

Internationally, MIPEX (Migrant Integration Policy Index), started a initiative of the British Council and Migration Policy Group that supplies a set of indicators for measuring the integration of the immigrants in every European country. As regarding the integration on the labour market, the immigrants from Belgium, who come from the states members of the European Union, are much more integrated on the labour market than those who come from the new states members or outside the borders of the European Union. Significant differences appear, depending on the immigrants' origin. The integration of the non-European immigrants on the labour market represents undoubtedly a problem for Belgium. This fact is under the attention of the Belgian authorities that wish for the improvement of the results, both in the immigrants' interest and in that of the Belgian on the whole. The level of qualification is different according to the nationality of the groups that exist on the labour market. It is not surprising the substantial proportion of those who work as unqualified manpower, a situation which is actually obvious in the entire Europe. The statistic data on immigration from the last decades were describing Belgium more as a nation of immigrants and, more recently, as an indigenous nation. During the last thirty years, there were many changes in adopting the law regarding the obtaining of

[1] The number of immigrants on the city (2008), based on the data collected by CECGK RN – DGSEI.

Belgian nationality and the proportion of the Belgian population of foreign origin has become extremely prominent. Before 1985 and due to the entering into force of the Belgian Nationality Code, the obtaining of the Belgian citizenship was relatively restrictive, it was not given automatically for the children whose father was Belgian. Since then, several amendments have been successively introduced and, nowadays, the Code is one of the most liberal normative documents on the obtaining of citizenship from Europe. I will not enter into details about its stipulations, but, synthetically, the Belgian citizenship is obtained in the following cases:

- at birth, for all the children with one Belgian parent or one of the parents born in Belgium, on the condition that the parent to live there five from the last ten years that preceded the birth of the child;
- after the acquisition, by any foreigner who lives in Belgium, of a main residence since their birth;
- after the legal acquisition, by the foreigners who have lived for seven years in Belgium, of a main residence;
- in case of marriage with a Belgian, after six months of common living in Belgium, if the spouses lived together for three years before the marriage or after three years of marriage;
- by naturalization, on the condition that the person to have the main residence in Belgium for at least three years (two years for refugees and apartheids).

This gradual relaxation regarding the obtaining of citizenship through the Nationality Code helped more than 800.000 foreigners to get Belgian citizenship from 1985 until today. In the last years, the number of the nationality changes has varied between thirty and forty thousand a year. The most important ways, in order of importance, to obtain citizenship, are:

- The obtaining of citizenship through declarations;
- The legal acquisition of a house;
- The children with one Belgian parent can have Belgian citizenship;
- Through naturalization.

A person who spent more than three years in Belgium can solicit the citizenship, but can face difficulties regarding the knowing of the two national languages. These aspects are very important for those with economic and social integration, marginalization or discrimination in the Belgian society.

A continuously growing number of studies and indicators compare the integration problems, of discrimination regarding the foreigners from the host countries, from the point of view of the manpower, education, access to social services etc. Recently, Belgium has been nominated among the last European countries concerning the integration of the non-European foreigners on the labour market, appearing with only 39% of the non-EU employed foreigners. Nevertheless, we should take into consideration the international similarities in a more cautious manner. Indeed, in Belgium for example, the share of the outside-community foreign population is relatively limited, because a great deal of the population (an average of 10% annually) obtained the Belgian citizenship. Logically, the countries with lower rates of naturalization have a much bigger extra-community foreign population. The obtaining of citizenship can be often a positive integration vector and a basic reason for the relaxation of the laws that refer to the obtaining of citizenship. Therefore, the no-EU foreign population represent, most of the times for these countries, including Belgium, a group of recently arrived immigrants, as comparing to the older immigrants, who came previously.

CONCLUSIONS

In conclusion, to make comparisons regarding the international integration of the foreigners can be deceiving. We can assert that the population of Belgium have become a diverse origin population, marked by immigration and mixture with the autochthonous population that have been continuing for tens of years. If the flow of migration is presently significant, yet, this does not mean that the most important part of the Belgian population is of foreign origin. Despite the rejuvenation of population, due to the immigrants, they can obtain fast an eligible Belgian statute, from that of foreigner, by requesting the citizenship after three years of residence in Belgium, or two, in case of acknowledged asylum. Actually, more than thirty thousand people a year obtain Belgian citizenship, more than a third from the annual net immigration from Belgium. The establishing of the future tendencies is, obviously, a very dangerous exercise[1]. It is important to notice the fact that the BFP

[1] DG SIE - BFP, calculations: The Institute of Demography– UCL & GéDAP – UCL, in the last important study published by the Federal Bureau of Planning (BFP), Belgium

previsions believe that immigration will become the main source of growth inside the population, in the next fifty years in Belgium.

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THE INTERNATIONAL CONFERENCE
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Pitesti, 23 - 24 May 2014

THE TIMELINESS OF THE THEORY OF FORMS WITHOUT SUBSTANCE. LEGAL TRANSPLANT AND EUROPEAN LAW –THEORETICAL PERSPECTIVES[1]

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Abstract:

The European law was born and developed mainly through vertically legal transplant, from top to bottom: from the supranational legal order to national legal systems. The unification / harmonization of the european law is aimed to be objectified through formal legal construction. The latter meets the praxis limits projected by the national legal identities, by the legitimate national legal culture preservation reflex or national legal pride. The convergence of the written law encounters the divergence of the law in action, determined by the culture /political and legal capacity of each national legal system. Therefore, successful legal transplant of the european law should not be resumed to the field of legal positivism, but extended to the dimension of law understood through culture or as culture. Rediscovering and (re)contextualising the Romanian theory of forms without substance, from the nineteenth century, to the curent problematics of the European law integration, unification and harmonization, we can discover a surprising timeliness conceptual background. In this paper we propose to explore and highlight this heritage of ideas.

Key words: *legal transplant, forms without substance, comparative law, legal culture*

1. INTRODUCTION

By *legal transplant* we understand the process by which a legal system (receiver/ recipient/ importer) adopts, takes over or accepts legal institutions, legal rules, legal standards, legal concepts or even political regimes from other legal systems (donors/ exporters).

There are a lot of metaphors used to explain the process through which a legal-system implement in its practice and doctrine elements

[1] This work was supported by the strategic grant POSDRU/159/1.5/S/133255 (2014), Project ID 133255 (2014), co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.

from the legal experience of other systems or, by case, to describe the method wherethrough a legal system dictates the evolution of another legal system: legal transplant, legal migration, legal transposition, legal borrowing, legal dictate, legal imperialism etc.. Inasmuch as the phenomenon of the migration of legal models in the world is a complex one, which comprehends a lot of variables, no one managed to build a generally valid theory and, obviously, no one managed to formulate an universal metaphor, capable to project in a unequivocally way the logic and the effects of the legal models' circulation in the world. We will use the expression legal transplant[1], due to its metaphoric meaning, taken over from medicine, which evokes the danger of rejection of the foreign transplanted legal body by the receiver, if there is no compatibility between the donor and the receiver or in case the necessary undertakings (previous, simultaneous or subsequent) are not made to sustain the transplant (its adaptation).

For the purpose of our scientific approach it is useful to underline the fact that legal transplant can be of many kinds. It is voluntary when the initiative belongs to the system which is in the position of the recipient; it is *imposed*[2] (legal imperialism) when the law of a state is not freely elaborated. When in the relationship of the transfer we find a national legal system and a supranational legal order, the legal transplant is vertical (bears both the version *top-down*, and the version *down-up).* If the transfer is made between equal position subjects, the legal transplant is horizontal. Taking into account the scope of the legal import and the way it is prepared, the transplant can be rational, when it is the result of a selection process based on legal comparison, and irrational, when the mentioned critical approach is not undertaken. If the possible effects that the transferred legal bodies can generate in the receiving society are evaluated, the transplant can be characterised as being conscious. Under contrary circumstances, it can be unconscious[3].

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1 We specify that in some cases we will use, as synonyms, other collocations as: legal transfer, legal import.

2 Jonothan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, American Journal of Comparative Law, Vol. 5, 2003, pp. 847-849.

3 Manuel Guțan, *Romanian Tradition in Foreign Law Import: Between Necessity and Weakness*, in „Imperialism and Chauvinism in the Law", colloquium - 20th anniversary of the Swiss Institute of Comparative Law, Schulthess, Genevè -

In order to be able to point out the timeliness of the theory of forms without substance, we will shortly present in the first part of our paper the main modern theories of legal transplant[1].

The theory of forms without substance finds its conceptual foundations in the article *În contra direcţiei de astăzi în cultura română* [*Against the contemporary direction in the Romanian culture*], signed by T. Maiorescu (1840-1917), in 1868. The mentioned article introduced in the landscape of the analysis about the Romanian society the issue of the massive legal transplant from the 19th century. It was debated the position of the Romanian law in report to the Western transplanted law. This report was elaborated based on an abstract exploration of the cultural and legal characteristics of the Romanian people, through the theoretical interaction between the transplanted form (a foreign constitutional law – the Belgian Constitution from 1831) and substance (Romanian societal background), that is between the imported law and the real national spirit or identity. Through this demarche, various intellectual positions were born. By exploring them, we can discover a surprising background of ideas common with the one belonging to the modern legal transplant theories. As we shall see, some ideas from within the theory of forms without substance can rendered unto an edification of a successful communitary legal transplant theory [2].

2. THE MODERN THEORIES OF LEGAL TRANSPLANT

A. Alan Watson's theory

A.Watson believes that the law is not a natural society emanation but the intellectual creation of some intelligent jurists. Therefore,

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Zurich - Bàle, 2004, pp. 66-67; *Idem*, *Forme pe un alt fond: transplantul juridic comunitar şi cultura juridică românească*, Pandectele Române, nr. 5/2008, p. 19.

[1] For a critical analysis on the legal transplant theories, see Răzvan Cosmin Roghină, *Teoriile transplantului juridic*, in „*Studii şi Cercetări juridice europene/ European Legal Studies and Research*, Conferinţa Internţională a doctoranzilor în drept", ediţia a 5-a, Edit. Universul Juridic, Bucharest, 2013, pp. 632-644; *Idem*, *Legal Transplant*, in„The need of Reform in Law", Lucian Chiriac (ed.), Technical University of Kosice, Kosice, 2013, pp. 370-378. For an analysis on the constitutional transplantation phenomenon, see *Idem*, *Transplantul constituţional*, RDPb, nr. 4/2012, pp. 124-140..

[2] In our paper we do not intend to develop such a theory, but only to highlight some useful directions which may serve for the birh of such a theory.

according to him, the law is easily adapted to other system's jurists' needs, as eventually it is the idea that travels[1]. The law is essentially a teleological product. According to the thinking of the American professor, the migratory character of the rules demonstrates that there is no close relation between society and law[2], which is largely autonomous and develops by legal *transplant*.

B. Pierre Legrand's theory

The opinion of P. Legrand is that not only the law is conditioned from a social point of view, but also the way it is comprehended (legal epistemology). He affirms that the interpretation of the legal norms is based on epistemological suppositions that are culturally conditioned[3]. In consequence, those legal transplants that seem to develop in the receptor's legal system are, in reality, "something else". The transferred legal elements suffer inevitably fundamental changes in the alleged transfer, so that the essential part of the legal norms –its meaning – does not survive[4]. A norm is not self-explained, is not applied through itself.

The actors of the law have to discover its meaning and explain it, but as the interpretation model differ from one society to another, the meaning will be completely deformed in the receptor's legal system. P. Legrand lets us understand that he denies the possibility that a law practitioner can change *his epistemological dictate* or, with other words, that the legal actor can change his model of thinking – the coat of his own culture[5]. This circumstance makes the imported legal forms different. The transplanted law will receive a new substance, a new meaning, according to the way of understanding it by the receptor society[6]. By this, the legal transfer – effectively – does not take place[1]. In

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1 Alan Watson, *Legal Transplants and LawReform*, Law Quarterly Review, Vol. 92, nr. 1, 1976, p.79; *Legal Change: Sources of Law and Legal Culture*, University of Pensylvania Law Review, Vol. 131, nr. 5, 1982-1983, p. 1152; *Evolution of Law: Continued*, Law and History Review, Vol. 5, 1987, pp. 537-570.

2 *Idem*,*Legal Transplants: An Approach to Comparative Law*, The University of Georgia Press, Athens/London, 1993, p. 23.

3 Pierre Legrand, *The Impossibility of „Legal Transplants*, Mastricht Journal of European and Comparative law, Vol. 4, 1997, pp. 111, 114.

4 *Ibidem*, p. 117.

5 *Idem*, *European Legal Systems are not Converging*, International Comparative Law Quarterly, Vol. 45, nr. 1, 1996, pp. 216 et. seq..

6 *Idem*, *The Impossibility of "Legal Transplants"*...cit., pp.114-115.

the best case, according to P. Legrand, only a set of words without unity of meaning can be transferred from one society to another[2]. So, the legal transplant would be impossible.

C. Otto Kahn Freud's theory

O. Kahn-Freud affirms that the law is suffering of transferability degrees and that the chance of accepting or rejecting the foreign legal body by the receptor depends on several political[3] (the most important in his opinion), economical, social and geographical factors. Unlike A.Watson, O. Kahn-Freud affirms that the autonomy of the law is not universal but relative. If the legal elements of the transplant's equation are not closely related to the social and cultural conditions of the donor legal system, we can talk about an autonomous law. As the mentioned socio-cultural linkage is more pronounced the autonomy degree gets lower and, as a result, the success of the transplant can be harder to achieve. Also, in such a case, the undertaken transplant comes with internal risks[4].

D. Esin Örücü's theory

The opinion of E. Örücü is that in the absence of an adaptation or in the presence of a superficial adaptation of the imported law, the latter can fail in the importing society. In this sense, the Turkish professor proposes a new metaphor: legal transposition[5]. The transposition is necessary both for the transfer of legal elements with limited autonomy, closely related to the social-legal culture of the donor society, and for the transfer of legal elements with high autonomy degree, deriving or not from a related legal culture.

Putting aside the compatibility necessity, but without cancelling it, E. Örücü thinks that a voluntary legal import heightens the probability

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1 *Ibidem*

2 *Ibidem*, p. 120.

3 For example, the differences between communist and non-communist states or between dictatorships and democracies highlights serious impediments for the the hypothesis of a legal transfer.

4 Otto Kahn-Freud, *On Uses and Misuses of Comparative Law*, Modern Law Review, Vol. 37, nr. 1, 1974, pp. 1-27.

5 Esin Örücü, *Law as Transposition*, International and Comparative Law Quarterly, Vol. 51, 2002, pp. 212 et. seq..

for a successful transposition, as the latter takes place in the presence of an authentic receptivity from the importing society[1].

The adaptation, in order to be successful, must be undertaken at all the levels of the legal system, especially among the judges and among the future jurist generations, so at an educational level as well and, of course, among the other legal actors[2].

E. Teoria lui Gunther Teubner

G.Teubner thinks that the object of the legal transplant is not positioned directly in the new organism (receptor system), but it is rather positioned on a surface level. The transplant will function as an *irritant*[3] and will start new and unexpected internal processes[4]. The irritant can't be tamed when it is closely related to the cultural background of the donor society, it can't be transformed from something foreign into something familiar and it is not adapted to a new cultural context; once introduced, the irritant will start an internal *evolutionist dynamics* leading to a reconstructed meaning of the foreign rule, subsequently generating fundamental changes in the internal context[5]. The German professor distinguishes two types of *law.* On the one hand, there is a law which is not closely related to the original cultural background and which, implicitly, can easily be imported. On the other hand, there is a law that can't be *tamed, can't be transformed from something foreign into something familiar*[6] because of the strong links with the original cultural background (*binding connections*). In such case, the legal transfer will take the form of a *legal irritation*[7].

1 *Ibidem*, p. 208.
2 *Ibidem*
3 The German professor blames the metaphor "legal transplant" (the version of Alan Watson) because it focuses on the mechanical act of the legal importation and too little on the effects or consequences of the transplanted law in the new society. See, Gunter Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, Modern Law Review, Vol. 11, 1998, pp. 11 et seq.;
4 *Ibidem*
5 *Ibidem*
6 *Ibidem*, p. 12.
7 He discusses about the difficulties of implementing the principle of good faith in English law, under an EU Directive.

3. THE TIMELINESS OF THE THEORY OF FORMS WITHOUT SUBSTANCE. THEORETICAL PERSPECTIVES ON THE UNIFICATION / HARMONISATION OF THE EUROPEAN LAW

The theoretical directions of the forms without substance considered the interaction between law and society. From the analysis of this report we can extract the idea that law is the natural product of a society and it would be malapropos to be transplanted, because the juridical import, as T. Maiorescu emphasizes, not only weakens the social and juridical identity of the importatory society[1], but also denotes the presence of a helpless society and of a law characterized under the same value. This is why the evolution of the law must be synchronised with the cultural and economic development[2]. In the opinion of T. Maiorescu, the insoluble links between the law and society, between the original background (substance) and form, impose the necessity of an organic development of the society. It is meaningless to transplant empty forms[3]. So we can observe several ideas similar to those of P. Legrand.

Regarding the communitary legal transplant, we can easily notice that the national legal systems are not uniform regarding their societal development (from an economic, political, legal point of view). In consequence, how can a theoretically scriptically-unified european law be transposed, stating the exact same quality of equability, to the level of praxis? The E.U. member states are equal in rights, but not equal in capacity. The ability to rationally support the transplanted European institutions and mechanisms is distinctive for each legal system. It can't be overlooked the fact that some of the member states don't have the tradition of a law creating system. It is quite interesting that this „deficiency" allows them to transplant the European law, without major problems, to the level of the national legal construction. In their case, the problems appear when they really have to apply the transplanted law. Conversely, the law creator member states, having an organic developed

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1 This idea can be encountered in P. Carp's intelectual positions as well. See, Petru P. Carp, *Discurs privind articolul 7 din Constituţie (28 septembrie 1879)*, in Ioan Stanomir, Lauremţiu Vlad, *A fi conservator*, Edit. Meridiane, Bucharest, 2002, pp. 81-83

2 Titu Maiorescu, *Opere I*, ediţie, note, variante, indice de Georgeta Rădulescu-Dulgheru şi Domnica Filimon. Studiu introductiv de Eugen Todoran. Colecţia „Scriitori români", Edit. Minerva, Bucharest, 1978, p. 473.

3 *Ibidem*, p. 147-148.

national legal pride, raise barriers both at the level of scriptical uniting of the European law and at the level of communitary praxis. For example, the positions formulated by the Constitutional Court of Germany in the Maastricht decision (1993) are relevant for the shaping of the idea of an organic development of an European legal culture or, in other words, of the necessity of forming the commnitary law through a European legal culture, which can't be obtained exclusively through the *up-down axis*[1] (a parallelism would be created between the national and the communitary order).

In a similar manner, P.P. Carp thinks that the imported law may be so affected by the cultural data of the importing society that its finality and registered practice could become two parallel realities. He put in the account of the success or failure of the legal transplant the ability of the importing society to decode/assimilate the forms, to search and answer coherently/consciously to the socio-cultural engineering supposed by their finality[2]. The failure of the transplant was found in the misunderstanding of the information.

However, how can an undeveloped society develop organically, in an acceptable rhythm, permitting it to become part of the modernity? If we consider the problem from this point of view, within the forms without substance theory, we notice that the legal transplant does not have to be completely eliminated from the equation, but only conditioned. It was underlined the requirement that the transplant must take into consideration the specific of the receptor's societal background (substance), in order not to irritate it and/or not to empty the forms of its substance. Otherwise said, we shouldn't look for an artificial, fake reality. In time, the same T. Maiorescu changed his ideational position and recognised that sometimes the transplant is necessary and can be good, if the care for the adaptation of the forms to the substance is respected[3]. To eliminate the risk of introducing an empty form, he pointed the necessity of their harmonisation with the traditions of the background. So, the request for transposition, that we spoted in the theory of E. Örücü, was in the sequence of the Romanian ideas about the legal import.

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1 Manfred Zuleeg, A Community of Law: Legal Cohesion in the European Union, Fordham International Law Journal, Vol. 20, 1997, p. 663.

2 Constantin Schifirneţ, *Teoria formelor fără fond. Un brand românesc*, Edit. Comunicare.ro, Bucharest, 2007, pp. 73 et. seq..

3 *Ibidem*, p. 130.

Related to the comunitarry unification/ harmonisation problematic, the adaptation of the forms to the national background (substance) can be understood through the need of developing a legal European culture by connecting the *up-down axis* with the *down-up axis.* The education seems to be the main way by which the form can be connected to the background. In this "exercise", the role of the national judicial body (especially the constitutional one) is definitive for the necessary epistemological reconfiguration of the other law practitioners. The latter approach is an extremely difficult one for those national judicial bodies which does not have practical experience based on case law. Therefore, legal education has the mission to effectively contribute to the development of a new legal epistemology (European) by the methodology of comparative law, proven to be a fundament of the European praxis.

The theory of forms without substance underlined the fact that the use of legal comparison may generate useful conclusions regarding the object, quantity of the legal transplant and, maybe above all, regarding the internal conditions that must exist or be created for the encouragement of the transplant's success.

G. Ibrăileanu (1871-1936) believed in the capacity of the forms to provoke changes in the receptor's background. According to him, a legal transplant built on critical fundaments has bigger chances to determine positive changes in the host society. The main idea of the theory of G. Ibrăileanu is the fact that the legal import is meant to generate, to develop or to create new cultural coordinates. For this outcome, a socio-political effort is absolutely necessary[1]. So it was pretty clearly outlined the opinion according to which the legal transplant must be rational.

For a part of the Romanian theorists and of the Romanian political elite it was obvious that the imported forms were suffering, inevitably, modifications. So, even when the legal norms are taken over with a big fidelity degree, they are not full-equivallent with the original ones. The Romanian theorists reached the conclusion that sometimes the new background can change so much the transplaned law that its finality may not be objectified.

The imported forms carry the risk of *misunderstanding*. In the sphere of the European legal problematics, the positivist application of the European law is not enough. The legal formalism leads to the

[1] Garabet Ibrăileanu, *Spiritul critic în cultura română*, Edit. Junimea, Iaşi, 1970.

ignorance of the teleological interpretation of law, that CEJ indicated, many times, as an essential instrument for the harmonisation of the communitary practice. This aspect brings us closer to the intellectual position of M. Eminescu (1850-1889). Regarding the imitation of the forms and their interaction with the importing society[1], the Romanian intelectual thinks that the forms can be characterised as being alive only if they function according to their designation, if they receive substance in practice. Otherwise, they are fake substances. In other words, we can say that in the absence of a teleological interpretation, the transplanted European institutions and mechanisms can be deeply transgressed. Naturally, the teleological interpretation supposes a certain capacity or mentality. By generating a balance between the above mentioned *axes*, the European legal culture is born by a synchronous between the enactment and the application of the communitary law.

The societal background must be capable of supporting the forms (the new desired substance), in the idea to determine, in the end, the effects supposed by their finality. For example, according to T. Rosetti (1837-1923), the failure of the transplanted constitutional forms in 1866 found their causes in the Romanian society background (substance), insufficiently developed to understand and manage the empty and meaningless transplanted forms[2]. The lack of adaptation of the forms and the absence of the original characters of the Romanian society from the import's equation were, for T. Rosetti, the reasons for the failure of the constitutional transplant. The failure consisted, apparently in the irritation of the Romanian substance by the imported forms. However, the remark according to which these were only fictive as existence, not developing root in the Romanian background, translates rather the fact that the necessary interaction between the form and substance was missing. The big problems camed more from the *substance* and less from the *forms*[3]. We can retain that, in the vision of T. Rosetti, the substance was the one irritating the forms, as it wasn't offering the necessary support. Even so, we can highlight several similar ideas to the ones we found in the theory

[1] See, Mihai Eminescu, *Opere*, Vol. XII, Edit. Academiei RSR, Bucharest, 1984, pp. 135 et. seq.. Constantin Schifirneţ, *op. cit.*, pp. 95 et. seq..
[2] Theodor Rosetti, *Despre direcţiunea progresului nostru*, in Ioan Stanomir, Laurenţiu Vlad, *A fi conservator*, Edit. Meridiane, Bucharest, 2002, p. 73.
[3] *Ibidem*, p. 74.

of the „binding connections" of the law with the society, developed by G. Teubner.

The cultural differences highlighted the need of forming a live connection between the substance and form (background). The unsatisfactory result was not due to the resistance of the Romanian substance, but because of its incapacities, because of the way in which it was prepared and in which the constitutional transplant was made in 1866. The consequences of the irrational legal transplant should have been taken into consideration. However, contrary to G. Teubner, T. Rosetti thinks that a successful legal transplant is the one interacting with the cultural substance of the receptor society, the one managing to form a connection between form and substance. As a conclusion, we can enounce the fact that the European law can't ignore the national cultures, as this would generate conflicting moods which could lead to a resonant failure of the communitarry legal transplant. So, it becomes clear that the unification/ harmonisation of the European law supposes a qualitative oscillation between the *theory of a societal background that creates the form* and the *theory of a form that creates the background/ substance*.

As E. Örücü stated, the interaction between the national cultures should lead to convergence. Referring to the theory of *legal irritation*, she considers that the irritation caused by the legal transplant is necessary, in the limits of an acceptable level, for a successful transposition[1]. The Turkish professor puts a positive accent on divergence (as an element leading to a constructive relation) in the solving of the convergence problem[2]. Accepting the diversity would be more important than creating a similarity which lacks substance. So, the accent shouldn't be put only on the idea of the *substance that creates the form*, but, as we already pointed out, on the balance of the relationship between the form and substance. So, the national cultures must effectively participate in the development of a European legal culture. For such an alignment, the capacity of each legal system to overcome the rigidity of the legal positivism is important and also being able to give a teleological interpretation to the European law. In this latter point we register the barriers between the national law and the European law – the legal epistemology and the national legal praxis (understood as culture).

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1 Esin Örücü,*op. cit.*, pp. 208-211.

2 *Why expect "repulsion" and not "interaction"? (…) The converge does not mean to attempt to create sameness, but to accept diversity*); (*ibidem*, p. 211).

The theory of forms without substance offers us useful instruments for the evaluation of a legal transplant under the dimensions of *when, how and how much* it is possible to import. Shortly, we may talk about a legal transplant theory of success.

For E. Lovinescu (1881-1943), legal transplant is the consequence of the need of cultural synchronisation of the less developed societies with the standards of those representing the modernity[1]. For the Romanian historian and literary critic, the success of a transplant is not necessarily confined to its finality. He assimilates to the success of the legal import the idea of adapting the forms by the host background/ substance, in a way of revealing the expression of the background's originality[2].

Such an outcome does not support the idea of uniting/harmonising the European law. It does not support, but it highlights a reality that can't be ignored, namely the idea that each national system understands the law in a specific way, determined by its own legal epistemology.

4. CONCLUSIONS

Taking into consideration the presented ideas, we can state that the success of the European legal transplant is relied on the success of the internal cultural engineering (national level), necessary to transform the transplanted law in living law, in law in action. Materialization of those cultural engineerings is, without any doubt, sinuous, because it embraces a lot of variables. Before everything else, it is important to obtain an application balance between the theory of the background creating the form and the theory of form creating the background. This balance has to be not only quantitative but also qualitative. By this we can limit the risk of creating a severe epistemological conflict, which can lead to the impossibility of applying the transplanted law.

At the level of formal-legal construction, the unification of the European law can be recorded through legal transplant. At the level of law in action (living law), the harmonisation of the European praxis becomes extremely problematic. The process of legal transplantation must be controlled through culture. The harmonisation of the living law

[1] Eugen Lovinescu, *Istoria civilizaţiei române moderne*, Edit. Minerva, Bucharest, 1997, pp. 352-353.
[2] *Ibidem*, pp. 304 et. seq..

can't be obtained only by exploring the *up-down axis,* under the form of a legal imperialism. We have to evaluate and explore the *down-up axis as well,* starting with the national legal cultures, in order to develop an European legal culture

Assuredly, the problematic of the European legal transplant cannot be debated outside the legal, cultural and political conjunctions in which are to be found the societies that enter its equation.

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INTERNAL REGULATIONS – A LEGAL INSTRUMENT BY WHICH THE EMPLOYER EXERCISES AUTHORITY OVER THE EXECUTION OF THE LABOR CONTRACT

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Abstract

The legal work relationship is characterized by a relationship of subordination of employees to the employer, relationship which arises from the position of authority of the employer. One of the prerogatives of the employers, arising precisely from their authority, is to determine the organization and functioning of the unit, the rules of conduct within it, the rights and obligations of employees. Among unilateral legal acts of the employers, by which their authoritative position is materialized, the internal regulations emerge as an important legal tool that benefits from special regulation in the Labour Code and that has a crucial role in securing labour discipline in an organization.

Key-words*: internal regulations, employer, labor contract*

INTRODUCTION

The internal regulation is the reference document for ensuring work discipline within an organization. Designed by legislators as a legal instrument by which the employers express their authority in relation to their employees, the internal regulation is a highly important document within the specific sources of labour law. Given its importance, the internal regulation is rigorously settled within the Labour Code and this will be analyzed in the content of the present study in order to identify both positive and negative regulatory practical issues. These issues are to be improved in order to address the need to ensure a fair balance between the interests of employers and employees.

GOVERNMENT REGULATION FOR INTERNAL RULES

Provisions relating to internal rules[1] are found throughout the Labour Code, but its regulation as a legal institution is found in Title XI, "Liability" without it being given a legal definition. The matter can be found in articles 241-246 of the Labour Code, which provide:

Article 241. Internal regulations shall be made by the employer, in consultation with trade union or employee representatives, as appropriate.

Article 242. Internal regulations include at least the following types of provisions:

a) Rules on the protection, hygiene and safety at work in the establishment;

b) Rules on non-discrimination and the elimination of all forms of violation of dignity;

c) The rights and obligations of employers and employees;

d) The procedure for processing requests or complaints of individual employees;

e) Concrete rules on labour discipline in the unit;

f) Disciplinary offenses and penalties;

g) Rules on disciplinary proceedings;

h) The implementing of other specific legal or contractual provisions;

i) The evaluation criteria and procedures for employees.

Article 243 (1) Internal regulations shall be communicated to employees by the employer and take effect from the time of their acknowledgement.

(2) The obligation to inform employees about the content of internal regulations must be met by employer.

(3) The manner in which each employee is informed on the content of the internal rules is established by the applicable collective

[1] The term "rules of procedure" used by Law 1/970 on labour discipline in state socialist units has been replaced with "internal regulations". See R. Dimitriu, *Regulamentul intern*, in „Raporturi de muncă" no. 6/2004 p. 40; D. Top, L. Savu, *Consideraţii privind regulamentul intern*, in „Revista română de dreptul muncii n0.4/2003, p.58-59; A.G. Uluitu, *Contractul colectiv unic la nivel naţional pe anii 2007-2010 şi regulamentul intern*, in „Revista română de dreptul muncii" no.1/2007, p.48-49

labour contract or, where appropriate, by the contents of internal regulations.

(4) Rules are displayed at the employer's headquarters.

Article 244. Any change that occurs in the content of internal regulations is subject to information procedures provided by Art. 243.

Article 245 (1). Any interested employee may notify the employer of the provisions of internal regulations, to the extent that proof of violation of one of their rights is made.

(2) The lawfulness of the provisions of the internal rules is the competence of the courts, which can be appealed to within 30 days of notification by the employer on how to resolve the complaint made under par. (1).

Article 246 (1) Preparation of internal regulations for each employer is made within 60 days from the date of entry into force of this code.

(2) If the employer is established after the entry into force of this code, the period of 60 days referred to in para. (1) begins from the date of acquisition of their legal personality. "

From the analysis of the mentioned legal provisions it results that internal regulations represent a document issued by the employer, with the main goal of establishing a climate of discipline within the entity, establishing the rights and obligations of the employer specifically, on the one hand, and of employees on the other hand, and by establishing uniform rules relating to the conduct that employees must have in relation to the employer, regardless of the position they occupy. The doctrine[1] recognizes the regulatory quality of internal regulations, specific to labor law that is to be correlated with the content of the collective labour agreement[2].

[1] Al Athanasiu, L. Dima, *Dreptul muncii*, All Beck Publishing House, Bucharest 2005, p. 12-13; Al. Ţiclea, *Tratat de dreptul muncii* Rosetti,Publishing House, Bucharest, 2006, p. 40-41; I.T. Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer, Publishing House, Bucharest, 2007, p. 44-47

[2] See I.T. Ştefănescu, *Conţinutul contractului colectiv de muncă*, in „Revista română de dreptul muncii" no. 4/2004, p. 13-18;

THE ANALYSIS OF INTERNAL REGULATIONS MANDATORY ELEMENTS

The most important mandatory elements of the internal regulations, as set out by the Labour Code, are further analyzed briefly.

1. Rules on protection, hygiene and safety in the unit. Considering the provisions of Law no. 319/2006 on safety and health at work, the employer has a number of obligations whose fulfillment means to promote improvements in the safety and health of workers, mainly consisting in establishing general principles concerning the prevention of occupational risks, eliminating factors of risk and injury, information, consultation, balanced participation and training of workers in this regard.

Legislation on safety and health at work of employees has many references to internal rules. The rules for the application[1] of Law no. 319/2006, state that a number of rules for safety and health at work must be provided in the internal regulations, rules of organization and operation or the applicable collective labour contract. Under this law is also defined the concept of office duties (Article 2, Section 15), as the professional duties set out in the individual employment contract , the internal regulations or the rules of organization and operation, job description, written decisions, the written or verbal provisions of the direct leader or superiors thereof. In the content of this definition are found all legal instruments by which the employers materialize their authority in relation to their employees.

2. Rules on non-discrimination and the elimination of all forms of violation of dignity. The principle of non-discrimination of employees is considered as a fundamental principle of labour law, in connection with the principle of social protection of employees, which has its origins in the fundamental law of the country. Discrimination in employment relationships requires differentiation or different treatment of two people or two situations where there are no relevant distinctions or equal treatment for different situations. Normative acts that shall establish such rules using the content of internal regulations are Government Ordinance no. 137/2000 on preventing and sanctioning all

[1] Approved by Government Decision no. 1425 of 11 October 2006, published in "Monitorul oficial al României", part I, no. 882 of 30 October 2006.

forms of discrimination[1] and Law. 202/2002 on equal opportunities and treatment of men and women[2]. The rules laid down in the internal regulations must be clear and tailored to the specific activity of the entity identifying situations in which discrimination may arise directly or indirectly. Thus, employees need to know both the legal concepts of discrimination and their obligations within the organization to prevent, namely to combat any form of discrimination or violation of the principle of dignity at work.

3. Rights and obligations of employers and employees. Besides the rights and obligations set out in art. 39-40 of the Labour Code, there are other rights obligations arising from the positions of the two contracting parties. The rights and obligations under the Labour Code are general, the employer has the obligation to establish concretely how they apply in practice. For example, the employer is obliged to keep records of work provided. The internal rules provide the concrete way to highlight the working time, by presence records, by timesheets or electronic cards.

4. Procedure for handling individual requests or complaints of employees. The employer must establish a procedure for handling requests and complaints of employees, which is to be brought to their attention, in order to use it in given situations. Thus, deadlines are set, forms used and persons responsible for employee requests are established.

5. Concrete rules on labour discipline in the unit. Work order and discipline are a must for any work process, whether a collective or an individual process, because it conditions the normal activity within the unit. Compliance with internal rules is mandatory for all employees, for this purpose the employer submitting the necessary efforts to bring it to the staff's attention.

6. Disciplinary violations and penalties. Due to the fact that there is no detail of misbehavior but only a definition in general terms, the employer must individualize actions and inactions of their employees that could constitute misconduct. With regard to disciplinary sanctions which are provided by law and the principle of legality of their application, the internal rules may be provided for other sanctions than

[1] Republished in „Monitorul oficial al României", part I, no. 166 of 7 March 2014
[2] Republished in „Monitorul oficial al României", part I, no. 526 of 5 June 2013

those established by the Labour Code, namely by a certain professional status. It should also be noted that neither establishing a correlation between a particular misbehavior and penalties is legal, because the disciplinary liability[1] arises depending on certain conditions, which cannot be predetermined.

7. Rules on disciplinary procedure. Labour Code provides that no disciplinary sanctions except written warning can be applied without a disciplinary investigation. Consequently , by internal regulations one must provide both means of implementation of written warning (authorized persons, formalities) and disciplinary procedures including research prior to disciplinary sanction (who is in the commission, how the commission works , what measures may be taken during the disciplinary investigation) .

8. Rules for the application of other specific legal or contractual provisions. As already mentioned in this work, the individual employment relationship arises, is conducted and terminated under the law, under the individual employment contract or under the collective agreement. There are situations when the provisions in these acts are contradictory or just different. The internal regulations stipulate specific rules for the implementation of legal or contractual provisions which complete and sometimes even change the provisions of this document.

9. Criteria and procedures for training of employees. Consistent with provisions of art17 and 40 in the Labour Code[2], Law 40/2011[3] for amending and supplementing the Labour Code, introduced a new concept, namely personnel evaluation criteria. These should be reflected in the content of the individual employment contract, and in the internal rules that regulate procedures to be followed in order to provide

[1] See, C. Flitan, *Răspunderea disciplinară a angajaţilor*, Ştiinţifică Publishing House, Bucharest,1959, I.T.Ștefănescu*, Disciplina muncii şi răspunderea disciplinară în unităţile socialiste de stat,* Academiei Publishing House, Bucharest 1979, S. Ghimpu, I.T.Ștefănescu, Gh. Mohanu, op. cit, p. 388-419, M-L-Belu Magdo*, Răspunderea disciplinară în sistemul general al legislaţiei muncii*, in „Revista română de dreptul muncii" no. 1/2005, p.58-66, Al. Țiclea, *Tratat de dreptul muncii*, Rosetti, Publishing House, Bucharest,2006, p. 633-674, I.T.Ștefănescu, *Tratat de dreptul muncii,* Wolters Kluwer Publishing House, Bucharest 2007, p. 450-480

[2] Al. Athanasiu, *Codul muncii Comentariu pe articole, Actualizare la vol. I-II*, C.H. Beck Publishing House, Bucharest, 2012, p 137.

[3] Published in Monitorul Oficial al României, part I, no. 225 of 31.03.20111

professional evaluation of employees. In the absence of such procedures, the employer is unable to make an objective and lawful professional evaluation of staff, being unable to dismiss the employee for professional unsuitability.

The importance of internal regulations as a tool for materializing the authority of the employers in relation to their employees is much diminished in practice. Therefore, the vast majority of employers with a small number of employees, only establish a formal role and not an essential one for the internal regulations. This role is necessary for carrying out tasks under the conditions of work order and discipline within the organization. Internal Regulations shall be binding on employees, the failure to comply with constituting misconduct. By internal regulations the employers can protect their rights to control and sanction, which may prove applicable disciplinary decisions.

THE IMPORTANCE OF INTERNAL REGULATIONS AND DELIMITATION OF THE COLLECTIVE LABOUR AGREEMENT CONCLUDED AT UNIT LEVEL

Another cause of diminishing the importance of internal rules to ensure work discipline, lies in an apparent overlap of terms that may be contained in this legal act and in the collective agreement. This overlap means that both regulate labour relations rights and obligations of the parties. Legally there is no distinction between the two legal acts. What is more, internal rules do not enjoy any legal definition as the collective agreement does. This overlap is maintained by the legislature, which states that certain elements of the collective agreement can be found in the internal rules. We exemplify with some provisions of this type in the Labour Code:

- Art. 29 para. 2 of the Labour Code provides that the ways to achieve professional skills and diligence of the person applying for employment are set out in the collective agreement applicable, in the personal status and in internal rules;

- Art. 40 para. 1 letter e it provides that the employer has the right to assess the disciplinary offenses and apply appropriate sanctions under the law, collective agreement applicable and internal regulations;

- Art. 49 para. 3 states that on the duration of the suspension of the individual employment contract there may still be other rights and

obligations of the parties if they are provided by special laws , in the applicable collective agreement , in individual contracts of employment or in internal regulations;

- Art. 51 para. 2 provides the possibility of suspending the individual labour contract when the employee has unexcused absences, as stipulated by the applicable collective agreement, by the individual employment contract, and the internal regulations;

- Art. 116 para. 1 states that the concrete means of establishing an uneven work program within the working week of 40 hours , and within the compressed work week will be negotiated by the collective agreement at employer level , or , in its absence, it will be provided in the internal regulations;

- Art. 134 para. 1 states that in cases where daily working time exceeds 6 hours, employees are entitled to a lunch break under conditions established by the collective agreement or by the applicable internal rules;

- Art. 137 para. 2, which provides that, in case rest on Saturday and Sunday would prejudice the public interest or the normal course of business, weekends can be given on other days determined by the collective agreement or by applicable internal rules of procedure.

- Art. 152 para. 2 provides that special family events and the number of paid days off are set by law, by the collective agreement or by the applicable internal rules.

The analysis of the legal provisions relating to the collective agreement and to internal rules leads to the conclusion that when a collective agreement is not concluded, the employer's internal rules are designed so that to fill the role of the collective agreement. But when both a collective agreement and internal rules are concluded, the legislature should determine the specific delineation of the content of the two legal acts, so that they would not include contradictory provisions or provisions on the same matter.

In terms of the hierarchy of legal acts concluded by the employer, the collective agreement has greater legal force, being higher to the internal regulations as a result of participation of employees, represented by unions or otherwise provided by law, to establishing the terms of content. In practice, the internal regulation is most often an annex to the collective agreement. Due to this last statement, in reality, the internal regulations shall be created according to art. 241 of the Labour Code, by

the employer in consultation with trade union or employee representatives, as appropriate. The employer can introduce internal rules in the collective agreement negotiations, but this negotiation cannot represent employees 'claims. Another issue raised in practice by the preparation and application of internal regulations relates to the lawfulness of the provisions contained therein. The legislature sets in art. 245 para. 2 of the Labor Code that only the court has jurisdiction to rule on the legality of these provisions. The legislature also specifies who has the capacity to go to court, that is, the employee who can provide certain proof of infringement. The question is that of the competence of the labour inspector to check the legality of the provisions of the internal regulations and to provide measures to remedy any deficiencies found. By analyzing the text of law, in relation to the duties of the labour inspector, it results that he has the only right to check whether the internal regulations are drafted and brought to the attention of employees, without being able to decide on the legality of the document, reasoning which is detrimental to the principle of protection of employees. It is true that the labour inspector may ask the court to rule on the invalidity of the provisions of the internal rules, but he cannot have direct measures to address them. It is not expressly permitted by law that the labor inspector should order remedies for the deficiencies found in the provisions of internal regulations, measures that could be challenged by the employer on the administrative courts, resulting in delay in the normalization of labour relations at the level of the respective employer. Lack of legal powers is materialized in an additional overload of the courts as long as labour inspectors can only go for an action for declaration of nullity of certain provisions of the internal rules, without being able to directly address certain deficiencies.

In conclusion, the internal regulations represent a document by which the employer, a legal entity or a natural person, advances authority to the employees, being essentially a set of rules that provide order and labour discipline in an organization.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

ANALYSIS OF THE SIMILARITIES AND DIFFERENCES BETWEEN THE INDIVIDUAL EMPLOYMENT CONTRACT AND THE COLLECTIVE AGREEMENT

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Abstract

The legal work relationship has its source in the individual employment contract, but a compulsory element of its content is represented by the clauses of the applicable collective agreement at unit level. Therefore, the analysis of the relationship between the individual employment contract and the collective agreement, as well as of their role and importance as sources of labour rights is a necessity for a better coordination of the two legal instruments. The aim is to identify overlaps and adapt legislation to current needs of the social partners.

Key-words*: employee, individual contract, collective agreement.*

INTRODUCTION

The individual employment contract, by its characteristic features, presents both similarities to and differences from other types of contracts covered by labour or civilian legislation. In this respect appears the necessary to identify the individual elements through which the individual employment contract, regardless of its type, is different from some of these contracts, such as the collective agreement, the agreement of availability, the mediation contract, the voluntary work contract or the warrant agreement.

GENERAL CONSIDERATIONS ABOUT COLLECTIVE AGREEMENT

According to art. 229 para. 1 of the Labour Code, " the collective agreement is the agreement concluded in writing between the employer or employers' organization, on the one hand, and employees

represented by unions or otherwise provided by law, on the other hand, setting out clauses regarding working conditions, wages and other rights and obligations arising from the employment relationship."

Since 1990, the collective agreement regulating most eloquently illustrates the specific dynamics of labour legislation in the new socio-economic and political conditions existing in our country. Initially, collective bargaining was stated by Law. 13/1991, then by Law. 130/1996[1] on collective labour agreements, currently the matter being included in Law 62/2011 of the social dialogue and the provisions of Title VIII of the Labour Code.

The collective agreement expresses synthetically, by its effects, the special meaning of collective bargaining for legal work relationships. In the market economy the public power lies legally outside the collective bargaining of working conditions[2]. A number of obligations belong, however, to the state so that it would ensure the economic development, the principles of market economy, a decent standard of living, social protection measures for different categories of people and respect for human rights and fundamental freedoms. To fulfill these obligations it is necessary to develop legislation regulating various fields. In this respect, among such acts, of a particular importance are those relating to labour relations, to rights and duties of the parties of such legal relations. To ensure the optimum and uniform labour relations, normative acts provide rights at the minimum level for employees, ie the maximum obligations that must be observed on the conclusion of both the collective labour agreements and individual employment contracts. The national normative regulation of collective agreements complies with ILO Convention no. 154/1981 on the promotion of collective bargaining[3].

Collective agreements are legal instruments able to treat all conditions of employment and working conditions of employees as well as social benefits for all professional categories concerned. The aim of concluding collective agreements is to promote fair labour

[1] Republshed in" Monitorul oficial al României" no. 184 of 19 May 1998, amended and supplemented
[2] I. T. Ştefănescu , *Dreptul Muncii*, Lumina LexPublishing House, Bucharest, 2002, p. 102
[3]Ratified by Romania by Law no. 112/1992, published in" Monitorul oficial al României", part I, no. 302 of 25November 1992

relations, such as to ensure the social protection of employees, prevent or limit collective labour conflicts and especially avoid triggering strikes.

Collective agreements may be concluded within units, groups of units and sectors. In their sequence, higher-level collective agreements are, by law, sources for collective bargaining at lower levels and at the level of collective agreements are a legal source for individual employment contracts. Thus, the collective agreement at the lower level can only include rights for employees at least equal to or greater than those in higher-level collective agreements, as the same contract may include provisions that impose obligations only equal to or lower for employees than those in higher-level collective agreements[1]. On this issue, the Constitutional Court[2] ruled that, by giving the parties' the right to collective bargaining of rights and duties arising from these relationships, the legislation governs the conditions for negotiation and conclusion of collective agreements, of the binding clauses of these contracts at the unit level or at branch and national level. These legal regulations have, however, no connection with freedom of association. Thus, no employer or employers' organization, trade union or employee can be compelled to join a superior level organization. Trade unions and employers may be represented at the unit, branch or national level, depending on the minimum number of members provided by law. Representativeness of these organizations entitles them to negotiate and conclude collective agreements at the appropriate levels, whose clauses on minimum rights should be mandatory on the conclusion of collective labour agreements at lower levels, whether their parts were associated respectively have joined or not the top level organizations. As such, with these natural obligations, the parties are free to negotiate other terms and superior rights.

Both the Labour Code and Law no. 62/1011, impose on employers with at least 21 employees the collective agreement bargaining obligation and not that of the conclusion of this legal

[1] Only if these obligations are not legally regulated by mandatory rules, unable to depart from them.

[2] Constitutional Court Decision no. 380/2004, published in" Monitorul oficial al României" no. 1015 of 3 November 2004 rejecting the plea of unconstitutionality of art. 238 para. (1) of the Labour Code and art. Article 8 (1) and (2) of Law 130/1996, republished

document. By analyzing legal texts in force, the provisions of Art. 229 para. (2) of the Labour Code and art. 129 para. (1) of Law no. 62/2011 , it is clear that they have a character of provisions, not a mandatory one , which means that the conclusion of collective agreements, regardless of the level, is not mandatory , the parties being free to enter into such a contract or not.

THE LEGAL NATURE OF THE COLLECTIVE AGREEMENT

The doctrine has a dual nature, a mixed legal nature of the collective agreement[1]. On the one hand, the collective agreement has a normative character, because, concluded at any level it has all the characteristics of a true rule of law:

- It is general and abstract, uniformly regulating the working conditions of a large number of employees;
- It is impersonal, because it regulates not only the situation of a particular employee, but of all the employees at the level it is concluded;
- It applies to an unlimited number of cases during the period of its validity;
- It has binding value for the contracting parties.

The normative regulation of the collective agreement introduces a number of issues that shape, somehow, the legal nature of the contract.

The collective agreement is by nature a regular contract, creator of rule of law, materialized through its constitutional principle that "the right to collective bargaining in labour and the binding nature of collective agreements are guaranteed[2]." The collective agreement has the character of private law, but the effects produced are similar to the rules of public law[3].

[1] N. Voiculescu, *Dreptul muncii. Reglementări interne şi comunitare,* Rosetti Publishing House, Bucharest, 2003, p. 108; I.T. Ştefănescu, *Tratat de dreptul muncii*, Wolers Kluwer Publishing House, Bucharest 2007, p. 132.

[2] Article 41 para. 5 of the Romanian Constitution

[3] I. T. Ştefănescu, *Tratat de dreptul muncii*, Wolers Kluwer Publishing House, Bucharest , 2007, p 132

On the other hand, the collective agreement is conventional, being reflected by the realities regarding the birth and the effects of the contract. The contractual nature could not explain why individual employment contract terms, contrary to those contained in the applicable collective agreement, shall be considered null and automatically replaced with the latter. Therefore, some scholars consider that we face a dual character of the collective agreement. In this view, the collective agreement has the features of a professional regulation. The duration of the effects of collective agreements differ, however, from the common rules of law. While common normative regulations are by nature permanent, their adoption being made indefinitely, collective agreement clauses are temporary, being concluded only on a fixed term[1].

In the European doctrine the thesis of the dualistic legal nature of the collective agreement is almost universally recognized, considering that a collective agreement is an agreement of wills that create specific rules which constitute the main source of socio-professional legal order, distinct from state order edict by law[2]. For example, the French theorists[3] recognize the dual nature of the collective agreement, holding that "while being a convention generating obligations between groups who sign it and a regulation, generating rules that are required." Also German theorists admit that, although collective agreements create laws in the material sense, they are contracts of private law, to which the general principles of civil law are applicable[4].

[1] N. Voiculescu, , *Dreptul muncii. Reglementări interne şi comunitare* Rosetti Publishing House, Bucharest, 2003, p 109
[2] I. T. Ştefănescu, , *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest ,2007, p. 131
[3] G. Lyon-Caen, J. Pellisier, A. Supiot, *Droit du travail*, 21–e edition, Dalloz, Paris, 2002, p. 864 - 866
[4] G. Halbach, N.Paland, R. Schwedes, O. Wlotzke, *Labour Low in Germany*, Bon, 1991, p.290

SIMILARITIES AND DIFFERENCES BETWEEN THE INDIVIDUAL EMPLOYMENT CONTRACT AND THE COLLECTIVE AGREEMENT

From the brief overview of the collective agreement it results that, in relation to the individual employment contract, both are contracts of employment. As for the collective agreement, the parties are "collective " rather than individual. An exception are contracts concluded at the employer's level, where both the collective and the individual contracts have the employer as one of the parties. The other party, in the case of the collective agreement, is represented by all employees[1]. At other levels at which collective agreements are concluded, both contracting sides are collective (employers and employees).

The collective agreement does not constitute a source of individual labour legal relations, this quality belonging only to the individual employment contract[2], but it is a legal source, with a normative value, by the intention of the legislature.

Also, the form of the two contracts resembles, the written form being a condition of validity for both types of contracts. The individual labour contract takes effect from the date of its conclusion in writing, while the collective agreement will take effect on the date of its registration at the territorial labour inspectorate or at the ministry , according to the level at which it is concluded , or on a date after the registration, agreed by the parties. Collective agreements concluded at the level of groups of units and sectors are published in the Official Gazette of Romania, Part V, by care of signatory units. However, their entry into force, by law, is the time they were recorded with the ministry. Publication in the Official Gazette emphasizes the importance of normative collective agreements and ensures their widest enforceability, without producing legal effect, because, unlike the

[1] S. Ghimpu, Al. Ţiclea, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2002, p. 143; T.I. Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest 2007, p. 131

[2] S. Ghimpu, Gh. Moroianu, *Condiţiile încheierii contractului individual de muncă,* Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1988, p. 20

regime of normative power acts, these contracts come into force from the date of registration[1].

Also collective bargaining agreements concluded at the employer's level must be notified to employees by having them posted at the headquarters and at branches.

The collective labour agreement takes effect to all employees at the level where the contract is concluded, constituting an exception to the principle of relativity of contracts, unlike the individual employment contract, where this principle is respected. Thus, the collective agreement, during its existence, is not only applicable to and enforceable against employees who were employed on the contract's concluding date, but also to the subsequent employees, so all persons employed by the respective employer, in the period of validity of the collective agreement.

The individual employment contract differs from the collective agreement by the fact that it is usually concluded indefinitely, and the latter can only be concluded for the fixed term of at least 12 months and maximum 24 months.

The conclusion of the collective agreement on a fixed term is a necessity reflecting the dynamics of the socio-economic and legislative changes, and especially the evolution of the inflationary process in our country. Thus, it is necessary that, answering the demands of the labour market, collective agreements be subject to annual review and be limited in time, to enable the social partners to negotiate the collective agreement conclusion on new levels.

Based on the differences that exist between the two contracts the issue of a discrepancy may arise between the provisions of the collective labour agreement and those of the individual employment contract. Considering, however, that a collective agreement is always the source of individual clauses, the individual employment contract retains the nature of work contract concluded on an indefinite duration, but, depending on the changes that occur in the collective agreement, it properly complements the terms of the applicable collective agreement. Having a regulatory nature, the collective agreement provisions have an immediate and direct impact on individual employment contracts already concluded

[1] Al. Athanasiu, Law no. 130/1996 on collective labour agreement in „Dreptul" no. 3/1997, p. 17

or to be concluded when those provisions are more favorable to employees[1].

Individual contracts reflect to the necessary extent, the rights and obligations of the parties provided not only by law, but also in the collective agreement. To be applied in a specific legal relationship, the collective agreement necessarily implies the existence of an individual contract of employment, from which this legal relationship should emerge[2].

Correlation of the individual employment contract with the law also functions, while keeping the proportions determined by the rule of law, in the case of the collective labour agreement. The individual employment contract may not provide any clauses contrary to either the applicable collective agreement or to the law.

EXECUTION, AMENDMENT, SUSPENSION AND TERMINATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT AND OF THE COLLECTIVE AGREEMENT

The collective agreement is, as it results from the above, a solemn, commutative, considerate contract, with successive benefits, concluded on a fixed-term, being a specific source of labour law[3]. During its negotiation and execution, its parties are fully equal, with no relationship of subordination between them, as in the case of the individual employment contract.

The terms of the collective labour agreement may be amended, as those of the individual employment contract, during its execution, whenever the parties agree to that, addendum being also concluded, which respects the same conditions of registration and form as the main contract.

In both the individual employment contract and the collective agreement, both being successive execution contracts, suspension of clauses thereof may interfere for reasons beyond the control of the

[1] O. Tinca, *Dreptul muncii. Relaţiile colective*. Lumina Lex Publishing House., Bucharest, 2004, p. 145
[2] S. Ghimpu, Al. Ţiclea, *Dreptul muncii* All Beck Publishing House., Bucharest 2002, p. 144
[3] I. T. Ştefănescu, *Tratat de dreptul muncii* Lumina Lex, Publishing House., Bucharest 2003, p. 130

parties, by the parties 'agreement. If the individual employment contract suspension may be due to the unilateral will of either party[1], this is not possible for collective agreements.

Termination of the two types of contracts is expressly provided by law. Based on the differences between the two contracts on the duration for which they are concluded, in the Romanian legislation collective agreements may not be terminated by either party withdrawal. In the case of the individual employment contract, the possible termination under unilateral initiative of one of the parties is a consequence of the indefinite duration for which this type of contract is usually concluded.

Both contracts can be terminated by agreement or by law, due to the occurrence[2] of causes beyond their control, making it impossible to continue the legal relations between them.

It can be said that applying the legal provisions of the collective agreement is possible only by valid conclusion and execution of the individual employment contract, being the most important legal instrument for the pursuit of economic social rights of employees, constitutionally guaranteed.

In the Western doctrine, a consequence of the increasing role of the collective labour agreements in the legal regulation of legal labour relations of employees, it is estimated that, currently, there is a decline in the conclusion of the individual employment contracts. Such a view , however, does not have a correspondent in the case of legal work relationships in Romania, at least from the following reasons[3]:

- Legal employment relationships arise only under individual employment-contracts;

- In small units, under 21 employees, but also to other employers, there may not be a collective agreement, as long as its conclusion is not mandatory;

- The existence of the collective agreement does not impede, but rather involves individual negotiation of working conditions, negotiation that is made just by signing individual labour contracts ;

[1] Art. 51 şand art. 52 in Labour Code
[2] Article 56 of the Labour Code and art. 151 of Act 62/2011
[3] I. T. Ştefănescu, *Tratat de dreptul muncii* Lumina Lex Publishing House, Bucharest 2003, p. 166

- The freedom of parties that, by the individual labour contract they could negotiate terms that are not contained in the collective agreement or in legal provisions , nor contradict them. Therefore, the individual employment contract reflects not only clauses of the collective agreement, but it can insert specific clauses in addition to the collective agreement.

In conclusion, according to the labour laws of our country, the individual employment contract preserves its importance.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

BRIEF ANALYSIS OF REGULATIONS REGARDING WORK BY TEMPORARY EMPLOYMENT AGENT

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Abstract:

The work by temporary employment agency represent an important form of employment in most of the European Union membre states.That's why, at the level of central institutions of European Union, stated the need "to reach a fair balance between the protection of temporary workers and strengthen the positive role that temporary agency work can play on the European labor market. "

Although relatively new inserted in romanian legislation, by Law 53/2003 (Labor Code), the work by temporary employment agency has been the subject of some mismatches between the intern legislation and the union law (European Parliament and Council Directive 2008/104/CE), taking into account that Romania was preparing for the integration into European Union.

Keywords: *temporary employee, labor, employment agency, union law, Labor Code*

The labor market plays an important role for the national economy. Flexibilization and adaptation of labor relations to the socio-economic realities was one of the priorities of the Romanian legislator in the matter of labor law .

By this study, we brought into attention a specific forme of professional activity held under an individual employment contract on a definit term, work by temporary employement agency. This institution of labour law was relatively late regulated for the first time in Romanian

[1] My contribution to this work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.

legislation by Law nr.53/2003 (Labor Code), although the work by temporary employement agency is an important form of labor employment at European level.

Since work by temporary employment agency plays an important role in the European labor market, the European Parliament and the Council, taking into account the proposal of the Commission, adopted a Directive to regulate the most important aspects of this institution.

The Romanian legislator, by Law nr. 40/2011[1] has amended the regulations from Labor Code concerning work by temporary employment agency, following the recommendations contained in the Directive 2008/104/CE.

Based on current regulations, we tried to highlight differences between them and the European Directive rules.

A part of the individual labor contract on a definite term, first related in Romanian legislation through Law no.53/2003 (The Labor Code), is the written work contract over the period of a mission[2], between a temporary employee and a temporary employment agent (a company).

Article 88 of Law 53/2003 shows that temporary work constitutes a specific form of professional activity, being performed by a temporary employee in favor of a user on the basis of the disposition given by a temporary employment agent to the employer of the temporary employee. Thus, in this specific form of labor are involved three parts: the employer (the temporary employment agent), its employee (temporary employee) and the user (the one who benefits from the work performed by the temporary employee).

The Law no. 40/2011 for modifying and supplementing Law 53/2003 has changed the definition given to this form of work, showing that work through a temporary employment agent is the work of a temporary employee who has closed a temporary contract with a temporary employment agent and is brought at the disposal of the user in

[1] For modifying and supplementing Law 53/2003- Labor Code, published in Official Gazette no. 225/31.03.2011.

[2] For a detailed analysis of this form of individual labor contract see CC Nenu, *Considerations on national and union regulations of work through a temporary employment agent*, in The EIRP Proceedings of the EIRP Conference, Galaţi, 2013, pp. 110-115.

order to work temporarily under the supervision and direction of the latter[1].

In the content of Art.88 from Labor Code are defined by one at the time the notions of temporary employee, temporary employment agent and user. Concerning all these notions it can be noticed that the definitions given by the regulations of the Labor Code are different from the notions provided by the regulations of the European Directive 2008/104/CE.

Thus, paragraph 2 of Art.88 of the Labor Code uses the term "temporary employee", while the European standard uses the term "temporary worker".

There are differences between the two categories of terms since the notion of worker is wider than that of employee, including not only those who sign contracts to work, but also those in labor relations, that have a different source than such a contract. Indeed, the Luxembourg Justice Court stated that the notion of worker must be interpreted under unional law in a broad way[2].

Also, paragraph 2 of Art.3 of the Directive shows that the directive does not affect the national legislation as regards to the definitions of remuneration, employment contract, labor relations or worker.

In the current regulation of Labor Code is made clear that the temporary employee closes a work contract with the temporary work agent. In the definitions given by the Labor Code to labor through the temporary work agent and also through the temporary employee it is stated that the User is the one who supervises and directs the activity of the temporary employee.

The provision is made over the time needed to achieve certain precise tasks and with a temporary aspect.

According to Art.88, paragraph 3 of the Labor Code, the temporary work agent is a juridical person. European regulation from Art.3, paragraph 1, letter b, shows that the temporary work agent can be any physical or juridical person.

[1] Art. 88 paragraph 1 from the Labor Code.

[2] A. Ţiclea (coordinator), *Codul muncii-comentat şi adnotat cu legislaţie, doctrină şi jurisprudenţă*, second edition, revized and lenghtened, Vol.I, Universul Juridic Publ. House, Bucuresti, 2010, p. 476.

Although the European Directive includes the concept of temporary work agent to both individuals and legal persons, the Labor Code refers only to juridical persons.

Also, European regulations show that the temporary work agent closes labor contracts or work relations with temporary workers, the Labor Code retaining only the closure of labor contracts, not accepting other work relations[1].

Article 88, paragraph 4 of the Labor Code regulates the notion of user as the employer whom the temporary work agent offers a temporary employee to carry out specific and temporary tasks. But, the European Directive uses the term "enterprise user" defining it as "any individual or legal person for whom and under the supervision and direction which it works as a temporary employee".

The directive does not restrict the meaning of temporary mission, but defines it as the period in which the temporary worker is made available to the User.

The definition given by the Labor Code to this notion is taken from the European rules, however, is completed with the phrase "to perform a specific, temporary task".

Limiting the use of temporary work only in those three cases shown in ex-art.88 from Labor Code, contravened the dispositions of Art.4 paragraph 1 of the Directive which state that "the prohibitions and restrictions regarding the use of temporary work are justified only on grounds of general interest regarding, in particular, the protection of temporary workers, the requirements on safety and health at work or the need to ensure proper functioning of the labor market and to prevent abuses."[2]

In this respect, the Labor Code has been modified showing that a user can resort to the temporary work agents in order to execute a temporary, precise task, excepting the case from Art.93 which shows that a user can not benefit from the services of the temporary employee if it

[1] For another forms of labor relationships see CC Nenu, *The evolution of legal regulation of individual employment relationship,* in Valahia University Law Study, Issue 2/2012, Bibliotheca Publ. House, Targoviste, pp 191-198.

[2] A. Ţiclea (coordinator), *Codul muncii-comentat şi adnotat cu legislaţie, doctrină şi jurisprudenţă*, second edition, revized and lenghtened, Vol.I, Universul Juridic Publ. House, Bucuresti, 2010, p. 477.

seeks to replace one of his employees whose work contract is suspended as a consequence to the strike participation.

As regards to the dead line of the mission of the temporary work, the Labor Code shows in Art. 90 that it is of maximum 24 months, with the option of being prolonged with successive periods, which added to the initial period, cannot be longer than 36 months.

The European regulation does not limit the period of the mission, respectively of the individual work contract. On the contrary, it is mentioned the undetermined period of this contract made with the temporary work agent (pct.15 of the Preamble and Art.5 paragraph 2).[1]

Article 91 of the Labor Code regulates the contract of provision closed between the temporary work agent and the user. Paragraph 1 of this article states that this contract is closed in written form.

As such it is considered that the contract of provision has no *ad probationem* and *ad validitatem* value. Also, Art. 91 of the Labor Code does not give any sanctions if the written form of the provision contract is not respected.[2]

Paragraph 2 of the same article regulates the content of the provision contract.

The Labor Code provides as first element of the provision contract the "period of the mission".

Other elements of the contract in question are: the specific job characteristics, especially the necessary qualifications, the mission location and work schedule, the concrete work conditions, individual protection and work equipments which the temporary employee must use, and any other services and facilities in favor of the temporary employee, the value of the contract which the temporary work agent benefits from, as well as the pay to which the employee is entitled.

Stating the pay in the contract has the role of protecting the temporary employee, his income being guaranteed by both parties of the provision contract.

The Labor Code provides an important element which the provision contract should contain refers to the conditions in which the

[1] A. Ţiclea (coordinator), *Codul muncii-comentat şi adnotat cu legislaţie, doctrină şi jurisprudenţă*, second edition, revized and lenghtened, Vol.I, Universul Juridic Publ. House, Bucuresti, 2010, p. 479.

[2] I. T. Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer Publ. House, Bucureşti, 2007, pp. 416-417.

user can refuse a temporary employee referred by a temporary work agent. As such the employee and the temporary work agent are protected by eventual unjustified refusals from the user.

The condition regarding the voidness of any clause through which it is forbidden the employment of the user of the temporary employee after completing the mission was held by the Law for modify and supplement the Labor Code.

According to the dispositions of the European Directive provided in Art.5 paragraph1, regarding the equality in treatment, the regulations of Art. 92 of the Labor Code state that temporary employees have access to all services and facilities given by the user, under the same conditions as any of its employees. Also, it is stated in paragraph 2 the obligation of the user to ensure the temporary employee with individual protection and work equipments.

Regarding these equipments the rule is that they are made available by the user, which is natural as long as the work is done by the employee at the headquarters or work stations of the user and in its use.[1] The same regulations also states the exception to the rule, meaning that through the provision contract the temporary work agent has to acquire for himself these equipments.

Article 93 of the present Labor Code provides a guarantee to the fundamental right to strike of the user's employees. So, the user cannot benefit from the services of the temporary employee if it seeks to replace in such a manner one of his employees whose work contract is suspended as a consequence to participating in a strike.

The solution provided by the law is fully explicable, because, if the replacement were admitted, practically, the effects sought by the strike as a form of protest of final rank in the case of a conflict of interests would be lost, by striking the employees seeking to force the owner to resolve their claims. As a consequence, the strike would reach this purpose only in the case in which the owner would see himself in the situation of remaining without his workers whom he so requires. If he were able to replace them with a temporary employee, he would never be

[1] A. Ţiclea (coordinator), *Codul muncii-comentat şi adnotat cu legislaţie, doctrină şi jurisprudenţă*, second edition, revized and lenghtened, Vol.I, Universul Juridic Publ. House, Bucuresti, 2010, p. 482.

interested in a real negotiation with the strikers concerning the ending of the conflict.[1]

The conditions of the temporary work contract are provided by Art. 94 of the Labor Code, paragraph 1, and showing that it is closed in written form over the duration of a mission. Temporary employment contract may be concluded for several missions.

As shown by the dispositions of pct.15 of the Preamble and of Art.2, paragraph 2 of the Directive, the European legislator considers that the general form of the work relation is the individual work contract over an undetermined period.

Paragraph 2 of Art. 95 shows that between the two missions the temporary employee is at the disposal of the temporary work agent.

The Labor Code provides that for any new mission a temporary work contract is closed. The dispositions of Labor Code are ambiguous, because taking into account the disposition of paragraph 1 of art. 95 regarding the closing of a temporary work contract for more missions, it can no longer be regulated that for each mission a new temporary work contract is closed.

As regards to the wage the temporary employee receives, it is provided in Art. 96 of the Labor Code, that he is paid by the temporary work agent, without being lower than the national minimum gross salary. The same article states the fact that the temporary work agent retains and transfers all the contributions and taxes owed by the temporary employee to the state budget and those owed under the law.

As a safety measure for the employee, the current regulations state that if in 15 days from the date in which the previously shown obligations have become due and payable, and the temporary work agent does not execute them, the temporary employee can ask them from the user. The latter is obliged to take the place of the temporary work agent as regards to the rights of the temporary employee.

Significant changes was brought to Art. 97 of the Labor Code. As such, the limits of the trial period depending on the temporary work contract are shown.

So, in order for the temporary work contract to be closed for a period smaller or equal to a month, the trial period is of 2 working days;

[1] M. Volonciu, in A. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole*, Vol.I, Art.1-107, C.H.Beck Publ. House, Bucureşti, 2007, p. 492.

for the closure of the temporary work contract over a period between one and three months the trial period is of 5 working days; for the closure of a temporary work contract over a period between 3 and 6 months the trial period is of 15 working days; for the closure of a temporary work contract for a period longer than 6 months the trial period is of 20 days; for the closure of a temporary work contract over a period of over 6 months, in the case of employees in management positions, the trial period is of 30 working days.

In order to protect the temporary employee, Art. 98 of the Labor Code states that it is the user's obligation to assure all conditions regarding the prevention of work related accidents or professional illness. The obligation provided by Art. 26 from Law no. 319/2006 is also used by paragraph 2 of the article in question, so the user has to inform the temporary work agent if such an event should occur, the latter being in the position of employer.

The text of Art. 99, paragraph 1 of the Labor Code allows for the cease of the mission, as the temporary employee to end with the user an individual work contract, meaning that he becomes his employer. Of course, the ending of the mission also means the ending of the contract with the temporary work agent, the one in cause loosing the position of temporary employee; as a consequence he becomes free to engage in a new work relation; this can be stated over a determined or undetermined period, as is the case, through enforcing the general rules. [1]

Article 100 of the Labor Code protects the temporary employee and uses the principle of non-discrimination, in the situation in which the temporary work agent fires the temporary employee before the term stated in the temporary work contract, for other reasons than disciplinary. So, the temporary work agent has to keep in mind the legal regulations regarding the cease of the individual work contract for reasons not regarding the employee.

A consequence of the non-discrimination principle in regards to work is represented in Art.101 of the Labor Code. As such, the temporary employees are subject to the same legal and contract provisions as the employees of the user registered with an individual work contract over an undetermined period.

[1] A. Ţiclea (coordinator), *Codul muncii-comentat şi adnotat cu legislaţie, doctrină şi jurisprudenţă*, second edition, revized and lenghtened, Vol.I, Universul Juridic Publ. House, Bucuresti, 2010, p. 491.

Art.102 provides a measure of financial protection to the temporary employees, showing that the temporary work agents do not perceive a tax from the temporary employees in exchange for steps regarding their recruitment by the user or the closing of a temporary work contract.

A study made by European Foundation for Improvement of Living and Working Conditions shows that temporary agency work is a significant form of employment in most Member States of European Union and employs large numbers of workers, especially in Belgium, France, Germany, Italy, the Netherlands, Spain, and the UK. It is also an area experiencing rapid, and in some cases substantial, levels of growth, both in terms of number of employees and sector revenues.

On the supply side, factors helping to drive the growth in temporary agency work include its active use to facilitate the reengagement of long-term unemployed into work, and a growth in the labor force participation of people that need or prefer temporary work. On the demand side, temporary agency work enables user firms to make relatively easy labor adjustments and cost savings by outsourcing some responsibility for recruitment and administration. Agency work is also widely used in sectors affected by seasonal patterns of demand and to cover staff absences[1].

The results of this study once again highlights that temporary agency work is an important form of labor employment and as such should be properly regulated also by the Romanian legislation.

Although the European Directive 2008/104/CE[2] provides some recommendations for Member States, the Romanian legislation on temporary agency work is not totally consistent with these recommendations.

[1] www.eurofound.europa.eu

[2] For a detailed analysis of the regulations of European Directive 2008/104/CE see C. Nenu, *Contractul individual de muncă*, CH Beck Publ. House, Bucureşti, 2014, pp. 268-269.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

BRIEF CONSIDERATIONS REGARDING THE CONDITIONS OF CONTRACTUAL IMPREVISION

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Abstract

The Romanian lawmaker chose to end any dispute in relation to the admissibility of the theory of contractual imprevision in the domestic law, such institution being regulated in Article 1271 of the New Civil Code. The adoption of this text reveals the alignment of the internal law to the opinions existing at an international level, since the current regulation has the same content as Article 6.111 of the Principles of European Contract Law. This study aims at analyzing the conditions involved by this legal mechanism, stressing the notions of "imprevision", "excessively onerous obligation" and "contractual balance", all of them being defining elements in the initiation of the imprevision's effects whose content shall be accurately delimited by jurisprudence.

Key words: *imprevision, contractual balance, good faith, excessively onerous obligation, criteria for determining onerous nature.*

INTRODUCTION

The New Civil Code ended controversy in the doctrine regarding the admissibility in the Romanian law of the theory of *contractual imprevision*, regulating such in Article 1271[1]. This concept proves the manner in which various elements interact when the economic reality is affected by changes affecting in their turn the contracts in progress. Throughout the entire term of the contract, a state of mutual dependence arises and continues between the contracting parties, which justifies and characterizes the *relation of solidarity* [2] between them. The convergent

[1]We mention that, based on Article 107 of Law no. 71/2011 for the application of Law no. 287/2009 on the Civil Code (published in the Official Gazette no. 409 of 10.06.2011), these provisions only apply to the contracts concluded after 1 October 2011, the date of coming into force of the Civil Code.

[2]L. Pop, *Execution of the contract under the authority of the principle of contractual solidarity* in Law Review no. 7/2011, p. 72.

point of the issue subject to analysis is to maintain the *contractual balance*, aimed at preventing and correcting the potential effects of certain events. This does not mean that the parties' obligations should necessarily be equivalent, but only that there is no unbalance between them upon the conclusion of the contract and the unbalance arising during the existence and performance of the contract is remedied.[1]

Following its French example, the former Civil Code (1864) established the *nominalistic principle* in Article 1578, which has been regarded, for a long time, as an insurmountable obstacle to admission of imprevision. Those who dared to support the possibility to apply the imprevision resorted to various theories in their attempt to substantiate it, among which: the theory *rebus sic stantibus*, the theory of *unjust enrichment*, the theory of the *cause*, the theory of *abuse of law*, the theory of *force majeure* or the theory of *good faith and equity*[2], and the latter seems to underlie the current regulation which has the same contents as Article 6.111 of the Principles of European Contract Law[3].

SHORT ANALYSIS OF THE PROVISIONS OF ARTICLE 1271 OF THE NEW CIVIL CODE

By reading the text invoked, the conditions which have to be found in a certain context for the application of the mechanism of contractual imprevision may be deducted. We mention that the favorite field consists of the contracts for good and valuable consideration with successive execution or the contracts affected by a suspensive term and it is not excluded that the imprevision also affects a pre-contract: "between the time of conclusion of the promise to sell an immovable asset and the signing of the contract in authentic form, a potential sudden increase in the price of immovable assets may determine the change of the transaction conditions in a manner which cannot be neglected"[4].

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[1]*Ibidem*, p. 75.

[2]For a presentation of the arguments for and against these theories, see R.I. Motica, E. Lupan, *General Theory of Civil Obligations*, Lumina Lex Publishing House, Bucharest, 2008, pp. 74-75.

[3]O. Lando, H. Beale, *Principles of European Contract Law. Parts I and II. Combined and Revised*, Kluwer Law International Publishing House, The Hague, 2000, pp. 322-323.

[4]C. Ménard, *Impévision et contrats de longue durée: un économiste à l'écoute du juriste*, in *Études J. Ghestin*, L.G.D.J., Paris, 2001, p. 661 *apud* Anne Etienney, *La durée de la*

First of all, *the moment of change in circumstances* is important and, according to Article 1271 para. 3 letter (a), this should occur *after the time of conclusion of the contract*. Distinction should be made between: the moment when the unpredictable event or its effect on the contract occurs *and* the time when the disturbance of the contract economy is found and the application of the imprevision mechanism. Thus, the time when the situation occurs should be after the conclusion of the contract and before the execution of the contract; otherwise, imprevision may not be entailed, but, possibly, an error or lesion, namely the very fact that the obligation was executed by the debtor reveals that such was able, from an economic standpoint, to honor it.

On the other hand, if the event generating the unbalance of services has already occurred at the time of conclusion of the contract, imprevision no longer applies, but the *initial impossibility of execution* which is currently the object of a different regulation, specified in Article 1277 of the New Civil Code.

An interesting problem identified in the doctrine is whether the imminent occurrence of the unpredictable event – without having effectively occurred – is sufficient for the initiation of the imprevision mechanism; it was presented that the answer is negative, being a basic cause-effect relation, and the determining element is not the occurrence of the event as such, but its disturbing effect on the contract[1].

Secondly, the exceptional change of the circumstances, as well as their extent were not and could not have been taken into account by the debtor, in a reasonable manner, at the time of conclusion of the contract. It is essential to specify that *the unforeseeability* to which the text refers is a "reasonable" one, meaning relative to a certain extent and not absolute because the nature of the contract, the professionalism of the contracting parties, the field of activity, etc. are taken into account[2]. Unforeseeability should not be confused with *the impossibility* to execute the obligation; the latter is generated by an event which creates an insurmountable obstacle in the fulfillment of the service, while the first

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prestation. Essai sur le temps dans l'obligation, L.G.D.J. Publishing House, Paris, 2008, pp. 74-75.

[1]Cristina Elisabeta Zamşa, *Theory of Imprevision. Doctrine and Jurisprudence Study*, Hamangiu Publishing House, Bucharest, 2006, p. 120.

[2]L. Pop, I.-F. Popa, S. I. Vidu, *Elementary Treaty of Civil Law. Obligations - according to the New Civil Code*, Universul Juridic Publishing House, Bucharest, 2012, p. 159.

allows the debtor to fulfill it, but in ruinous conditions for it[1]. It should be emphasized that only factors outside the contracting parties' will may justify the judicial review, and such should also be *exceptional* factors. The specification of the attribute "exceptional" for the change should not be qualified as an actual additional requirement, because it is a "legal metaphor''[2], which announces all the attributes-conditions of the change in circumstances. They should be considered *in concreto* and by reference to the economic environment existing at the time of conclusion of the contract; the capacity of the parties to foresee it shall be considered *in abstracto*, taking as a benchmark the prototype of the average individual, with a regular level of intelligence, which could not "reasonably" foresee the disastrous change[3].

A reasoning similar to that for determination of force majeure [4] is used as starting point for the identification of the criteria for measurement of unforeseeability, namely the objective criteria of a diligent and prudent individual, *bonus pater familias*, which is at the same time dynamic and variable[5].

On the other hand, analyzing the text of the New Civil Code, it may be noticed that no reference is made to the scope and nature of the situations of imprevision, and, according to the principle *ubi lex non distinguit nec nos distinguere debemus*, it results that there are no circumstances or situations which *a priori* cause an excessive onerous character. Unforeseeability, as well the economic-financial aspects which should characterize the effect on the contract, are not so much related to the nature or cause of the event (war, revolution, etc.), but especially to its effects on the execution of the obligations, resulting in a *disturbance of the contractual economy*[6]. In the case of the contracts providing

[1]This distinction is also operated in the comment related to Article 6.111 of the Principles of European Contract Law; in this respect, see O. Lando, H. Beale, *op.cit.*, p. 324.

[2]Cristina Elisabeta Zamşa in Fl. A Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *New Civil Code - Comment per Articles*, C.H.Beck Publishing House, Bucharest, 2012, p. 1331.

[3]P. Vasilescu, *Civil Law. Obligations - in the regulation of the New Civil Code*, Hamagiu Publishing House, Bucharest, 2012, p. 458.

[4]Cristina Elisabeta Zamşa, *Conditions of Contractual Imprevision - between tradition and present* in Romanian Business Law Review no. 6/2009, p. 31.

[5]C. Stătescu, C. Bîrsan, *Civil Law. General Theory of Obligations*, 9th edition, Hamangiu Publishing House, Bucharest, 2008, p. 202.

[6] Cristina Elisabeta Zamşa, *Conditions of Contractual Imprevision..., op.cit.*, p. 30.

several services, the unbalance should concern most of them, being contrary to *good faith* not to accept compensation of the actual prejudice with the benefits which resulted from the services already provided based on the same convention[1].

As an example and illustration, a classification of the unforeseeable situations was proposed, according to several criteria, as follows[2]: according to their *origin*, they may come from a natural fact (storm, drought, fire, epidemics etc.) or a human fact (war, strike, insurrection, laws); depending on the *different nature* of the situations coming from human facts, there may be: events with an organized nature (elaboration of a law) or individual nature (a scientific discovery); lawful events (monetary reform) or unlawful events (insurrection); events with legal nature (acts of the parliament, acts of the administrative authorities), political nature (revolution), economic-financial nature (monetary reform, foreign currency exchange), scientific nature (an invention).

In the judiciary practice, the most commonly invoked situation of unforeseeability was the *inflation*. Thus, in a case[3], it was established that in case of non-payment or payment of the delivered goods with delay, the debtor has to pay the price updated according to the inflation index, even in the absence of a contractual clause in this respect, because such update is not a contractual penalty, but the equivalent value of the creditor's service as of the date of the effective payment, according to Article 1084 of the Civil Code (1864). The use of the inflation rate is justified by its character as unique and accurate criterion, calculated on scientific bases[4], unlike other criteria, such as parity – by reference to the value of a currency, which was considered inaccurate, uncertain and fluctuating because of the subjective nature of choosing the respective currency.

In the process of establishing the conditions of imprevision, the general economic situation at the time of conclusion of the contract

[1] R. Reviriot, *Le droit privé français et la théorie de l'imprévision: Essai sur un aspect de l'interpréation de la loi*, thesis, G. Mathieu Printing House, Nice, 1951, p. 93.
[2] Cristina Elisabeta Zamşa, *Theory of Imprevision...*, *op.cit.*, p. 99.
[3]Supreme Court of Justice, Commercial Division, Decision no. 1091 of 21.02.2001 summarized in N. Varo, A. Man, *Again On Indexation of Receivables* in Judicial Courier no. 2/2004, p. 94.
[4]Supreme Court of Justice, Civil Division, Decision no. 5253 of 21.12.2000 in *Jurisprudence Bulletin. Collection of Decisions of 2000*, Juris Argessis Publishing House, Bucharest, 2001, p. 81-86.

should not be ignored, as it was justly emphasized in a case[1] regarding the termination of a sale-purchase promise for an immovable asset concluded in mid-2009. Within the reasons for the decision dismissing the action because the condition related to the notice of default to the debtor-promissory seller was not fulfilled, the court specified that, if the contractual imprevision had been invoked, such an argument would not have been admitted because such imprevision implies the occurrence of unforeseeable and exceptional events, which could not have been foreseen by the parties and which result in a major disproportion between the two obligations, to the exclusion of any default thereof; however, the sale-purchase promise was concluded in the middle of the economic crisis, when it was obvious that the price of immovable assets would continue to decrease.

An aspect worth attention is the possibility of revision, for reasons of imprevision, of a contract concluded for a lump sum. In a decision issued by the Luxembourg Court of Appeal[2] regarding a general contractor agreement, the author of the work, invoking the "disturbance of the contractual economy", requested the increase of the consideration from the beneficiary; the Court assessed that, although the expenses forming the object of the dispute involve an increase of the initial cost by 17 percent, such increase is not sufficiently high to trigger the adaptation of the contract; the court seems to refine the dominant view of rejection of the theory.

Also within this context, it should be specified that the *generating effect* should be *exterior*, *abnormal* and *unforeseeable*[3]. Given that nobody may obtain advantages by invoking its own default, the event should be independent from the debtor's acts; but it is not sufficient that the victim did not cause the unbalance itself, it is also necessary that it uses its best efforts to avoid incurring any prejudice. Equally, the event should be beyond the parties' forecasts because the victim should not be

[1]Alba Iulia Local Court, Civil Sentence no. 692/09.02.2012 (not published), and such ruling was maintained by Civil Decision no . 652/19.10.2012 issued by the Alba Tribunal (not published).
[2]Court of Appeal, 15 December 2010, DAOR, 2012, no. 101, p. 76 with a note by P. Philippe *apud* O. Poelmans, *Droit des obligations au Luxembourg. Principes généraux et examen de jurisprudence*, volume II *Les Dossiers du Journal des tribunaux Luxembourg*, Larcier Publishing House, Brussels, 2013, p. 182.
[3]Y. Picod, *Le devoir de loyauté dans l'exécution du contrat*, L.G.D.J. Publishing House, Paris, 1989, pp. 224-225; R. Reviriot, *op.cit.*, pp. 91-92.

protected against a risk which is unforeseeable for most of the persons but which is foreseeable or, more exactly, accepted by it as an inherent risk of the contract.

Thirdly, the requirement that *the contract should not include any clause under which the debtor has expressly assumed any risk determined by the change of contractual circumstances, namely it should not be reasonably considered that it undertook such risk* (Article 1271 para. 3 letter (c) of the New Civil Code) should not be forgotten. This happens, first of all, because, since the *principle of contractual freedom* operates, any possible of subsequent adaptation of the contract by the exclusive will of the debtor shall be excluded, with the following two exceptions: the risk arisen further to an unforeseeable event is different in nature form the risk assumed by the parties or exceeds, by the size of its effects, the provision of such risks. In the second case, assuming the risk of the unforeseeable event is deducted by the court through the interpretation of the contract[1].

Fourthly, letter (d) of the article subject to analysis requires that the debtor has attempted, within a *reasonable term* and in *good faith*, the negotiation of reasonable and equitable adaptation of the contract. The existence of the *obligation to negotiate* is also mentioned in the French law which, although rejecting in principle the theory of imprevision for the reason that it infringes the *principle of binding character of a contract*, admits that, based on Article 1134 para. (3) of the Civil Code (the relevant provision of the *principle of good faith*), the co-contractor's refusal to renegotiate the contract may be sanctioned by the court, since it is a culpable conduct[2], the source of such being also found in the concept of *contractual loyalty*[3].

As regards the other requirement, regarding the *excessive onerous nature*, a legislative vacuum may be noticed, because the criteria for establishing such are not provided. It has been recently proposed to take into account two criteria: *the market price* of a service equivalent to the service forming the object of the contract, namely its *utility* for the creditor, which has to be regarded both from an *objective* standpoint

[1] L. Pop, I.-F. Popa, S. I. Vidu, *op.cit.*, p. 159.
[2] Y. Picod, *op.cit.*, p. 200; Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Civil Law. Obligations*, Wolters Kluwer Publishing House, Bucharest, 2010, pp. 401-402.
[3] Laurence Fin-Langer, *L'équilibre contractual*, L.G.D.J. Publishing House, Paris 2002, p. 357.

("average" utility of the thing or service owed), and from a *subjective* standpoint (taking into account particular and strictly personal features that the creditor assigns to the respective thing/service)[1].

However, we consider that the text of Article 1271 is the result of a direct intention because, if a certain solution had been developed, it could have proven useless or insufficient for the variety of the practical situations. At the same time, it was asserted that it is difficult to draw a "border line" between the notion "more onerous", which excludes the application of the imprevision mechanism, according to Article 1271 para. (1) of the New Civil Code, and the notion "excessively onerous" [2]; again, the jurisprudence shall have the task to establish the benchmarks delimiting these two elements.

The following criteria were discussed as possibilities of assessment[3]: *the subjective criteria* for measuring the excessive onerous nature – debtor's bankruptcy (however, it did not enjoy large scale application, being considered too excessive, generating inequality of treatment between debtors and failing to differentiate depending on the debtor's entire economic activity), and *objective criteria*, such as: exceeding a ceiling (for instance, the percentage of 50% increase in the value of the debtor's obligation, or reduction in the value of the consideration received by the creditor, a criterion which was retained by the commentators of the Unidroit Principles, for determining excessive onerous nature, which has a double meaning – both for the debtor and for the creditor, unlike the Romanian regulation); or establishing a progressive rate, between 15-40%, beyond which the contract shall be adapted depending on several benchmarks: value of the service (the rate shall be directly proportional with the value of the service, similar to the progressive tax on profit, for instance), and the lucrative nature of the activity forming the object of the contract.

These arithmetic thresholds seem to facilitate the assessment by the court of the application of the theory subject to analysis and to lead to harmonization of jurisprudence. However, opinions were expressed that such "benchmarks" would be rigid, intangible, and arbitrary, contrary to

[1] For more details, see L. Thibierge, *Le contrat face à l'mprevu*, Editura Economica, Paris, 2011, pp. 368-371.
[2] B. Ionescu, *Gems of Jurisprudence*, Universul Juridic Publishing House, Bucharest, 2011, pp. 129-130.
[3] Cristina Elisabeta Zamşa, *Theory of Imprevision..., op.cit.*, pp. 126-136.

what it appears at a first sight[1]; however, the judge should enjoy indisputable flexibility in establishing the existing level of unbalance. More recently, in the French space, the criterion of the *derisory nature of services*[2] was discussed, because this is a notion already established[3], in agreement with the contractual forecasts and compatible with the *principle of binding character of the contract.*

CONCLUSIONS

We have attempted within this study to make a short "radiogram" of the text of Article 1271 in terms of the requirements imposed by the institution of contractual imprevision: occurrence of an objective unforeseeable situation or of a situation with unforeseeable effects on the contract; excessive onerous character of the parties' obligations; absence of a clause for adaptation of the contract or insufficiency of the clause; excess of the normal risks undertaken or implied by the nature of the contract. The core aspect of the problem is the *disturbance of the contractual economy* because of the occurrence of unforeseeable situations which lead to unbalance of the parties' services. Debated for a long time and rejected for centuries, the theory of *contractual imprevision* was legally established by the adoption of the New Civil Code, and the role of the courts becomes essential *in concreto* for the assessment of the fulfillment of the imprevision mechanism, on a case by case basis.

[1]G. Piette, *La correction du contrat,* Presses Universitaires d'Aix-Marseille-PUAM Publishing House, Paris, 2004, pp. 512-513.
[2] For more details, see L. Thibierge, *op.cit.*, pp. 429-437.
[3] As an example, it can be found in the case of a sale which may be cancelled because of a derisory price [Article 1665 para. (2) of the New Civil Code].

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE NATURE OF INTELLECTUAL PROPERTY RIGHTS[1]

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Abstract:

The author cannot have a natural right over his/her intellectual creation because the intellectual creation, by its nature, cannot be appropriated by a person. This impossibility of appropriating a piece of work is not just a consequence of its intangibility, but it derives also from the relation intellectual creations versus society, universal patrimony, knowledge. The intellectual creation is not susceptible, by its nature, of being legally protected, just like the tangible assets. But more than that, by its nature, an intellectual creation, whether copyrights, trademarks or patents is circulating freely from one individual to another, enriching the know-how and contributing to the social progress and humanity development. This feature does not characterize the other intangible assets. By their nature, they do not have the vocation of contributing to society development. Intangible assets contribute to the development of the society to the same extent as the tangible assets, contributing to social welfare by encouraging private property and the relations between individuals. Any intellectual creation has the vocation of entering into the public domain, being protected under certain conditions stipulated by law only in order to encourage the creative activity necessary for society development by remunerating the authors. Thomas Jefferson highlights that the rights over an invention do not relate to the natural law because the stable property itself over the tangible assets, which goes beyond the mere occupation, is typical to the laws of an organized society, therefore inventions cannot belong, by their nature, to the scope of the property right, as long as by their nature, they circulate freely, unlimitedly, from one individual to another, as long as they are not disclosed by its author. Intellectual property rights are not and they must not be permanent; in reality, they need to be very well limited and they must not last one more day than necessary in order to encourage creativity. For these reasons, I believe that the rights in the field of intellectual property are the exception; the rule states that all intellectual creations have the vocation of accessing the public domain.The juridical protection title of an intellectual creation is awarded the moment when the creation meets certain conditions of novelty, utility and concerning the existence of an author.Legal norms do not bring the intellectual creations into the civil circuit as assets subsisted by a series of rights, but in reality, it simply acknowledges the moral and patrimony rights concerning

[1]Acknowledgement: This work was supported by the strategic grant POSDRU/159/1.5/S/133255, Project ID 133255 (2014), co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007 – 2013

the intellectual creations. One way or another, all conceptions related to the nature of the intellectual property rights are trying to answer to some particular characteristics of the rights in the field of intellectual property, respectively the co-existence of moral rights and of patrimony rights, as well as the limited duration of the patrimony rights. In reality, the limited duration of the patrimony rights is of any interest. However, it should be approached differently. The limited duration of the patrimony rights in the field of intellectual property does not represent an emblematic aspect thereto, but merely a natural consequence of the reason for which such rights have been acknowledged in the normative system. More precisely, the nature of the patrimony rights in the field of intellectual property must not be established based on a secondary effect of their regulation reasoning, but eventually, based on a deep analysis of the reasons causing their acknowledgement normatively, regardless the effects caused by such acknowledgement. Intellectual creations exist way before the acknowledgement of any right in relation with them, prior to the juridical protection, benefiting from social and cultural acknowledgement and protection, to the extent that the authors were respected, and the plagiarists were blamed by the community. For reasons related to endorsing the creative activity required for society development, the authors were admitted certain rights in order to reward them. The reason for endorsing the creative activity with the purpose of developing the society must never be lost of sight, because a piece of work, by its nature, tends to be accessible to all community members contributing to community development. Such accessibility trend of an intellectual creation is not a consequence of its intangibility, but it rather deals with its intrinsic nature towards enriching the universal cultural patrimony. In order to encourage the creative activity, the society allowed the authors a series of patrimony rights so they could be remunerated for their creative effort. The natural trend of the intellectual creations of being passed to the others, thus contributing to the enlargement of the universal cultural patrimony, is involved in the very creative activity of the author. More precisely, the authors create for the result of their work, of their creative effort to reach to the entire communitythey are part of. For these reasons, one could claim that, in the case of intellectual property, one of theessential elements of the property animo sibi habendi is missing, since nobody is creating an intellectual work for himself, but it is created in order to be included in the universal patrimony. The intellectual creation route, from the moment when created and until when included in the public domain, proves once more that it is incorrect to talk about temporary property, even when we would allow that the work is acknowledged as intangible asset. In case it would be allowed that the work is legally acknowledged to be an intangible asset, upon the expiry of the protection period, it disappears, `evaporates' into the public domain, and it is no longer susceptible of being included in the scope of any patrimonial right. The very existence of the public domain is proving the fact that the law does not acknowledge the intellectual creation to be an intangible asset. The moment when the intellectual creation enters the public domain, it is definitely res nullius.There is a characteristic differentiating the exclusive use in the field of intellectual property from use(usus) as attribute of the property right, respectively from the prerogative of use inherent to the property right. For the creations of the mind, their use is `non-rival' (according to James Boyle), respectively nonexclusive, in the meaning that one use does not exclude a concomitant use of the same object. More "uses" of the same land area exclude one

another; by contrast, an MP3 _le or an image could be used by several persons, the use by one person not interfering with the use of the same intellectual creation by another person . The argument according to which this rule would be applicable to all intangible assets is not valid, the best example being the goodwill, several `uses' of the goodwill being excluded. In reality, patrimony rights in the field of intellectual property are rights of claim correlative to a propter rem obligation of the owner of the material support (electronic support respectively) of the intellectual creation. Besides, in an article regarding the juridical nature of the author and inventor's rights, published in the anniversary book dedicated to Roubier, Remo Franceschelli makes such an observation, namely the specificity of the intellectual property right resides in the fact that the owner of the material support of the work cannot reproduce it, and considering the patrimony rights in the field of intellectual property as real rights, respectively property rights does not explain the reason why the author of the intellectual creation can, even after selling such a material support of the intellectual creation, prevent the buyer from reproducing it, respectively to do whatever the owner of a material asset could do drawing the conclusion that this is the specific object of the intellectual property (such negative, non facere obligation), which does not exist in the absence of the special legislation in the field of intellectual property, not the possibility to use the intellectual creation which its author has, based on the common right.

***Key-words**: intelectual property, law, rights*

INTRODUCTION

Due to easiness the intellectual creations spread worldwide, the law-makers at the level of every national regulatory system asked whether the authors can benefit from and/or invoke legitimate rights acknowledged by the national legislation in force in that particular state. To solve this problem, the states proceeded to entering into relevant bilateral treaties which were generally based on the principle according to which every signatory state will grant the same protection to the citizens of the other state as it does to its own citizens. The 20th century came with several bilateral treaties that produced legal effects. As these treaties stipulated different protection periods, the legal conditions governing the protection granted to a creation or work authored by a citizen of a particular state, disclosed to the wide public of another state and copied and distributed in different other countries, were highly complex. This problem was amplified by the different rules related to the period of protection, the level of protection granted to foreigners and, in some cases, the need to cover the steps regarding the legal registration procedures applicable to various foreign states for the author to enjoy the protection of the local law. In default of a bilateral treaty and until the

generalization of the international regulations in the matter of intellectual property, every state established its own protection system which took into consideration the national interests of either its simple citizens or its traders. As a matter of fact, these rules of private international law opened the path towards the current international and regional regulations with whom they presently coexist with and to whom they provided most of the rules, mechanisms and protection criteria.

The Anti-Counterfeiting Trade Agreement entered into by and between the European Union and its member states, Australia, Canada, Japan, Korea, United Mexican States, Morocco, New Zeeland, Republic of Singapore, Swiss Confederacy and the United States of America[1], known in English as *Anti-Counterfeiting Trade Agreement* (ACTA) was based on the desire of the United States of America, the European Union, Switzerland and Japan to establish a new standard of protection in the field of intellectual property, paying a special attention to the works subject to and protected by copyright. Subsequently, other states, such as Australia, South Korea, New Zeeland, Mexico, Jordan, Morocco, Singapore, United Arab Emirates and Canada joined negotiations: and the agreement was signed on January 27th 2012. The fact that the negotiations have been confidential and the procedures governing the negotiation and signing of this agreement have not been concluded under the patronage of an international organization[2] gave rise to powerful controversies[3] regarding the rules set forth by this international treaty[1],

[1]http://register.consilium.europa.eu/pdf/ro/11/st12/st12196.ro11.pdf

[2] This fear is not fully justified because the conclusion of some of the most efficient international instruments in the field of intellectual property was not led by any international organization; on the contrary, these instruments laid the foundations of certain international organisations (as the Berne Union), the most powerful counter-example being the Universal Convention regarding the copyright, the negotiations for its conclusion being led by UNESCO, and the TRIPS Treaty designed to regulate the incidence of intellectual copyright on the trade, signed under the aegis of the World Business Organization; this fear can be justified to the extent in which the contracting parties of this international agreement would have particularly intended to block the participation of some international organization, especially of World Intellectual Property Organization.

[3] It is worth to mention the fact that the agreement lays the basis of a new international entity, more precisely under the grounds of Chapter V of Anti-Counterfeiting Trade Agreement being settled the Anti-Counterfeiting Trade Agreement Committee.

(we include here also the controversies emerged at the social level[2]), which finally culminated with the rejection of the treaty by the European Parliament on July 4th 2012. In other words, the treaty could no longer be considered a *de facto* and *de jure* part of the legal regulations implemented by both the European Union[3] and the member states. In favour of the ACTA, its supporters invoked the fact that it provided efficient and proper means, which complement the TRIPS Agreement, to apply the intellectual property rights, considering the differences between their legal systems and their procedures; they also argued that it gave relevant alternatives to other international regulations on intellectual property, which, at that moment of societal development, provided "*the raw material for the economy*".Against ACTA there has been invoked the fact that the agreement was too ambiguous and that could lead to potential misinterpretations, particularly in terms of the excessive limitation of citizen's rights and freedom. The opponents underlined the fact that ACTA would bring about an imbalance between the intellectual property rights and the holders thereof, between the service providers from the digital media and the users of such media, resulting thus in a breach of the citizens' freedoms.

After a careful reading of the international regulation, one could notice that (a) the Anti-Counterfeiting Trade Agreement does not expand the field of legal protection intended for the intellectual creations[4], (b) the Anti-Counterfeiting Trade Agreement sets up a series of standards concerning the manner in which the administrative authorities[5] and the legal bodies[6], including here the competent law courts[7], take actual measures to protect the intellectual property, with the possibility of awarding compensatory damages[8], the amount of the profit[1] that has not

[1] Pantea, M.;Dincă, M. (2012) – *PRO or AGAINST ACTA*, in *Romanian Magazine of Intellectual Property*, No. 1/2012, p. 188.

[2] Many people, especially citizens of European Union member states, manifested against ACTA inclusively through street demonstrations, The European parliament receiving a petition signed by no less than 2.8 million citizens from around the world, by means of which they requested the rejection of this agreement

[3] It was the first time when the European Parliament used the ability conferred by the Treaty of Lisbon, to reject an international trade agreement

[4]see art. 3 par. (2) of the Anti-Counterfeiting Trade Agreement

[5]see art. 6 par. (1) of the Anti-Counterfeiting Trade Agreement

[6]see art. 7 of the Anti-Counterfeiting Trade Agreement

[7]see art. 8 par. (1) of the Anti-Counterfeiting Trade Agreement

[8]For this purpose art. 9 par. (1) of the Anti-Counterfeiting Trade Agreement

been gained, the court and legal fees and charges, the lawyer's fees[2], with the possibility of ordering the disposal of both the counterfeited goods and the brand counterfeited goods[3], with the possibility of ordering the implementation of provisional measures to prevent the breach of the intellectual property rights and to preserve relevant proof concerning the alleged breach[4], including without limitation to the *inauditaaltera parte*[5] provisional measures, the relevant actions involving the seizure of the suspicious goods[6], and even the manner chosen by the legal authorities to apply criminal penalties in the field of counterfeiting or piracy of trademarks which might prejudice the copyright or the related rights thereof[7] from different perspectives such as: the categories of persons who can be held criminally liable[8], the incrimination regarding the participation in such criminal actions[9], the severity of the custodial sentences or measures involving deprivation of liberty, the fines,so these punishing measures be severe enough to discourage any future infringement acts[10], and also from the point of view of the criminal complementary punishments referring to seizing, forfeiting and disposal of the pirated goods and the trademark goods susceptible of having been counterfeited, the materials and tools used in committing the crime[11], establishing that the actual protection measures shall also be applied to the digital media[12]; consequently, there have been instituted a series of intensively criticized procedures, such as the authority to ask a provider

[1]see. art. 9 par. (2) of the Anti-Counterfeiting Trade Agreement
[2]see. art. 9 par. (5) of the Anti-Counterfeiting Trade Agreement
[3]see. art. 10 par. (1) of the Anti-Counterfeiting Trade Agreement
[4]see. art. 12 par. (1) letter (a) and (b) of the Anti-Counterfeiting Trade Agreement
[5] Without quoting the other party, see art. 12 par. (2) of the Anti-Counterfeiting Trade Agreement
[6]see. art. 12 par. (3) of the Anti-Counterfeiting Trade Agreement
[7]see section 4 – *Criminal Enforcement*of the Anti-Counterfeiting Trade Agreement .
[8]see art. 23 par. (5) of the Anti-Counterfeiting Trade Agreement which advises the contracting countries to incriminate and punish not only the natural persons but also the legal entities
[9]See art. 23 par. (4) of the Anti-Counterfeiting Trade Agreement which advises the contracting countries to incriminate and punish not only the author but also his/her accomplices
[10]see art. 24 of the Anti-Counterfeiting Trade Agreement
[11]see art. 25 of the Anti-Counterfeiting Trade Agreement
[12]see 5 – *Enforcement of intellectual property rights in the digital environment*of the Anti-Counterfeiting Trade Agreement .

of online services to rapidly disclose[1] enough information to a holder of intellectual property rights to enable the latter to identify a subscriber whose account is supposed to have been used for infringement[2] or to implement legal punishments applicable to the users who cancel out the efficient technical measures used by the holders of intellectual property rights to protect their rights[3] or who offer such illegal devices[4] to the wide public (c) the Anti-Counterfeiting Trade Agreement imposes these standards solely to implement real and effective measures designed to protect the intellectual property at the trade level[5], and not in case of isolated infringements of such rights, with the note that such infringements are isolated when the rights of the intellectual property's holder are rarely and irregularly infringed, so much less when the holder of such rights failed to use thereof at the commercial level; nevertheless, such measures are applied to a personal scale, when a user infringes rarely and irregularly the intellectual property rights, but when collaborating with other users, such concerted infringements gain a higher amplitude.

After having read the Anti-Counterfeiting Trade Agreement I can state that this international regulation applicable to the field of intellectual property is solely focused on setting forth a series of very precise standards on the actual measures to protect intellectual property. The Anti-Counterfeiting Trade Agreement addresses two simple questions: what can be done to protect the intellectual property and to what extent, and more precisely, how much can the individual freedoms of the users or the potential users be limited to protect the intellectual property rights? Which was the motivation based on which the Anti-Counterfeiting Trade Agreement has been entered into, considering that the signatories had already complied with the standards set out by this international regulation? At first sight, we could believe that this

[1] The text leads us to the conclusion that we are talk about an administrative procedure and not about a legal procedure, even *inauditaaltera parte*.
[2]see art. 27 par. (4) of the Anti-Counterfeiting Trade Agreement
[3]see art. 27 par. (5) of the Anti-Counterfeiting Trade Agreement
[4]see art. 27 par. (6) letter(a) point (ii) of the Anti-Counterfeiting Trade Agreement
[5] An express limitation of the Anti-Counterfeiting Trade Agreement field is found in art. 23 par. (1), but it represents the core of all international regulations, in the sense that the holder of the intellectual property right who has no vocation to use it at a commercial scale or who does not use it at commercial scale cannot enjoy these high standards of the concrete measures to protect intellectual property.

international regulation makes an inventory of the actual means of protection of intellectual property. However, we must bear in mind the fact it is almost a general rule that a multi-national regulatory instrument be developed not as a result of the contracting parties' intention to change the standards from their national legislation, but to consolidate such standards by "exporting" thereof to as many national legal systems as possible. The best example in this case is the European Convention on Human Rights, *i.e.* the states that initially signed the convention had previously implemented, to their national legal systems, similar provisions with those set forth by the European Convention on Human Rights. Nevertheless, the states signed the European Convention on Human Rights because their aim was to expressly consolidate those standards in terms of defending the fundamental rights and freedoms and to expand thereof to as many other states as possible so as such standards become a unquestionable landmark for that particular regulatory area. The signatories of the Anti-Counterfeiting Trade Agreement pursued the same objective: to expressly consolidate the standards from the national law regarding the actual means to protect the intellectual property, at multi-national level, following to subsequently impose thereof to all other states to the extent to which these standards become an irrefutable landmark for the regulatory field and reach the level of good practices in the field of intellectual property, allowing no waivers unless exceptional circumstances occur.Under the appearance of this noble or, at least, innocent purpose, the Anti-Counterfeiting Trade Agreement brings a series of substantial contributions to the national standards regarding the actual means of protection of intellectual property by means of the provisions set out at section 5– *Enforcement of intellectual property rights in the digital environment.* These provisions address the second question mentioned above, *i.e.* to what extent can the individual freedoms of either the users or the potential users be limited to protect the intellectual property? The provisions give a clearly favourable answer to the holders of intellectual property rights as opposed to the users and their fundamental freedoms. The answer to this question was also one of the reasons based on which the European Parliament rejected the Anti-Counterfeiting Trade Agreement. Definitely, after this evaluation and considering the fact that the ACTA has failed to reach the objective targeted by the contracting parties, the question comes back and the answer is more likely to be unfavourable for the holders of intellectual

property rights and favourable to the other participants in the civil circuit. The same direction is also followed by the most recent case-law of the European Court of Justice[1] which decided, on February 16th 2012 that the administrator of an online network cannot order the constant supervision of its users to prevent illegal use of audio and video materials because several rights, such as the commercial freedom, the right to enjoy the protection of personal data, the freedom to receive and transfer information, would be breached. More precisely the European Court of Justice found and ascertained the following: *"(...) the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights*"[2], *"(...) the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as hosting service providers*"[3], *"(...) Moreover, the effects of that injunction would not be limited to the hosting service provider, as the contested filtering system may also infringe the fundamental rights of that hosting service provider's service users, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively*"[4], *"(...)the injunction requiring installation of the contested filtering system would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users. The information connected with those profiles is protected personal data because, in principle, it*

[1] European Union Court of Justice, Third Chamber (2012) *Information society, Copyright, Internet , Hosting service provider, Processing of information stored on an online social networking platform, Introducing a system for filtering that information in order to prevent files being made available which infringe copyright, No general obligation to monitor stored information*, Decision pronounced in cause C-360/10 BELGISCHE VERENIGING VAN AUTEURS, COMPONISTEN EN UITGEVERS CVBA (SABAM) c/ NETLOG NV of February 16th, 2012, published on the official site of C.J.U.E. (European Union Court of Justice).
http://curia.europa.eu/juris/document/document.jsf?text=&docid=119512&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=323421

[2] Idem point 42

[3] Idem point 47

[4] Idem point 48

allows those users to be identified"[1], *"(...)the above mentioned injunction would harm the freedom of information, as it would be possible that this system fail to make a distinction between a legal and an illegal content, so that the use thereof could have as consequence the blockage of the communications consisting of legal contents. As a consequence, it is not contested that the answer to the issue regarding the legal nature of a transmission of information depends on the application of legal exceptions concerning the copyright which varies from one member state to another. Additionally, some works may be regarded, in some member states, as public works* [2] *or may be subject to a free publication on the internet, publication made by their authors.*"[3].The Belgian Court of Lawthat referred the case to the European Court of Justice, requesting a judgment where the European Court could establish whether the EU applicable laws forbids the issue of an injunction by a national law court to an internet provider, asking the latter to implement a filtering system of the information posted by the users on its servers, filed the request for the delivery of a preliminary ruling in the trial between the "SABAM" (a management organization representing the authors, composers and editors) and the NETLOG (an internet service provider) asking the European Court of Justice: *"Do Directives 2001/29 and 2004/48, in conjunction with Directives 95/46, 2000/31 and 2002/58, construed in particular in the light of Articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms [signed in Rome on 4 November 1950], permit Member States to authorise a national court, before which substantive proceedings have been brought*

[1] Idem point 49

[2] The public field as legal notion in the field of the intellectual property was outlined through the provisions set forth by art. 18 par. (1) of Berne Convention of September 9th , 1886 for the protection of literary and artistic works as completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979 which stipulates " *This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection* " underlining the fact that after the juridical protection period expires the intellectual creation cannot be approached by anyone and it is a part of public domain.

[3]see item 50 of the Judgment delivered by the European Court of Justice in the case C-360/10 BELGISCHE VERENIGING VAN AUTEURS, COMPONISTEN EN UITGEVERS CVBA (SABAM) c/ NETLOG NV of February 16th, 2012.

and on the basis merely of a statutory provision stating that "[the national courts] may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right", to order a hosting service provider to introduce, for all its customers, in abstracto and as a preventive measure, at its own cost and for an unlimited period, a system for filtering most of the information which is stored on its servers in order to identify on its servers electronic files containing musical, cinematographic or audio-visual work in respect of which SABAM claims to hold rights, and subsequently to block the exchange of such files?"[1]*. In the light of the foregoing, the answer to the question referred is that Directives 2000/31, 2001/29 and 2004/48, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against a hosting service provider which requires it to install the contested filtering system.*"[2].

The problem of balance between the rights acknowledged in the field of intellectual property and the third parties' rights to access the protected creation is highly stringent and approached not only from its theoretical perspective, but also at the level of international regulations. Therefore, the amendments brought to the Convention of Berne and the Universal Convention on the copyright as a consequence of the problems raised by the developing nations, are relevant in terms that these nations need to obtain materials legally protected under the intellectual property rights to support their educational programmes and other initiatives designed to facilitate the implementation of the cultural development programmes. This entire international regulatory system is built based on several considerations focused on the protection or lack of protection of intellectual property. For example, the first argument set out by ACTA stipulates that the efficient implementation of intellectual property rights is essential to support economic growth in all industrial sectors, as well as worldwide. When talking about setting up the relation between the interests protected under the intellectual property and the interests of the other persons, it is difficult to draw a line between the rationales that justify the restrictions of an exclusivity given by a legal protection status, at the community level, and the reasons that give no justifications for this

[1]Idem item 25
[2] Idem item 52

aspect[1]. Taking into consideration the international regulations, one of the questions ACTA tries to give a relevant answer, as we have already pointed out, is how far can we go to protect the intellectual property[2] and to what extent can the individual freedoms of the users or the potential users be limited to protect the intellectual property rights. The answer was that we can go quite far and that the interest of both the authors of intellectual works and the holders of intellectual property rights is of paramount interest compared to the individual rights, interests and freedoms of the other legal subjects. The question for which ACTA seemed to give a favourable answer for the holders of such rights has been launched again after the rejection of ratification at European Union level. The answer which seems to be offered in the European Parliament provides for a certain balance between holders' rights and the rights of users / potential users. This line is also followed by the case-law of European Court of Justice in the NETLOG cause: the European Court of Justice restates the necessity of a balance between the interests of the holders of the intellectual property rights and the interests of all other legal subjects, invoking thus the fundamental human rights[3]. Even if the acknowledgement of the rights on tangible properties, particularly the lands, leads to a winning for the entire community through a better exploitation thereof, the protection of intellectual works has the potential to affect and even to encourage the inventive activity. More precisely, the acknowledgement of several rights in the field of intellectual works, even if it apparently seems to represent an inducement for the authors, does not necessarily lead to the increase of the quality and quantity of the production of intellectual works, comes with an adverse effect too. This may happen because of the fact that the rights in the field of intellectual property can somehow hinder not only the inventive activities through the drawbacks set in the subsequent research works[4], but also the free

[1]See Boyle, J, op.cit., point 15 of Chapter 2.
[2]On the dangers of excessive protection of intellectual property see Boyle, J., op.cit.,, point 51 of Chapter 4.
[3] For precision the answer to the preliminary question was *" In the light of the foregoing, the answer to the question referred is that Directives 2000/31, 2001/29 and 2004/48, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against a hosting service provider which requires it to install the contested filtering system*".
[4]Boyle, J., (2008), op.cit.,, point 28 of Chapter 3.

access to information and knowledge, including here the excessive limitation of the free circulation of intellectual works. Therefore, the protection of copyright meant to serve creativity and promote access to information turned into a real obstacle for both, particularly due to a higher protection term which can easily exceed a century[1]. A proper example in this case is the judgment ruled by US Supreme Court in the case of Sony Corp. of America vs. Universal City Studios, Inc., also known as the Betamax case[2] which gives an example of setting relevant landmarks in terms of limiting the control of the holders of intellectual property rights over the new technologies which can contribute to the illegal reproduction and communication of intellectual works; these landmarks can also be enforced to the latest technologies applicable to internet[3]. In this case the judges of the US Supreme Court, criticizing the ruling of the court of first instance, in this case, the US Ninth Circuit Federal Court of Appeal, underlined that *"it is extraordinary to argue that the legislation in the copyright field confers to all holders of these rights, including here the two plaintiffs, the exclusive right to distribute video recording devicesVTR (Video Tape Recorders) by the simple fact that these could be used to infringe their rights*"[4]. Starting from this case, we can make an analogy with the ACTA's regulation, which is intended to be the answer of the regulatory system in the field of intellectual property to the danger posed by the internet and the new piracy technologies, considering the fact that, although the new technologies pose new risks regarding the breach of the rights applicable to the field of intellectual property, they also came with tremendous benefits. For example, even if the greatest movie producers in the United States of America feared the new technology of video tape recorders can seriously affect the cinematographic industry, it was almost in no time proven that, until the implementation of the DVD technology, almost half of the cinematographic industry market was covered through distribution of video tapes; so, the disadvantages were clearly inferior to the benefits brought by this new technology that has significantly contributed to the

[1]Idem point 45 of Chapter 1.
[2]Seehttp://en.wikipedia.org/wiki/Sony_Corp._of_America_v._Universal_City_Studios,_Inc.
[3] Boyle, J., op.cit., point 59 of Chapter 4.
[4] Idem point 60 of Chapter 4.

dissemination of the cinematographic creations[1]. Even in the subsequent case-laws, *i.e.* A&M Records, Inc. v. Napster, Inc.[2] and MGM Studios, Inc. v. Grokster, Ltd.[3], the same law courts, more precisely, the Ninth Circuit Federal Court of Appeal and the US Supreme Court of Justice, even if they seemed to go back to and amend the judgments previously delivered, they didn't; moreover, the courts insisted that the intellectual property rights should be protected in relation to the technologies that appear to be explicitly promoted among the users, in terms of copyright infringement[4].

The purpose of the protection of intellectual creations must be properly understood. The first goal was to encourage the authors of intellectual works by stimulating their creativity, helping thus implicitly to the development of the entire society. To encourage creativity and develop the society, the law-makers decided to allow the authors to have access to the civil circuit; in other words, the authors gained rights and took upon themselves a series of obligations in relation to their own intellectual works. This entire legal protection must be outlined in relation with the targeted objective: the development of the society using the very means that have been identified for this purpose: the inclusion of the intellectual works in the civil circuit whose direct consequence is the protection of the author's interests. Presently, there is the tendency to support the idea that the essential purpose would be solely focused on the protection of the author's interests, disregarding somehow the general context that talked about the development of the society. This tendency poses a serious risk in terms of deviating the legal protection from its initial purpose and turning it into a blockage of the development of society, obstructing the access to information and hindering the development of the previously agreed contractual relations as a consequence of acknowledging some super- prerogatives of the author to block thereof by invoking the moral rights, for example. Given these aspects, we consider that it is of paramount important to establish a balance in the relation between the holders of intellectual property rights and the other legal subjects because the legal protection shall never deviate from its purpose when the interests of all participants in the legal

[1] Idem point 33 of Chapter 4.
[2]seehttp://en.wikipedia.org/wiki/A%26M_Records,_Inc._v._Napster,_Inc.
[3]seehttp://en.wikipedia.org/wiki/MGM_Studios,_Inc._v._Grokster,_Ltd.
[4] Boyle, J., op.cit., point 63 and the following one of Chapter 4.

relations applicable to this field are properly and vehemently defended. The current imbalance is particularly due to the fact that the legislation in the intellectual property field was created at the initiative of the holders of intellectual property rights, who totally ignored or at least, they disregarded the rights of the other legal subjects. For example, the Berne Convention of 1886 on the protection of literary and artistic works has been prepared and signed under the powerful influence of the International Literary and Artistic Association presided by Victor Hugo. The effect of this legislative politics which inevitably led to the hindering of the progress is now analysed in the American doctrine by an author who made an analogy. Professor James Boyle wondered what would have happened with the ordinary consumers, if the gas lamp sellers had the chance to set the rules designed to govern the activities carried out by the companies working in the electricity field[1].In this light, we often wonder to what extent an intellectual work is entitled to protection by its very own nature. Or, in a vision adjusted to the intellectual property field, but which concerns the natural right too, to what extent the author of an intellectual creation can expect that the result of his/her creative activity be protected, considering his/her work and efforts made to complete his/her creation. The answer to this question, in my opinion, can be only one. The author cannot have a natural right over his intellectual creation. And this happens because his intellectual creation, by its very nature, cannot be appropriated by a person if such person cannot totally identify him with the material support of the creation. Again, we are talking about the natural property right over the material support and not over the work itself as the latter cannot exist without its material support. Moreover, this impossibility to appropriate an intellectual work is not just a consequence of its immaterial nature; it derives from the relation between the intellectual creations and the society, the universal patrimony and the knowledge, in general. More precisely, the very nature of the intellectual creation requires no legal protection, as opposed to the tangible properties. Furthermore, by its nature, an intellectual creation,

[1] "*intellectual property legislation had always been a cosy world in which the content, publishing, and distribution industries were literally asked to draft the rules by which they would live. The law was treated as a kind of contract between the affected industries. Rationally enough, those industries would wish to use the law not merely to protect their legitimate existing property rights, but to make challenges to their basic business plans illegal*" see Boyle, J., op.cit., point 7 of Chapter 4.

irrespective of the fact that it is a work subject to copyright protection, a utilitarian creation or a distinct trademark, circulates freely from one individual to another, enriching thus the stage of knowledge and contributing to the social progress and the human development. This characteristic is not met in the case of other tangible properties. These properties, by their nature, have no vocation to contribute to the development of the society. On the other hand, the intangible properties contribute to the development of society to the same extent as the tangible properties, encouraging the private property and the relations between natural persons, contributing thus to the social welfare. In a letter sent by Thomas Jefferson to Isaac McPherson, as an answer to one of his requests to advise about his opinion on a patent released to Oliver Evans, he uses this opportunity to firstly review the rights acknowledged to the inventors by means of different patents, and then to express his reserves regarding the extent to which Evans' device, which consisted of several containers able to move cereals, represented a real invention[1]. In the same letter, Thomas Jefferson gives several pertinent arguments on the different between the tangible properties and the intellectual property, summing up that every intellectual creation is intrinsically meant to enter the public domain, since it is protected under certain conditions set out by the law solely to encourage the creative activity required to develop the society by remunerating the author thereof. Thomas Jefferson underlines that the rights over an invention do not automatically highlight a natural right because, the permanent property upon the tangible goods that goes beyond the simple possession is a characteristic of the laws set up by an organized society; therefore, the inventions, by their nature, cannot be subject to the ownership title as long as, by their nature, they circulate freely unlimitedly from one individual to another, provided that they have been disclosed by their author[2]. Starting from this point, Jefferson launches a real warning where he underlines that the holders' rights in the field of intellectual property are not revealed from the natural right. Therefore, he demonstrates that everything that is protected under the intellectual property rights is totally different from everything that is protected under the property rights over the tangible properties. Partly due to these differences, Jefferson does not perceive the intellectual

[1] To read the full letter see http://www.red-bean.com/kfogel/jefferson-macpherson-letter.html
[2]Boyle, J., op.cit., point 13 of Chapter 2.

property as a natural right based on work of the intellectual creation's author, but as a temporary monopoly created by the state to encourage creativity. Secondly, he argues that no person is directly entitled to the acknowledgement of his/her intellectual property right as these rights may be or not granted depending on both the will of the law-maker and the social standards ("*will and convenience*") without any claims or complaints from a person ("*claim or complaint from anybody*"). Thirdly, the intellectual property rights are not and must not be permanent; in fact, they should be quite limited and should not last longer than it is necessary to encourage creativity. Fourthly, a connection point, the intellectual property rights pose certain risks from the perspective of the nature of the monopoly. So, due to the fact that the intellectual property confines the natural tendency of the ideas and creations of the mind to be freely disseminated from one person to another for educational purposes ("*ideas ....freely spread from one to another over the globe, for the moral and mutual instruction of man*"), in certain cases, it can discourage creativity instead of encouraging it. Fifthly, the decision to have an intellectual property system is just a first choice in a long row of choices. Even if it is considered that the protection of intellectual property is a good idea, there should be determined the categories of intellectual creations which to justify, in terms of community ("*worth to the public the embarrassment*"), the disadvantages of an exclusive right; hence, it is very difficult to determine such limits[1]. In light of these reasons, I consider that the rights in the field of intellectual property represent the exception as the general rule stipulates that all intellectual creations are meant to enter the public domain[2]. The title of legal protection of an intellectual creation is conferred the moment it satisfies certain

[1] Idem, point 19 and the following of Chapter 2.

[2] For the same purpose the dissident opinion of Judge stands concerning the decision pronounced by the Supreme Court of Justice of the United States of America in the cause of International News Service v. Associated Press (see http://en.wikipedia.org/wiki/International_News_Service_v._Associated_Press) "*the general rule of law is, that the noblest of human production-knowledge, truths ascertained, conceptions, and ideas-become, after voluntary communication to others, free as the air to common use* (...) *the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules*" quoted by Boyle, J., op.cit., point 30 of Chapter 3.

conditions referring to novelty, utility and the existence of an author. Indeed, talking about property in the field of intellectual creations is quite improper. In spite of how strange it might seem that the intellectual property does not involve a property right, it must be considered that the name of the intellectual property has its origin in a wrong translation of a word from English into French, due to the fact that in the first revolutionary decrees from France which acknowledged the exclusive rights of the authors and inventors, we may find the influences of English and American law that uses the word *property*; this wordhas been translated into French as *propriété,* although the French conception about property corresponds to the English word *ownership,* in the context in which in the Anglo-Saxon law, the concept of *property* is broader and includes even personal rights (*jus in personam*).

As to the object of the regulation in the field of intellectual property, we must take into consideration the fact that the legal guidelines do not introduce the intellectual creations in the civil circuit as assets on which a series of rights can exist; in fact, these guidelines limit themselves to acknowledging moral and patrimonial rights on the intellectual creations. Basically, the current doctrine does not insist on this distinction between the intellectual rights and the intellectual creations when referring to the object of the legal protection[1]. On the other hand, this vision is extremely important to determine the nature of the rights in this field. We may invoke the fact that the property right is sometimes mistaken for the thing to which it is subject to, but this is a traditional concept in the Roman law[2]. Even if Ihering wrote that all assets are analysed taken into account the rights they imply or confer[3], in the field of intellectual property, the extremely detailed regulation of the prerogatives pertaining to the holders of such rights, corroborated with the fact that the works and other intellectual creations existed long before the establishment of any system of legal protection, can influence the nature of rights, especially because, in the case of the *jus in rem*, the

[1] For this purpose "in the category of immaterial assets the following rights can be added*: (...) c) intellectual rights as copyright, meaning the literary works and the artistic works and the rights arising from them, data base etc*." Munteanu, C., (2010) – *Considerations on the immaterial assets in the present and New Civil Code*, in magazine Dreptul (The Law), issue. 3/2010, p. 65, the author starting from the idea that any product of intellectual activity is an asset, mentioned in the foot note 22.
[2] Idem, p. 62.
[3] Idem, p. 64.

holder's prerogatives are regulated quite briefly. All rights in this field are born the moment the intellectual creation satisfies the conditions required to set up the legal protection title, *i.e*the novelty, the utility and the existence of an author. Thus the legal protection title (mechanism) refers exclusively to the rights arising in connection to the protected creatio. The current doctrine oscillates in respect to the nature of the intellectual property, particularly due to the time limitation, which contrasts with the continuity of the property. Therefore, it has been underlined that *"the rights on intangible assets can be considered property rights, but we should note the fact that they are not genuine property rights and this happens because they are basically temporary, they are connected to the holder's person; moreover, they exist only due to the involvement of third parties, and the protection regarding the possession of such assets outlines specific aspects; therefore, the acquisitive prescription does not apply, the action in counterfeiting and the action in disloyal competition are operating*"[1]. Jefferson, in the aforementioned letter, when arguing that the inventions cannot be the subject to the property right, refers to a permanent and exclusive right of property, which, from the perspective of the natural right, cannot be imposed by a government. In his opinion, the inventions can be subject to certain temporary monopolies set up by the state for the interest of the wide public[2]. When analyzing the legal nature of the rights in the field of intellectual property, the doctrine fluctuates between the concept according to which the right of the intellectual creation's author is a property right[3], the concept according to which the intellectual rights represent a distinct category of rights[4] (*sui generis*), the concept according to which the immaterial assets are perceived as a distinct

[1] Idem, p. 66.
[2] Boyle, J., op.cit., point 14 of Chapter 2.
[3] "*the first laws regulating these rights are categorical in qualifying the property rights, according to natural right*" to present this concept especially in the industrial property domain see Mihai, L. (2002) – *Invention. Ground conditions of patents. Rights*, UniversulJuridic Publishing House, Bucharest, p. 83 - 86.
[4] *"starting from Romanclassification of personal rights (iura in persona ipsa), obligational rights (iura in persona aliena) and real rights (iura in re materiali), E. Picard added, in 1877,a fourth category of patrimonial rights: intellectual rights*" to present this concept especially in the industrial property domain see Mihai, L.op.cit., p86 – 87.

category of patrimonial rights[1], the concept of the goodwill's rights[2], the concept of the monopoly rights[3], the concept of the personality of the author of intellectual creation[4]. The post-war Romanian legal doctrine elaborated a series of concepts, such as: the concept according to which the subjective inventor right is in fact a set of patrimonial rights and personal non-patrimonial rights[5], the concept according to which the subjective right of the intellectual creation author is a personal non-patrimonial right[6], the concept according to which the intellectual creation author's subjective right is a *jus in rem* over an immaterial asset[7]. All these conceptions try, more or less to address some particular

[1] *" J. Kohler's theory underlines the different nature of the object on which he has "intellectual" rights, to show why their holders are the only judges of the opportunity of their publishing, as well as why, on the other hand, it would be unconceivable that "this absolute right is perpetual, because such ideas, form creations have, in the moment their creator decided to send it to the public, a propagation force which cannot be infinitely ruffled by the suzerain will of a single person""* to present this concept especially in the intellectual property domain see Mihai, L.,op.cit. , p. 87 – 88.

[2] "the notion of the goodwill's rights was introduced in the modern law by *P. Roubier, who started from the economic utility of the rights called, until that moment, as intellectual rights, ascertaining that they all tend, under different forms, to conquer the goodwill*" to present this concept especially in the field of industrial property right see Mihai, L.op.cit., p.. 88 – 89.

[3] *"supported byR. Franceschelli, this concept is part of the authors and inventors' rights, a different category of rights, named monopole rights, to underline their fundamental structure and, at the same time, their functional element (the competition function which it exerts)*" to present this concept especially in the industrial property domain see Mihai, L.op.cit., p. 89 – 90.

[4] *"moral right and privative right of exploitation are two aspects of the same right, which can have a personal character*" to present this concept especially in the industrial property domain see Mihai, L.op.cit., p.. 90.

[5] *"it can't be ignored the classification of the author's classification in the personal-non-patrimonial rights and patrimonial rights*" to present this conception especially in the industrial property domain see Mihai, L.op.cit., p. 91 - 94.

[6] "*the copyrightis an non-patrimonial personal right which starts, as a consequence, the patrimonial rights which organically interlaced with the non-patrimonial personal ones for a whole "* to present this concept especially in the industrial property domain see Mihai, L.op.cit., p.. 94 - 95.

[7] *"analysis of the legal characters of exclusive exploitation right leads to the conclusion that they cannot be classified tale quale in one or more universal categories of civil patrimonial rights: rights of claim and respectively, rights in rem. It is still certain that the right of exclusive exploitation that has a relative nature cannot be considered a right of claim. On the other hand, this subjective right approaches the classical property right, although between the two rights there are certain differences and*

treats of the rights in the field of intellectual property, namely the coexistence of the moral rights and the patrimonial rights as well as the limit of the patrimonial rights, identifying the legal nature of the rights in the field of intangible property. As for the moral rights, as argued by the concept according to which the subject right of the author of the intellectual creation is a *jus in rem* over an intangible property, they do not coexist with the patrimonial rights; they are distinct rights. In fact, the interest is chiefly aroused by the limited period of the patrimonial rights. But this approach must be made in a different manner. The limited period of the patrimonial rights in the field of intellectual property does not represent a definite characteristic thereof, but a natural consequence of the reason for which these rights have been acknowledged in the regulatory system. More precisely, the legal nature of the patrimonial rights in the field of intellectual property must not be determined based on a secondary effect of reason that underlay the regulation thereof; it shall be determined based on a complex analysis of the grounds which led to the acknowledgement thereof at the regulatory level, irrespective of the effects such acknowledgement might procedure. Intellectual creations existed long before the acknowledgement of any rights related to them, and prior to the setting up and establishing the legal protection, the intellectual works enjoyed the confirmation and protection thereof at the social and cultural levels, as far as the authors were honoured and the plagiarists were blamed by the community. I have previously showed that every intellectual creation has the "natural" vocation to enter the public domain, irrespective of the creative activity, the effort or the talent of its author. Based on certain reasons concerning the encouragement of the creative activities needed for the development of the society, certain rights have been acknowledged solely to gratify the authors thereof. We should never forget the ration that accounts for the encouragement of the creative activity for the benefit of the development of community, because the intellectual work through, by its very own nature, tends to be accessible to all members of community to whose development it has contributed. This tendency that allows an intellectual creation to be accessible to the public is not a consequence of its immateriality, but it

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namely: - under the object aspect (immaterial object, and not a working one); - under the time period (temporary character, and not perpetual); - under the space protection (territorial character, and not protection in the territory in which the object is placed)" see Mihai, L.op.cit., p. 95 - 98.

falls under its inherent nature to enrich the universal cultural patrimony. To encourage the creative activity, the society acknowledged a series of patrimonial rights for the authors thereof to be remunerated for their creative efforts. Seeing the reward conferred for their creative efforts, either these authors or others will create more works, inventions, distinctive trademarks that will contribute to the development of the society. However, the intellectual creations tend to be accessible to everyone and implicitly, to be a part of the public domain (and this will happen after the expiry of their legal protection period). Due to this reason, the law does not recognize the intellectual creations as intangible goods; it solely acknowledges certain patrimonial rights granted in favour of the authors who use thereof at the contractual levels. The natural tendency of disseminating the intellectual creations, contributing thus to the enrichment of the universal cultural patrimony, derives simply from the author's creative activity. In other words, the authors create so that the result of their work and efforts reach the each and every member within the community they are living in. Bearing this aspect in mind, we may argue that in the case of intellectual property, one of the core elements of property, *animosibihabendi*, is missing because nobody creates an intellectual work solely for himself, but to include it into the universal patrimony. At a certain moment, the society may decide through its regulatory system whether the author should be rewarded or not by acknowledging some rights, and from that point on, we may say that the author had a legitimate expectation concerning the acknowledgement of certain patrimonial rights. However, the acknowledgement of these rights does not change the nature of the work or the relation of the author with his work, as we know and the regulatory system sets forth that the work has been assigned to the wide public, even from the moment it has been developed. The path followed by the intellectual creation starting with its conception up to the inclusion thereof into the public domain, proves once more that it is quite improper to talk about a temporary property, even if we would admit that the work is acknowledged as an immaterial asset. In the event that we would somehow admit that the intellectual work has been legally acknowledged as an immaterial asset, after the expiry of the protection period, the work would disappear, it would "disintegrate" into the public domain, and consequently, it would no longer be subject to any legally protected patrimonial right or interest. It is important to underline that this

"disintegration" into the public domain has nothing to do with the expropriation of land properties, and the public domain in the field of intellectual property has nothing in common with the state's public domain. The moment an intellectual creation becomes part of the public domain, no patrimonial right can be created in relation to such work given the lack of existence of any legal protection as no requirement related to innovation and newness is met, since the work is already known by the wide public. In fact, the law does not acknowledge the intellectual creation as an immaterial, intangible asset, but it acknowledges some patrimonial rights over a limited period of time (the path followed by the intellectual work on its way to the public domain being suspended during this period). A proof of the fact that the law does not acknowledge the intellectual creation as an immaterial asset is the existence of the public domain itself. The moment the intellectual creation enters the public domain, it certainly becomes *res nullius*. However, a defining characteristic of the immaterial assets is the fact that they cannot exist in default of a holder of the right inherent to such assets, regardless whether it is known or not. In other words, the intangible assets can never become *res nullius,* as they belong to their creator whose rights are acknowledged and protected by the law. The explanation lays in the fact that the law acknowledges only the rights over the intellectual creation, and not the intellectual creation itself. The manner the law regulates the holders' prerogatives in relation to the intellectual creation is an unquestionable evidence that we are not in the presence of any *jus in rem*. The legislation in force provides an exhaustive regulation of each and every prerogative and this fact is not applicable to the *jus in rem* where the prerogatives are implied. Therefore, it is relevant the fact that, regarding the use of the work in the copyright domain where the author's right to disseminate his/her work is clearly acknowledged, the law insists on the existence of a separate right: the right to authorize, upon request, the access to the protected work. As we see, this is the best example that gives a detailed account of the prerogatives in the Directive 2001/29/CE, as the first right does not include the first. The argument according to which the intangible property is based on the law while the tangible property is based on the possession itself, does not confute this thesis; on the contrary it strengthens it and the trader's / expert's prerogatives in relation to the goodwill are simply acknowledged, without being excessively detailed.

Furthermore, the thesis admits that the goodwill is subject to the property right. More than frequently, the authors, out of their desire to argue and support their own legal idea concerning the nature of the rights in this field, try to classify the prerogatives acknowledged to the holders based on the prerogatives pertaining to the *jus in rem*. The best example in this sense is the artist's resale royalty (*droit de suite*). Even if the doctrine argues that *"the artist's resale royalty is the attribute of a jus in rem which consists, irrespective of the actual owner of such asset "*[1], the reality is quite different: based on this right, the author becomes the creditor in respect to the amount that he is legally entitled to receive from the purchaser of the intellectual work; the artist's resale royalty is a genuine right of claim, duly set up and implemented through the applicable legislation. This reasoning is also applied to other rights; in reality, the author of the intellectual creation is legally entitled, from a patrimonial point of view, to enforce his right to charge and cash in amounts of money from the persons or entities that are using his work, with or without the author's agreement. The prerogatives acknowledged to the author of the intellectual creation are specific to a *jus in personam* instituted by the law, and consequently, the author can use such right solely in the contractual relations involving his work. If somebody uses the work without firstly obtaining the holder's agreement, he may defend his interests based on civilliability in tort. Practically, the author's patrimonial rights and the rights the other holders may exclusively be enforced at the contractual or extra-contractual levels, on the grounds of the civil liability in tort, and in both cases, we are dealing with certain *jus in personam* and not with *jus in rem* or *sui generis* rights. It is improper to talk about a temporary monopoly, because this would assume that, after the expiry period, this monopoly can be used upon another person, which is not the case, considering the public domain and the conditions of novelty based on which the legal protection is instituted. And even if the monopoly concept is assumed, its main feature is given by the possibility of other persons to restrain the use of the intellectual work. Furthermore, there is a characteristic that differentiate the exclusive use in the field of intellectual property from the use itself (*usus*) as an attribute of the property right, and from the prerogative of the inherent use of the property right. In the case of the creations of the mind, the use

[1]Roș, V., Bogdan, D., Spineanu-Matei, O. (2005) – *Copyright and connected rights, Treaty,* All Beck Publishing House, Bucharest, p. 284.

thereof is "non-rival" (as stated by James Boyle), and non-exclusive respectively. In other words, the use does not exclude the simultaneous use of the same object. There cannot be multiple and simultaneous uses of the same land, but we can definitely talk about the multiple uses of a MP3 file or an image by more than one person, as the use of such items by one person does not interfere with the use of the same intellectual creation by another person[1]. The argument according to which this rule might be applicable to all intangible assets is not valid, and the example for such invalidity is given by the goodwill that simply excludes "multiple" uses thereof.

CONCLUSIONS

In reality the **patrimonial rights in the field of the intellectual property represent the *jus in personam* correlative to a *propter rem* obligation of the owner of the material (electronic) support of the intellectual creation.** As a matter of fact,Remo Franceschelli, in an article addressing the legal nature of the rights pertaining to authors and inventors rights, published in a deferential volume dedicated to Roubier, makes a similar observation, stating that the characteristic that defines the intellectual property right is the fact that the owner of the material support of the intellectual work cannot reproduce the work, and the classification of the patrimonial rights in the field of intellectual property as a *jus in rem* does not explain the reason based on which the author of the intellectual creation can, even if after having sold the material support of such creation, prevent the buyer from reproducing the work and to act as the owner of a tangible asset (Remo Franceschelli underlines this aspect by giving a series of simple and easy-to-remember examples: the wheat we buy can be sowed, the potatoes can also be planted, the eggs we buy can be either consumed or put into an incubator; then, he draws the conclusion that the core, the essence of the intellectual property which however does not exist in default of the implementation of the special legislation in this field, lays in this negative, *non facere* obligation-, and not in the common-law possibility of the author to use the intellectual creation. Franceschelli underlines this negative obligation using a right of monopoly. But this approach is wrong because the idea

[1]see Boyle, J., (2008) - *The Public Domain. Enclosing the Commons of The Mind,* Yale University Press, The Project Gutenberg eBook, point 24 of Chapter 3

of monopoly leads us to the idea that after expiration, it might be granted to a different holder, which is not the case, as long as even Franceschelli acknowledges that, in this field, we have no assets (even if he argues his position exclusively on immateriality) because intellectual creations naturally enter the public domain, becoming part of the universal knowledge patrimony accessible to everyone, with a note that for a limited period of time the users of these intellectual creations must pay the authors thereof, the former (users of intellectual creation) having a *propter rem* obligation afferent to the material support of intellectual creation, and the latter (authors of intellectual creation) having a right of claim correlative to the *propter rem* obligation previously mentioned.

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THE INTERNATIONAL CONFERENCE
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Pitesti, 23 - 24 May 2014

CRITERIA FOR DETERMINING UNFAIR TERMS IN THE BUSINESS-TO-BUSINESS AND BUSINESS-TO-CONSUMER CONTRACTS

„Le droit cesse où l'abus commence."[1]

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Abstract

Legislator's direction toward a certain limitation of the contractual liberalism by imposing certain contracts (adhesion and the so-called forced contracts) requires measures to protect the receivers of law. This work analyses the criteria for determining the abusive characteristic of clauses inserted both in business-to-consumer contracts, and in business-to-business ones, sanctioned de lege lata. This analysis constitutes an argument to support the need to observe the contractual balance when concluding the contract.

Key-words: *freedom of contract, business-to-business contract, the abusive characteristic of clauses.*

1. INTRODUCTION. FREEADOM TO CONTRACT?

The present work raises the question of executing a contract otherwise than freely and in a natural way, by contravening imperative statutory provisions, as well as general law principles as good faith, abuse of process or unjust enrichment.

The prime factor for concluding a contract is the agreement. Therefore, the contract is founded on the principle of autonomy of will.

According to article 1270 of the Civil Code "The legal conventions concluded have the power of a law between the contracting parties". One can interpret this provision in the manner that, if the will of the parties imperatively impose to strictly observe the contract, then this will produces the effects of an imperative statutory provision.

[1] M. F. Planiol, *Traité élémentaire de droit civil,* vol. III, General Library Law and Jurisprudence, Paris, 1923, p. 154 „The right ceases where the abuse begins".

The will of the parties materialized in the contract has the power to force the parties to observe it, and, in case of breaching, to bear the consequences through the agency of statutory sanctions. To this effect, some authors[1] drew the conclusion that the contract can be seen as an instrument that generates private norms sanctioned by the norms of the objective law, granting them mandatory power, with the statement that the objective law cannot create private norms, being only able to acknowledge and integrate them in the hierarchy of the judicial norms.

In order to support the idea that "the contract operates as law for the contacting parties", a series of authors[2] stated that "the contract is generically superior to the law of a state". This assertion considers the initial moment of forming a contract, respectively the phase of negotiations, where the parties are the ones settling forth the contracting conditions and limits through a series of offers and counteroffers. The legislator cannot intervene to replace or suppress the will of the parties, unless when the parties leave gaps for completions. As a result, according to article 1188, paragraph (1) from the Civil Code, "a proposition represents the offer to close a contract if it contains sufficient elements to form the contract and expresses the intention of the offeror to assume an obligation in the case the addressee accepts it". Most relevant in this article, for this subject matter, is the content of the offer. Thus, it constitutes an offer the proposition containing essential elements, seen by the legislator as sufficient so as, once accepted by the beneficiary of the offer, the contract to be considered concluded.

The freedom of contract represents the tangible reality of contracts, is a fundamental principle and only the legislator has the power to reflect on it.

Undeniably, the contract represents the law of the parties, compelling them to accurately observe it, only in the case where it doesn't contravene the law.

The question of exclusive freedom of parties is raised, parties apparently having the freedom to choose the contracting partners, the terms, as well as the content of the contract. It represents the situation of the adhesion contract and of the forced contracts imposed by the

[1] I. Adam, *Drept civil, Obligaţiile, Contractul (Civil Right, Liabilities, The Contract)*, C.H.Beck Imprint, Bucharest, 2011, p. 315;
[2] P. Vasilescu, *Relativitatea actului juridic civil (Relativity of the Civil Legal Act)*, Universul Juridic Imprint, Bucharest, 2008, p. 180-182;

legislator (insurance contracts, contracts generating dependence on the supplier, as well as monopolies) to which the parties are forced to adhere. The party enforcing the contract of adhesion controls it, being as such on a position superior to that of the contracting party. This power represents *the strongest crushing the weakest*[1].

Such contracts are missing the volitive aspect, raising therefore the question of an infringement of freedom of contract.

2. BUSINESS-TO-CONSUMER CONTRACT

2.1 General aspects of the two categories of contracting parties. Area of application

Contracts concluded between professionals and consumers are for the most part contracts of adhesion, where the controlling party (the professional) enforces the consumer to contract on terms unilaterally settled. The consumer, the weak party from an economic and legal point of view[2], has the choice, on the grounds of the principle of freedom of contract, whether to conclude or not the contract on such terms.

In order to determine the category of people coming under the protection of internal and European Law, one proceeds to a short characterization of the consumer and professional.

The consumer is defined by the Romanian legislator[3] as "any natural person or group of natural persons formed into organizations, who, on the grounds of an contract covered by the provisions of this Law, is acting for purposes outside his commercial, industrial or productive capacity, handicraft or liberal activity".

The Government Emergency Ordinance no. 50/2010 on credit contracts for consumers defines in the same general terms, "the consumer as the natural person acting for purposes outside his commercial or

[1] H. and L. Mazeaud, J. Mazeaud, Fr. Chabas, *Leçons de droit civil, tome II/premier volume, Obligations. Théorie générale*, Montchretien, Paris, 1998, p. 104;
[2] C.T. Ungureanu- *Drept internaţional privat. Protecţia consumatorului şi răspunderea pentru produsele nocive (International private law. Consumer's protection and liability for the harmful products)*, All Beck Imprint, Bucharest, 1999, pp. 2-3;
[3] Law 296/2004, on Consumer's Code, Annex 1, point 13, Law 193/2000, on abusive clauses from contracts concluded between professionals and consumers, art. 2, paragraph (1), G.O. no. 21/1992, on consumer's protection, art. 2, point 2;

professional capacity". The notion is taken from the provisions of article 3 point a) from Directive 2008/48/EC.[1]

In what concerns the European legislation on the consumers' protection from the abusive clauses introduced in contracts that they concluded with the business operators, the Directive 93/13/EEC[2] represents from far the most important measure of equalization of the law of contracts in Europe. The Directive defines the notion of consumer as "any natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade".

As well, other European documents[3] define the consumer as "the person who concludes an agreement having no connection with his professional capacity".

The economic operator is "a natural or an authorized legal person who, within his professional activity, manufactures imports, stores, transports or trades products or parts of products or provides services."[4].

The question of discriminating the legal person in the professionals-consumers relationship was raised, pleading that the legal person also, in his legal relationships, has the quality of a consumer, referring to phone contracts or electrical power providers.

One could notice from the legal notions that the economic operator is either a natural or an authorized legal person, whereas the consumer is a natural person or a group of natural persons formed into organizations. The consumer is always acting outside his trade, in order to be able to benefit from legal protection. The reasoning of the legislator was that the economic operator is always a professional of his branch, whereas the consumer, unprofessional, could easily be manipulated within these relationships. For this reason, the Directive 93/13/EEC requires the controlling party (the seller or the supplier) to introduce in

[1] European Union Resolution 2008/48/EC and of the Council from 23rd of April 2008, on credit agreements for consumers and of repeal of the Council's Resolution 87/102/EEC;

[2] Council's Resolution 93/13/EEC from the 5th of April 1993, on abusive clauses in agreements concluded with consumers;

[3] Brussels Convention of 1968 on jurisdiction in civil and commercial matters, Lugano Convention of 1988 on jurisdiction in civil and commercial matters applicable to states from the European Free Trade Association;

[4] Law 296/2004 on Consumption Code in Annex 1, point 1, G.O. no. 21/1992 art. 2, point 3;

the contract submitted to the consumer clauses drawn up in a clear and plain language, in case of doubt on the content of a clause prevailing the meaning which is most favourable to the consumer.

The Constitutional Court of Romania passed on this matter by means of the Decision no. 360/2013[1] on the exception of unconstitutionality of the provisions of article 2 from the Law 193/2000, on breaching the article 16, paragraph (1) from the Constitution of Romania, that states the equality of rights of the Romanian citizens with no privileges or discriminations, the article 30, paragraph (7), on the freedom of expression, as well as the article 53, paragraph (2) from the same legislative act, on the restriction of the exercise of certain acts of freedom. The author of the exception pleads that this is leading to a restriction of certain rights and acts of freedom legal persons should also benefit from in the same way the natural persons do.

The Constitutional Court of Romania rejected the unconstitutionality exception, justifying that the constitutional text of the article 16, paragraph (1), considered by the author of the exception to be breached by means of the Law no. 193/2000, should be applicable, in the case of collective bodies in regard with whom a differentiated legal treatment was promoted, only if in this manner the distinct legal system would reflect on the citizens, presupposing their inequality in front of the law and of public authorities. The principle of equality of rights of the people can be pleaded by a legal person only if, by cause of a differentiated legal treatment, the distinct legal regime would reflect on the citizens, presupposing their inequality in front of the law or of public authorities, or if, by the agency of the legal person, the citizens exercise a constitutional right, as organizing into political parties.

Article 2 from the Law no. 193/2000 on abusive clauses in contracts concluded between professionals and consumers was amended by means of the Law 65/2012[2] assuming the notion of consumer from the Directive 93/12/EEC. Therefore, if until 2012 the broad term of the word "consumer" was used, covering the natural person as well as the legal person, by means of the amendments brought by the Law 65/2012, article

[1] Decision no. 360/2013 published in the Official Gazette no. 718/21.11.2013
[2] Law 65/2002 for amending the Law no. 193/2000 on abusive clauses in agreements concluded between traders and consumers, published in the Official Gazette no. 52 from the 25th of January 2002

2, paragraph (1) from the Law 193/2000, any ambiguity able to raise the question of the quality of consumer of the legal person is cleared.

The European Court of Justice also passed on this matter, establishing that the sphere of the notion of consumer as defined by the Directive 93/13/EEC includes solely natural persons[1].

1.2 Removing abusive clauses to protect the controlled party

According to article 4, paragraph (1) from the Law 193/2000 "a contractual clause that hasn't been negotiated directly with the consumer will be thought of as abusive if, by itself or together with other provisions from the agreement, it creates, to the prejudice of the consumer and contrary to the demands of good faith, a major disequilibrium between the rights and obligations of the parties".

From the legal notion it results that a contract clause is qualified as abusive if (i) it hasn't been negotiated with the consumer, (ii) a contractual disequilibrium occurs at the expense of the consumer, (iii) the principle of bona fide is broken.

The first condition for proclaiming a clause as abusive consists in enforcing the content of the contract by the professional without negotiating with the consumer. It is the case of contracts of adhesion[2], giving a controlling position to the professional, while the consumer has only the option to adhere or not to his will.

Article 4, paragraph (2) from the Law 193/2000 stipulates, as a requirement for determining abusive clauses, the consumer's inability to influence the content of the contractual clause. The legislator mentions the fact that the law is applicable even in the case that one of the clauses has been negotiated directly with the consumer, for the segment of contact unilaterally pre-established by the professional.

One also specifies that, if the clauses have been negotiated between the parties, in the sense that the professional as well as the consumer were on equal positions, submitting consequently for argument

[1] C.J.C.E., Cape Snc and Idealservice Srl(C-541/99), Idealservice MN RE Sas and OMAI Srl (C-542/99), 22nd of November 2001, (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999J0541:EN:HTML)

[2] Art. 1175 from the Civil Code „The contract is a contract of adhesion when its essential clauses are enforced or drawn up by one of the parties for this end, or as a result of its instructions, the other party's only option being to accept them as such."

the content of the clause, the latter cannot be submitted to legal examination unless proven abusive.

The quintessence of the contract and the benefits or losses it brings or generates by itself to the parties must be eliminated from the sphere of control of the abusive clauses.[1]

In the same time, the contractual transparency is incumbent upon the professional, definitive for the consumer's right. The liability of contractual transparency enforces the professional to use plain notions when drawing up the content of the clauses, so that the consumer, lacking most of the times the knowledge of terminology, to be able to understand the content of the contract clauses. Also, as a measure of protection of the consumer generated by his lack of knowledge, in case of doubt on the meaning of a clause, the reading most favourable to the consumer will prevail[2].

The contractual disequilibrium to the prejudice of the consumer is another request for establishing abusive clauses. In this sense, the French doctrine[3] considers that a clause "can be abusive by cause of its origin and consequences: it reads an abuse of power from one of the contacting parties […] and carries forward an undue profit for the most powerful party".

Art. 3 of Directive 93/13/EEC lays down that this disequilibrium to the consumer's prejudice should be a significant one. In the Romanian specialized literature different criteria were proposed to determine the contractual disequilibrium, among which one reminds that of juridical disequilibrium[4], justified by the fact that the legislator speaks of disequilibrium between parties' rights and obligations

Bona fide, in contract execution and drawing-up, consists for each of the parties in not violating the trust the other party has given when entering into the contract; this predictability is at the core of the contract, especially when the contractual relationship has to last.[5]

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[1] L. Pop, *Tratat elementar de drept civil. Obligaţiile (Elementary Treaty of Civil Law. Liabilities)*, Universul Juridic Imprint, Bucharest, 2012, p. 164

[2] Art. 5 from the Resolution 93/13/CEE

[3] P. Malaurie, L. Aynes, P. Stoffel-Munck, *Drept civil, Obligaţiile (Legal Right. Liabilities)*, Defrenois, Wolters Kluwer Romania, p. 392, Marius Şcheaua – coordinator of the edition in Romanian;

[4] L. Pop, op.cit., *Tratat elementar de drept civil, Obligaţiile*, p. 166

[5] H. Muir Watt, *Reliance et definition du contrat, Prospectives du droit economique*, Editura Dalloz, p.57 şi urm.

Bona fide is a European concept; within the meaning of Directive 93/13/EEC it constitutes a global assessment instrument of the abusive feature of a contractual clause, along with all the other instruments used.[1]

To these criteria is added the list of abusive clauses provided by annex of Law 193/2000, as well as the following circumstances provided by Art. 4 par. (5) of the Law to be considered when assessing the abusive clauses:

a) nature of products or services making the object of the contract when signing it;

b) all the factors having led to the conclusion of the contract;

c) other clauses of the contract or of other contracts upon which it depends.

3. BUSINESS-TO-BUSINESS CONTRACT

3.1 General aspects of the contracting parties. Area of application

Within the meaning of the phrase „business-to-business contract" one has regard to the relation between professionals, as defined by Art. 3 sub-par. (1) of the Civil Code[2]. In compliance with Law 71/2011 for enforcement of Law 287/2009 concerning the Civil Code [3] the "Notion of professional" provided by at Art. 3 of the Civil Code includes the categories of merchandiser, undertaker, economic operator as well as other persons authorized to carry out economic or professional activities, as provided by law on the date of entry into force of the Civil Code".

Thus, business-to-business contract referred to in this work means the contract concluded between two or several professionals.

One has concluded in the previous section that solely consumers consisting of natural persons may benefit from the protection of internal and European laws, excluding by this conclusion the possibility that legal

[1] L. Pop, op.cit., *Tratat elementar de drept civil, Obligaţiile*, p.167

[2] „Sunt consideraţi profesionişti toţi cei care exploatează o întreprindere." (*Are deemed professionals all who exploit an enterprise)*

[3] Published in the Romania's Official Journal, 1st Part I, no. 409/10.06.2011

persons may acquire the capacity of consumer and profit from the benefits of dispositions in the field of consumer protection. Also, one has motivated this by that the professional has, at least at presumptive level, knowledge in his field of activity, placing him on the same position of power as that of his co-contractor.

Although Directive 93/13/EEC of the European Council clearly states in Art. 2 par. 1 that the consumer is a natural person, this does not prevent the Member States from adopting an attitude to extend, not to derogate, manifested by regulating other types of contracts which might benefit from protection in relation to abusive clauses. To this effect, Germany has reformed BGB[1], which, in Art. 305 and the following, introduced provisions concerning the abusive clauses in the contracts concluded between merchandisers.

3.2 Protection of sanctioning parties to void unfair terms in contracts

Law 72/2013 concerning the measures to combat late payment of sums of money arising out of contracts concluded between professionals and between them and contracting authorities[2], transposes in the national legislation the provisions of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

This law comes to professionals' aid regulating the notion of abusive clause in these contracts and rules on the determination of abusive clauses.

With regard to the scope of Law 72/2013, Art. 1 states it applies to debts that are uncontested, liquid and enforceable, consisting of payment duties of sums of money arising out of a contract concluded between professionals or between them and a contracting authority, the contract having as object the supply of goods or service provision, including design and execution of public works, buildings and civil engineering works.

In Chapter V. entitled Contractual clauses and abusive practices, the legislator defines the abusive clauses and practices as those by which

[1] Bürgerliches Gesetzbuch- Codul civil german(*German Civil Code*)
[2] Publicată în Monitorul Oficial al României, Partea I, nr. 182/02.04.2013 (*Published in the Romania's Official Journal, Part 1)*

is set out clearly unfair, in relation to the creditor, the payment period, interest rate for late payment or of additional compensation for damages.

The penalty provided by law for unfair is their absolute nullity

The Court notified to admit the action of repeal or in nullity findings shall proceed to determination of the abusive characteristic of the contractual clause, in this operation taking account of all circumstances of the action, especially:

- serious infringements of practices established between parties or from usages consistent with public order or good manners;
- breach of the bona-fide principle and of the principles of due diligence in executing obligations;
- nature of goods or services;
- improvidence of objective grounds to derogate from payment periods or from the interest rate, in accordance with this law;
- dominant position of the co-contractor in relation to a small or medium-sized enterprise.

Thus, just like in business-to-consumer contracts, the Court shall deem a clause as abusive should the general principles of law be breached, like bona fide or due diligence in executing the obligations, infringement of practices established between parties and usages consistent with public order or good manners.

In compliance with Art. 5 par.(1) "In relations between professionals, the payment period is limited, as a general rule, to 60 calendar days. However, parties may stipulate by contract more extensive payment periods, provided this clause is not grossly unfair, in compliance with Art. 12" letter d) of Art. 13 par. (1) of Law 72/2013 it results that parties may derogate from payment periods or from the interest rate as provided by law under an objective reason, so as not to be deemed abusive in the meaning of Art. 12.

With regard to the dominant position that the judge shall find in setting out the abusive clauses, mention should be made that this provision refers to the situation in which one of the parties imposes the so-called adhesion contracts. Thus, the party imposing the contract acquires a position of authority before his co-contractor, in the meaning that the latter has solely the possibility to accept the contract's content, without imposing his own vision.

Law 72/2013 lays down, in title of example, what might constitute an abusive clause. Thus, are qualified as abusive clauses that:

a) exclude the possibility to apply penalty interests or set out penalty interests lower than the legal penalty interests;

b) fix an obligation to put into default so as to charge interest;

c) provide a higher period from which the debt produces interest than that set out in Art. 3 par. (3) or, as the case may be, Art. 6 and 7 par. (1);

d) fix, in the contracts between professionals and contracting authorities, a payment period longer than that set out in Art. 7 par. (1);

e) remove the possibility to pay additional compensation for damages;

f) set a term to issue/ receive the invoice [1].

Mention should be made that these clauses are deemed as abusive without the judge needing to find such a characteristic by analyzing the circumstances set out in Art. 13 or other circumstances of the action.

The Judge before whom such an action is notified shall have only one option, namely to sanction the abusive clauses with absolute nullity. Like for business-to-consumer contracts, the Judge shall not be able to replace the abusive clause with a different clause in accordance with the law and good manners, not being able to intervene in *pacta sunt servanda* and supply for parties' volition.

4. CONCLUSIONS

This paper question is on different execution of a contract than freely and naturally in violation of imperative legal and general principles of law in good faith, abuse of law or unjust enrichment.

Until recently, the Romanian legislation could raise the question of abusive clauses only in the field of business-to-consumer contracts, by transposing Directive 93/13/EEC, pieces of legislation regulating such situations specifically stating the persons benefiting from these protective measures; in 2013 Law 72/2013 entered into force on the measures to combat late payment of sums of money arising out of contracts concluded between professionals and between them and the contracting

[1] Art. 14 of Law 72/2013 concerning the measures to combat late payment of sums of money arising out of contracts concluded between professionals and between them and contracting authorities.

authorities. This comes to professionals' aid – parties of unfair contracts in which abusive clauses are inserted, sanctioning them by absolute nullity and potential compensations within the meaning of the Civil Code.

The question of banks' abuse on their main external stakeholders (bank services consumers) is raised more and more often on the Romanian territory, as the latter fall victim to a weakened system and act on the natural imperative granting a "necessary" trust on the Romania's banking system. An enhanced protection of these victims of such constant abuses from those "too big to fail" is to be imposed.

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G.O. No. 21/1992 on consumer protection

European Union Resolution 2008/48/EC and of the Council on credit agreements for consumers and of repeal of the Council's Resolution 87/102/EEC

Council's Resolution 93/13/EEC on abusive clauses in agreements concluded with consumers;

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Convention of 1988 on jurisdiction in civil and commercial matters applicable to states from the European Free Trade Association

Law 65/2002 for amending the Law no. 193/2000 on abusive clauses in agreements concluded between traders and consumers

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE EFFECTS OF THE CULTURAL CRISIS IN THE ROMANIAN CULTURAL SPACE

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Abstract:

The study has been realized on a sample of 99 managers of culture, from cultural institutions: educational institutions, theatres, museums, cultural clubs or centres, cultural associations, libraries, cinemas, philharmonics, the representativeness being shown in the table below. The questions from the questionnaire were open and with multiple choices or closed, followed by open questions with multiple choices. The sample was chosen in a manner in order to provide information from different activities and a variety regarding the representation of the cultural institutions. This study was made after the research of the works from sociology and philosophy, with a special concern for the functions, the role of the cultural institutions, but also for the actual crisis from culture, regarding both the cultural values, the norms, the traditions and the economic perspective, together with the decisional factors.

Key words: *cultural institutions, cultural crisis, cultural values, norms, traditions.*

INTRODUCTION

The crisis phenomena that go over the nowadays world have left their mark on the spiritual life too. The emerging and the improving of the form that fights against the rebellious and amorphous matter, represent the self-improvement capacity of the human being, who, through creation and artistic knowledge, deciphers the unknown ways of the future and offers himself an inner peace and an essential certitude regarding his place in universe and his future.

From the point of view of the crises that manifest at the macro-social level, the social disorganization is, first of all, manifested through the denying of some traditional values that can be the consequence of the acceleration in the evolution of life, inside the technical society: an acceleration through the cultural spreading or through the mimetic cultural pretention, rather than through a genuine intellectual and moral education; an acceleration through the duplicity, abstract and intensive cultural education; through the modification of the relations between

parents and children; through the multiplications of the pleasuring, entertainment and evasion occasions, through the young's race towards facile earnings, difficult to obtain in honest ways, but indispensible for the satisfying of their temptations. Thus, the anomie phenomena of the 21st century go hand in hand with the destroying of the transcendental and symbolic background of the culture.

In this process of economic integration and synchronization with the European cultural phenomenon, the means of mass communication and improving procedures of the reproduction techniques can have a beneficial role, if they are used for the affirmation of the national authentic aspirations and if they do not look for the persuasive penetration of the consumerist ideologies and of the cultural industry, from the developed countries in the cultural institutions from these countries.

The progress cannot come into sight from the sterile opposition between the superior culture, isolated inside a secular tradition of a caste and transformed into a landmark or a tool and the impediment of the new cultural forms, spread world-wide due to the technical progress: radio, television, cinema, video, Internet etc. Moreover, it can neither appear from the reciprocal denial of the two types of cultures: traditional and modern, different through the profound vision, structures of the sensibility and the diversification of the compositional registers and the different perceiving of the socio-historical realities.

THE CRISIS OF CULTURE IN THE ROMANIAN CULTURAL

The objectives of our research were:

The realization of a sociologic poll with regard to the effects of the cultural crisis inside the Romanian cultural institutions, applied among the managers;

The identification of the entire economic, technical-scientific, social and political phenomenon that lead to the modernization of the cultural institutions or the cultural crisis determined by the syncope that concern the functionality of the cultural institutions;

The identification of certain good practices for the efficient functioning of the cultural institutions, of the public bodies and of their development strategies for the cultural field;

The identification of the optimal working pattern for the cultural institutions and of certain solutions for the development of the cultural field;
The identification of the optimal behavioural and acting pattern inside the cultural institutions, the efficient actions taken by the managers of culture in relation with the society and the cultural globalization;
The realization of the social poll, as a main method for researching the causal relations in sociology, according to the methodological and deontological principles.

Hypotheses:

1. The general cultural crisis in relation with the efficient functioning of the cultural institutions is due, mainly, to the insufficiency of the human and material resources from this institution.
2. The managers of the cultural institutions are preoccupied with the increase in the number of the partnerships, by the diversity of the activities, the development of the cultural consumption, these aspects leading to the annihilation, partly, of the effect of the material and financial lacks existent there.
3. The public institutions involved in the development strategies for the cultural field find solutions and adopts efficient strategies in this respect.
4. The effects of globalization can also be seen in the cultural institutions.

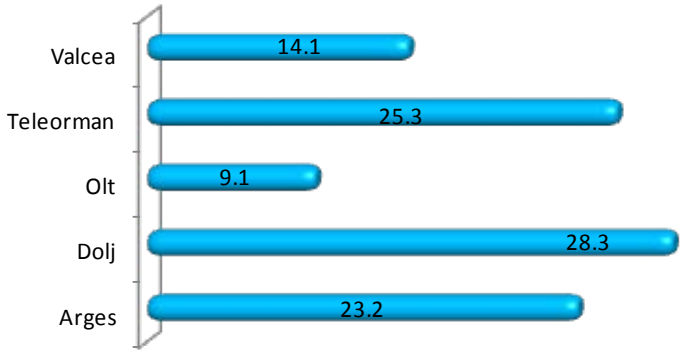
Table 1: The type of institution, number and representativeness

Variants	Frequencies	Percentages
Educational institution (high-school, school groups etc.)	19	19.2
Theatre/Museum	26	26.3
Cultural club/ cultural centre/cultural association	32	32.3
Library/book-shop	17	17.2
Cinema/philharmonics	5	5.1
TOTAL	99	100%

The questionnaires were applied in cultural institutions from Argeş, Dolj, Olt, Teleorman, Vâlcea, their manager or other appointed person in a leading position from that institution. Most of the interviewed people were from Dolj County, they were managers of 28 cultural institutions, representing 25.3%, %, Argeş- 23.2%, Vâlcea-14.1% and Olt-9.1%. the chosen institutions were the most important from those counties,

concerning both the quality of the services and their multitude and importance.

Figure 1: The representativeness of the cultural institutions in each county



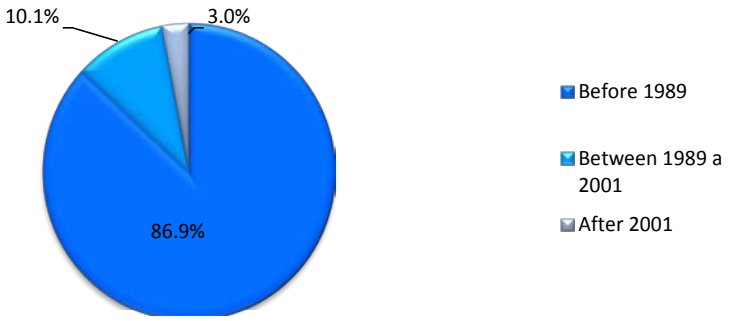
As concerning the field of activity of each organization, we may say that we took into account its variety: book suppliers, the arts of show and activities that imply the management of the show halls, museums, visual arts, architecture, cinemas, digital culture, video, community development, cultural centres, music, advertising. We were also concerned by the interdisciplinary activity field, for example, education and culture.

The field of the organization

Variants	Percentages
Book	14.8
The arts of show and activities that imply the management of the show halls	20.7
Museums	10.4
Interdisciplinary	25.2
Visual arts	4.4
Architecture	2.2
Cinematography, digital culture, video	4.4
Community development, cultural centre	14.8
Music	2.2
Advertising	0.7
TOTAL	100%

Eighty-six cultural organizations were founded before 1989, representing 10.1% of them and 3 cultural organizations were found after 2001, which is 2.0% of these. This demonstrates the fact that most of them cultural institutions that developed cultural activities on a long period of time, the activities being performed by the highly experienced staff that can express a real and pertinent opinion on the actual socio-economic conditions.

Figure 2: The period in which the organization was founded



As referring to the number of the employees from the cultural organizations: 21.2% have between 1 and 5 employees, representing 21 of them; 12 organizations have between 6 and 10 employees, representing 12.1% of them. We obtained the same number and the same representation among the organizations with employees between 11 and 20.

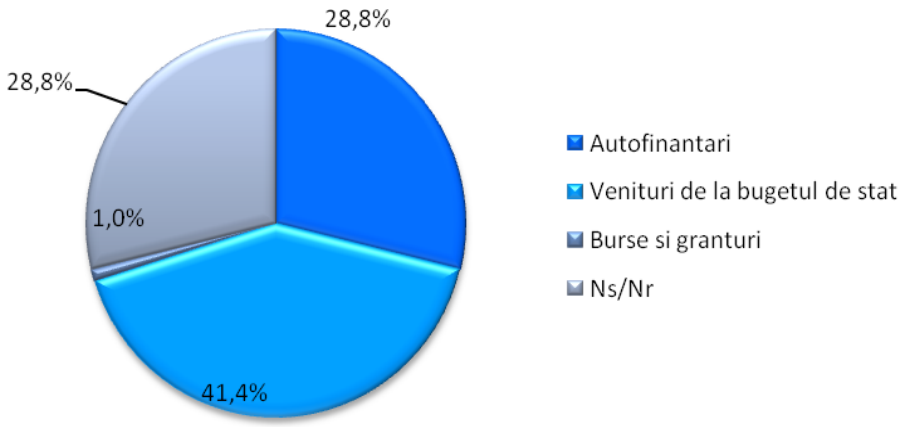
Table 3: The number of employees from the organization

Variants	Frequencies	Percentages
1-5 employees	21	21.2
6-10 employees	12	12.1
11-20 employees	12	12.1
20-40 employees	7	7.1
40-50 employees	7	7.1
50 employees or more	33	33.3
Dk/Da	7	7.1
TOTAL	99	100%

The cultural organizations with more than 20 employees, up until 50 are 14, those with 20 to 40 employees represent 7.1% of and those that have between 40-50 employees also represent 7.1% of them. The cultural institutions with more than 50 employees are 33, representing 33.3% of

them. There were also 7 situations in which the managers of cultural institutions refused to respond, because the number of the employees fluctuates because of the financial situation.
It can be noticed that there were interviewed the managers of the representative cultural institutions from each county that carry on a large variety of cultural activities.
As regarding the number of the collaborators from each organization, this is very different, according to table 30, depending on the specificity of the cultural activity, their number and the financial situation of the institution. Yet, there are 22 cultural organizations, which represent 22.2% that refused to answer related to this situation.
The income sources for the cultural organizations come, in a great extent, from the state budget, 41.4% of them, 28.8 of the auto-financing and 1.0% of grants and scholarships. From the gathered data, it is confirmed the first hypothesis of the research, according to which the general cultural crisis, in relation to the efficient functioning of the cultural institutions is due, mainly to the insufficiency of the material and human resources. We have noticed that, in this case, the obtained results regarding the number of the employees, collaborators and the financing sources, for all the categories of cultural institutions, according to their number, complexity and importance of the developed activities.

Figure 3: The income sources for the cultural organizations



From the point of view of the evolution perspectives in the last 5 years, regarding the financial income of the organizations, the interviewed culture managers expressed different opinions. Almost half of the number of the questioned people were optimistic, 46 of them, representing 46.5% who considered that this financial income will grow. An approximately equal number, 47 managers, said that the financial income will diminish or will remain the same in their institutions. Yet, it is alarming that 37 managers, representing 37.4% of the questioned people see a standstill of the financial income. There were also 6 managers who did not express their views about the financial income of the institutions that they belong, for the next 5 years. This financial income is conditioned by many social, political and economic factors that can positively or negatively influence their growth.

Figure 4: Evolution perspectives, in the next 5 years, of the financial income of the organization

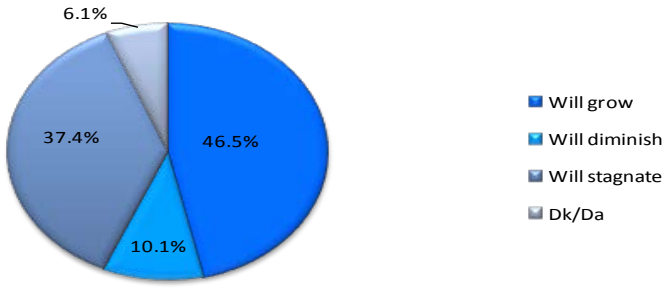
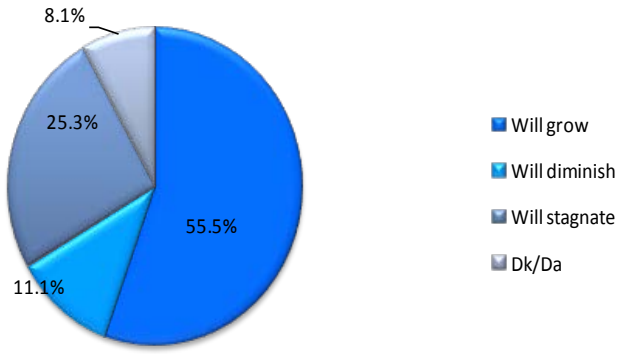


Table 4: The expenses for the cultural activities

Variants	Percentages
Maintenance	25.0
Rent	7.1
Payment of suppliers	19.6
Distribution expenses	6.1
Wages	14.5
Dk/Da	27.7
TOTAL	100%

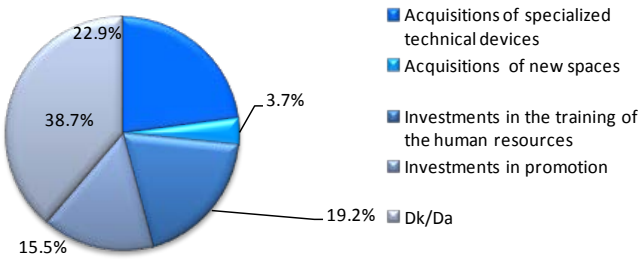
Most of the expenses made in the cultural institutions are those related to the maintenance, 25.0%, the payment of the suppliers, 19.6% and by wages, 14.5%. The least expenses are related to rents, 7.1% of the distribution expenses, 6.15. There were 27.7% of the mangers who refused to say what important expenses they have in their institution.
As regarding the evolution of the expenditures made for the cultural activities, more than half of their number, representing 55.6%, hope the expenses for the cultural activities will grow. Almost a quarter, 25 managers, representing 25.3% said that they will diminish, because of the economic crisis and the insufficiency of the financial resources. 11 managers, that is 11.1%, consider that the expenses for the cultural activities decrease, a number of 8.1% were not able to make a prognosis for this.

Figure 5: The evolution of the expenses made for the cultural activities



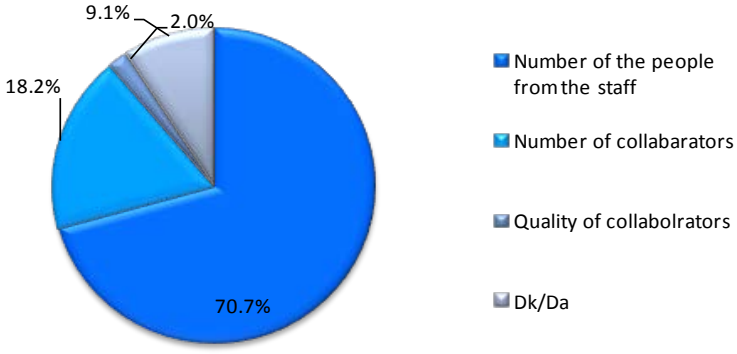
The maximising of the cultural services quality offered to the public/consumers is determined by investments regarding acquisitions of technical devices, for 22.9% of the managers, investments in the professional training of the human resources, for 19.2%, investments in the promotion of the staff, 15.5% in the acquisition of new spaces, for 3.75 of the cultural managers. There were many people, determining a percentage of 38.7%, who expressed their opinion regarding the investments that could determine the maximising of the cultural services quality offered to the public that could be done in the institution. This fact was determined either by the lack of the financial funds, or the inexistence of a projection regarding the investments that can be made.

Figure 6: Investments for maximising the quality of services offered to the public/consumers made in the institution



The opinion of the cultural mangers regarding the economic crisis and its effects on the human resources from the organization is that this crisis affected, mainly, the organization from the point of view of the hired staff, 70.7% of the managers. It is also affected by the economic crisis the number of the collaborators for 18.2% of the mangers, but also their quality, for 2.0% of them. Nine cultural mangers, representing 9.1% did not answer, because their cultural institution is not affected by the economic crisis, or they did not analyse these aspects.

Figure 7: The economic crisis affected the human resources of the organization from the next points of view



The institutions represented by the cultural managers concluded local partnerships, 30.0%, at the national level, 25.95, at the international level, 12.8%. it can be noticed from the gathered data, the existence of a quite small number of the cultural institutions who concluded international, or

even national partnerships. There are also cultural mangers who were not preoccupied by such partnerships, 31.3%.

Figure 8: Types of partnerships from the institution

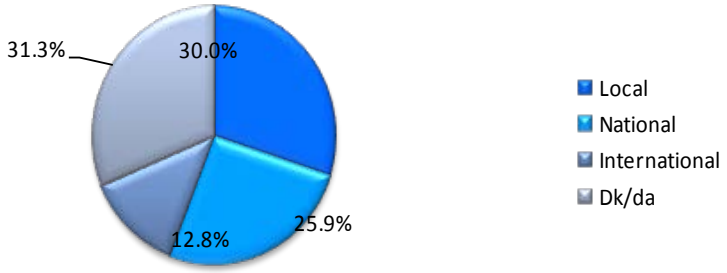


Table 5: The estimation of changes for the next 5 years, concerning the partnerships

Variants	Frequencies	Percentages
Same	24	24.2
Growing	68	68.7
Decreasing	1	1.0
Dk/Da	6	6.1
TOTAL	99	100%

As for the estimation of the changes for the next 5 years that involve the partnerships, 68.7% of the cultural managers expect that their number will grow, 24. 2% think that their number will stagnate and only 1.0% consider that the number of the partnerships will decrease. It can be noticed the optimism regarding the intensifying of the cultural exchanges and the preoccupation for the increase of the managers' partnerships.

Table 6: The evolution of the cultural production in the cultural institution during the last 10 years

Variants	Percentages
Concerning the quality	22.0
Concerning the quantity	14.9

Concerning the diversity	24.0
Dk/Da	39.2
TOTAL	100%

The evolution concerning the production of the cultural institutions was noticed, in almost equal proportions from the qualitative point of view, 22.0% and from the diversity one, 24.0%, during the last 10 years, in the opinion of the cultural mangers. As for the quantitative aspect, there are only 14.0% who agree with this affirmation. Nevertheless, there is a quite big number of cultural managers, representing 39.2% who did not analyze this aspect during the last ten years.

Table 7: The distribution of the products registers a growth, in 2011, from the next points of view

Variants	Percentages
The number of the distribution networks	6.7
The quality of the distribution networks	9.4
The local distribution network	9.1
The national distribution network	8.8
The international distribution network	3.4
The number of the distributed products	8.1
Dk/Da	54.5
TOTAL	100%

The distribution of the products registers a growth, in 2011, from the next points of view: the quality of the distribution networks, 9.4%, the local distribution network, 9.15, the national distribution network, 8.8%, the number of the distributed products, 8.1%, the number of the distribution networks, 6.7%, the national distribution network, 3.4%. 54.5% of the respondents did not answer, due to the specificity of the cultural activities in the institution they work, or because they did not analyzed these aspects.

The volume of the participants to the cultural activities organized in the cultural institutions registers, in the last 5 years, a growth of 63.6%, which is a positive aspect, due to the interest manifested by the public for the cultural activities. 27.3% of the cultural managers considered that the interest manifested by the public regarding the cultural activities stagnates, this fact being also due to the specific of the activities and 8%

said that the number of the participant to the cultural activities is decreasing.

Figure 9: The volume of the public/participants at the cultural activities organized in institution in the last 5 years

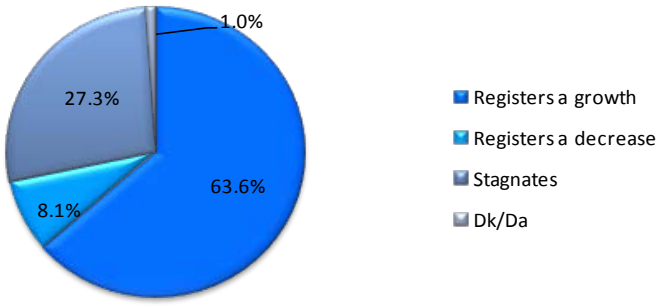


Table 8: Aspects related to the cultural consumption and the participation to cultural activities organized by the institution in the next 5 years

Variants	Percentages
The number of the distribution networks	9.4
The quality of the distribution networks	15.2
The local distribution network	11.8
The national distribution network	6.1
The international distribution network	1.7
The number of the distributed products	8.8
Dk/Da	47.1
TOTAL	100%

As regarding the aspects related to the cultural consumption and the participation to cultural activities organized by the institution in the next 5 years, the respondents consider that it will develop: the quality of the distribution networks, 15.2%, the local distribution network, 11.8%, the number of the distributed networks, 9.4%, the number of the distributed products, 8.8%, the national distribution network, 6.1%, the international distribution network, 1.7%. Yet, there were 47.1% of the respondents who could not make a prognosis in this respect.

It is almost entirely confirmed the second hypothesis regarding the managers of the cultural institutions. They are preoccupied by the increasing in the number of partnerships, the diversification of activities, the development of the cultural consumption. These aspects lead to the annihilation of the financial lacks that the cultural institutions face. Nonetheless, it is required a report about the specific of the cultural activities.

Table 9: The main causes of the modifications that appeared in the activity of the organizations

Variants	Percentages
Sources of financing	26.9
The evolution of the human resources	12.1
The number of partnerships	10.4
Aspects related to the cultural consumption	10.1
Aspects related to the participation to the cultural activities	5.7
Aspects related to the involvement of the decision factors	3.4
Dk/Da	31.3
TOTAL	100%

The main causes of the modifications that appeared in the activity of the organizations are, in the opinion of the respondents: the sources of financing, 26.9%, the evolution of the human resources, 12.15, the number of the partnerships, 10.4%, aspects related to the cultural consumption, 10.1%, aspects related to the participation to cultural activities, 5.7%, aspects related to the involvement of the decision factors, 3.4%. There were 31.3% of the respondents who did not mention their opinion in this respect.

Table 10: The main directions proposed for the next 5 years for being developed

Variants	Percentages
The development of new strategies for the promotion of the cultural products	26.3
The balancing of the relation quality-price	3.4
The initiation of new partnerships	22.6
The development of a new distribution network	7.1

Other alternative sources of financing	9.4
Dk/Da	31.3
TOTAL	100%

As regarding the directions proposed for the next 5 years for being developed, the cultural mangers proposed to develop new strategies for promoting the cultural products, 26.7%, to initiate new partnerships, 22.6%, to find other alternative sources of financing, 9.4%, to develop new distribution networks, 7.1%, to balance the relation quality-price, 3.4%.

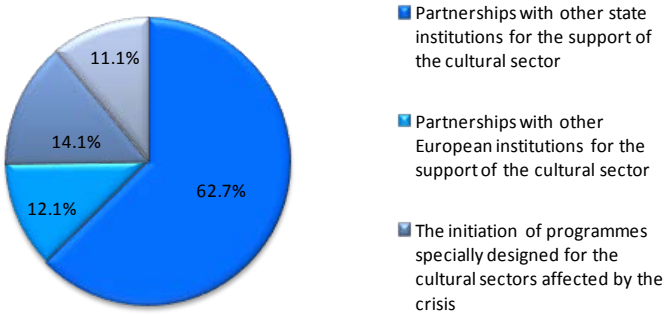
Table 11: The main public bodies that can get involved in the development strategies for culture

Variants	Percentages
The Government	16.8
The Ministry of Culture and National Patrimony	19.9
Each cultural institution	14.1
The ministry of Public Finances	1.3
The European institutions	6.7
The local public authorities	17.8
The banks	0.3
Other bodies	0.3
Dk/Da	22.6
TOTAL	100%

They consider that the Ministry of Culture is able to involve in the field of the strategies development, 19.9%, the local public authorities, 17.8%, the Government, 16.8%, each cultural institution, 14.1%, the European institutions, 6.7%, The Ministry of Public Finances, the banks and other bodies.

The main solutions offered by the Ministry of Culture for the development of the cultural sector are: partnerships with other state institutions for the support of the cultural sector, 62.6%, the initiation of programmes specially designed for the cultural sectors affected by the crisis, 14.1%, partnerships with other European institutions for the support of the cultural sector, 12.1%.

Figure 10: The main solutions offered by the Ministry of Culture and Cultural Patrimony for the development of the cultural sector



It is also confirmed the third hypothesis according to which the public bodies involved in the development strategies for the field of culture find solutions and adopt efficient strategies for the development of culture and for the development of the cultural activity.

In the opinion of the respondents, the globalization is, generally, a phenomenon that threatens the identity specific for each society, 43.4%, a consequence for the progress of humanity, 28.3%. The globalization is necessary for the elimination of the world wide economic, social, cultural discrepancies, 19.2%, it is a phenomenon that might eliminate the competitive spirit of different peoples, 9.1%.

Figure 11: Generally, globalization is

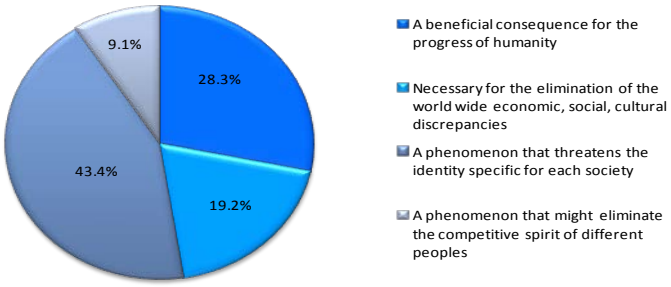


Table 12: Do you consider that each society should:

Variants	Frequencies	Percentages
Borrow what is special and necessary from other cultures	32	32.3
Keep its traditions unaltered	39	39.4
Not renounce to the particularities that make it individual	17	17.2
Allow all kind of innovations to interfere with the already existent traditions and activities from a society	11	11.1
TOTAL	99	100%

As referring to what each society should do, the respondents say that it should keep its traditions unaltered, 39.4% and to borrow only what is special and necessary from other cultures, 32.3%, should not renounce to the particularities that make it individual, 17.2% and to allow all kind of innovations to interfere with the already existent traditions and activities from a society, 11.1%.

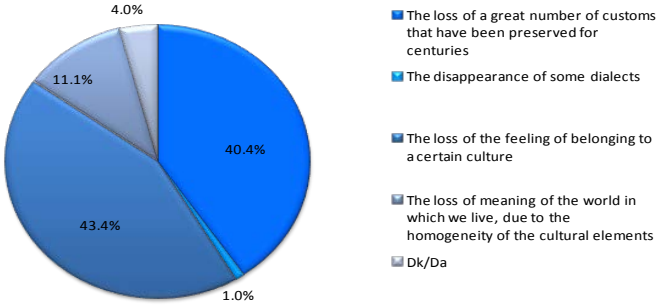
Table 13: Do you consider that the cultural globalization:

Variants	Frequencies	Percentages
Is unavoidable	42	42.4
Does not involve great risks, because the civilizations will succeed to keep their cultural identity	15	15.2
Will affect all the societies, regardless their efforts to oppose to it	17	17.2
Will extent only to certain limits and will not be able to eliminate the cultural features, specific for different civilizations	24	24.2
Dk/Da	1	1.0
TOTAL	99	100%

To this question, the people answered that the globalization is unavoidable, 42.4% of the respondents, will extent only to certain limits and will not be able to eliminate the cultural features, specific for different civilizations, 24.2%, will affect all the societies, regardless their

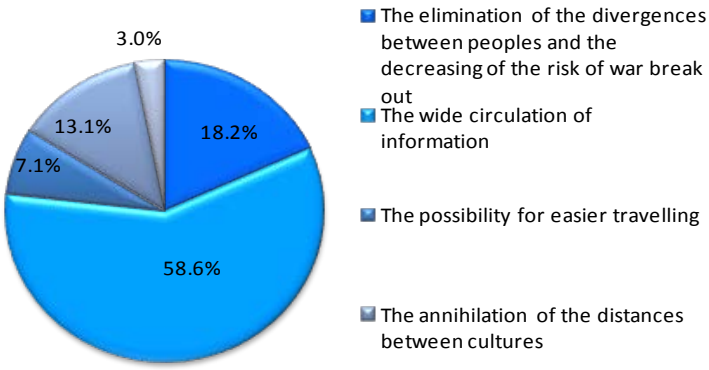
efforts to oppose to it, 17.2% and does not involve great risks, because the civilizations will succeed to keep their cultural identity, 15.2%.
As referring to the most noxious effects of the cultural globalization, the culture managers mention the loss of the feeling of belonging to a certain culture, 43.4% and the loss of a great number of customs that have been preserved for centuries, 40.4%. Other noxious effects might be loss of meaning of the world in which we live, due to the homogeneity of the cultural elements, 11.1% and the disappearance of some dialects, 1.0%.

Figure 12: The most noxious effect of cultural globalization



The main advantage of globalization is considered by more than a half of the interviewed culture managers, 58.6%, the wide circulation of information. Other advantages of the globalization are: the elimination of the divergences between peoples and the decreasing of the risk of war break out, 18.2%, the annihilation of the distances between cultures, 13.1% and the possibility for easier travelling, 7.1%.

Figure 13: The main advantage of globalization



It is also confirmed the fourth hypothesis according to which, the effects of the globalization are aslo seen in the cultural institutions from Romania.

A major characteristic of our age are the processes of globalization of the world economy and the necessity solving of the vital problems of the humanity. The aspiration towards the perfecting of the form as confronted to the rebel and amorphous matter represents the self-improvement capacity of the human condition that, through artistic creation and knowledge, deciphers the unknown paths of the future and offer a inner tranquillity and an existential certitude to the human being, regarding his place in the universe and his future.

The homologation of the cultural values in accordance to the standardized consumption norms could not have been produced without a secure market for the cultural products. And after all, this market have never had such a proper ground for its affirmation, as it is the consumption society, when the manipulation of the artistic taste of the public serves to the obtaining of the profit.

CONCLUSIONS

Instead of the elaboration of a long term policy for the development of the human personality, based on the authentic existence in consensus with the bio-psycho-social nature of the

human, the cultural managers orientate their motivations and aspirations towards a system of values whose axis is concentrated on a way of existence based on the obsession if consumption and constant effort to gather and possess goods. This frame lacks a system of moral and spiritual values, meant to offer the human the feeling of formative usefulness for these goods and not the ephemeral pleasure of possession. It can be said that the cultural agents have many defining features such are: they are profoundly interested, after their actions and decisions, in a preponderantly spiritual, aesthetic and artistic finality; they are dependent on the quality and structure of their resources; they have a consistent "dialogue" with the human community to which they belong and with the representatives of other cultures; they are specialized in the realization, promotion and spreading of their own cultural services.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

PITFALLS OF ACTIONS FOR DAMAGES FOR INFRIGEMENTS OF EU COMPETITION LAW

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Abstract

Compensation for harm caused by infringements of EU competition rules cannot be achieved through public enforcement. The proposal of Directive analysed in the current paper seeks to ensure the effective enforcement of the EU competition rules by optimising the interaction between the public and private enforcement of competition law and ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered.

Key words: *competition law, actions for damages, private enforcement of EU competition law*

1. PRIVATE ENFORCEMENT OF EU COMPETITION LAW. DEFINITION AND RATIONALE

The amount of compensation that victims of antitrust infringements are currently forgoing ranges from approximately €5.7-€23.3 billion/year. For example, in France a mobile phones cartel caused damages between 295 and 590 mil. Euro, in 2000 – 2002. In UK, an antitrust agreement between supermarkets and milk producers cost the consumers 375 mil. Euro, in only 2 years. In Netherlands, a beer cartel produced 400 mil. Euro damages, between 1996 and 1999. [1]

Compensation for harm caused by infringements of EU competition rules cannot be achieved through public enforcement. Awarding compensation is outside the field of competence of the Commission and the NCAs and within the domain of national courts and of civil law and procedure.

[1] http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_report.pdf

Compliance with the EU competition rules is thus ensured through the strong public enforcement of these rules by the Commission and the NCAs, in combination with private enforcement by national courts. [1]

Nevertheless, actions for damages are less developed in Europe.

As the former EU competition commissioner, Neeli Kroes stated: „Each citizen has the right to benefit from an economic environment based on efficient competition. When these rules are not respected, individula and companies should be able to claim damages." [2]

ECJ expressed the same principles in case C-453/99, Courage Ltd. v. Bernard Crehan: "The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition." [3]

"Article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm. "[4]

This idea determined the European Commission to take actions in order to facilitate actions for damages. [5]

[1] Katherine Holmes, *Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK*, European Competition Law Review, 2004, 25 (1), p.25-36

[2] Neeli Kroes, *More Private Antitrust Enforcement through Better Access to Damages: An Invitation for an open Debate*, Era Forum, I/2006, p.13, www.era.int/damagesactions/documentation

[3] Cauza Courage v Crehan, C-453/99 [2001] ECR I-6297, par.26;

[4] Cauza AG Van Gerven, C-128/92, Banks v. British Coal, 1994 E.C.R. I-1209

[5] ***http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html***

2. FROM THE WHITE PAPER'S CONCLUSIONS TO THE DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CERTAIN RULES GOVERNING ACTIONS FOR DAMAGES UNDER NATIONAL LAW FOR INFRINGEMENTS OF THE COMPETITION LAW PROVISIONS OF THE MEMBER STATES AND OF THE EUROPEAN UNION

In 2009 was adopted the European Parliament resolution on the White Paper on Damages actions for breach of the EC antitrust rules, that strongly supports the Commission's objective of seeking to facilitate damage actions. [1]

To ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for injured parties to exercise the rights they derive from the internal market, it is therefore appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for antitrust damages.

Those are the objectives of the proposal which seeks to ensure the effective enforcement of the EU competition rules by law and ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered.

The overall enforcement of the EU competition rules is best guaranteed through complementary public and private enforcement. However, the existing legal framework does not properly regulate the interaction between the two strands of EU competition law enforcement.

An undertaking that considers cooperating with a competition authority under its leniency programme (whereby the undertaking confesses its participation in a cartel in return for immunity from or a reduction of the fine), cannot know at the time of its cooperation whether victims of the competition law infringement will have access to the information it has voluntarily supplied to the competition authority. In particular, in its 2011 Pfleiderer judgment, the European Court of Justice (hereinafter: 'the Court')[7], held that, in the absence of EU law, it is for the national court to decide on the basis of national law and on a case-bycase basis whether to allow the disclosure of documents, including leniency documents. When taking such a decision, the national court

[1] Disponibilă la adresa http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0187+0+DOC+XML+V0//RO

should balance both the interest of protecting effective public enforcement of the EU competition rules and of ensuring that the right to full compensation can be effectively exercised. This could lead to discrepancies between and even within Member States regarding the disclosure of evidence from the files of competition authorities. Moreover, the resulting uncertainty as to the disclosability of leniency-related information is likely to influence an undertaking's choice whether or not to cooperate with the competition authorities under their leniency programme. In the absence of legally binding action at the EU level, the effectiveness of the leniency programmes — which constitute a very important instrument in the public enforcement of the EU competition rules — could thus be seriously undermined by the risk of disclosure of certain documents in damages actions before national courts.

The need to regulate the interaction of private and public enforcement was confirmed in the stakeholders' responses to the public consultation on the 2008 White Paper on damages actions for breach of the EU antitrust rules ('White Paper')[8] and the 2011 consultation on a coherent European approach to collective redress9. The May 2012 resolution of the Heads of the European Competition Authorities also stressed the importance of the protection of leniency material in the context of civil damages actions10.

The European Parliament repeatedly emphasised that public enforcement in the competition field is essential, and called on the Commission to ensure that private enforcement does not compromise the effectiveness of either the leniency programmes or settlement procedures11.

The first main objective of the proposal is thus to optimise the interaction between public and private enforcement of the EU competition rules, ensuring that the Commission and the NCAs can maintain a policy of strong public enforcement, while victims of an infringement of competition law can obtain compensation for the harm suffered.

The second main objective is to ensure that victims of infringements of EU competition rules can effectively obtain compensation for the harm they have suffered.

While the right to full compensation is guaranteed by the Treaty itself and is part of the acquis communautaire, the practical exercise of this right is often rendered difficult or almost impossible because of the

applicable rules and procedures. Despite some recent signs of improvement in a few Member States, to date most victims of infringements of the EU competition rules in practice do not obtain compensation for the harm suffered.

As long ago as 2005, the Commission identified, in its Green Paper on damages actions for breach of the EC antitrust rules12 ('the Green Paper'), the main obstacles to a more effective system of antitrust damages actions. Today, those same obstacles continue to exist in a large majority of the Member States. They relate to: obtaining the evidence needed to prove a case; the lack of effective collective redress mechanisms, especially for consumers andSMEs; the absence of clear rules on the passing-on defence; the absence of a clear probative value of NCA decisions; the possibility to bring an action for damages after a competition authority has found an infringement; and how to quantify antitrust harm.

Besides these specific substantive obstacles to effective compensation, there is wide diversity as regards the national legal rules governing antitrust damages actions and that the diversity has actually grown over recent years. This diversity may cause legal uncertainty for all parties involved in actions for antitrust damages, which in turn leads to ineffective private enforcement of the competition rules, especially in cross-border cases.

To remedy this situation, the second main objective of the present proposal is to ensure that throughout Europe, victims of infringements of the EU competition rules have access to effective mechanisms for obtaining full compensation for the harm they suffered. This will lead to a more level playing field for undertakings in the internal market. In addition, if the likelihood increases that infringers of Articles 101 or 102 of the Treaty have to bear the costs of their infringement, this will not only shift the costs away from the victims of the illegal behaviour, but will also be an incentive for better compliance with the EU competition rules.

To achieve that objective, the Commission put forward concrete policy proposals in its 2008 White Paper. In the ensuing public consultation, civil society and institutional stakeholders such as the European Parliament13 and the European Economic and Social Committee14 largely welcomed these policy measures and called for specific EU legislation on antitrust damages actions15.

3.THE SOLUTIONS IDENTIFIED IN THE PROPOSAL

3.1. SCOPE AND DEFINITIONS

The proposed Directive seeks to improve the conditions under which compensation can be obtained for harm caused by infringements of the EU competition rules, and infringements of national competition law provisions, where the latter are applied by a national competition authority or a national court in the same case in parallel to the EU competition rules.

Article 2 recalls the acquis communautaire on the EU right to full compensation. The proposed Directive thus embraces a compensatory approach: its aim is to allow those who have suffered harm caused by an infringement of the competition rules to obtain compensation for that harm from the undertaking(s) that infringed the law.

Article 2 also recalls the acquis communautaire on standing and on the definition of damage to be compensated. The notion of actual loss referred to in this provision is taken from the case-law of the Court of Justice, and does not exclude any type of damage (material or immaterial) that might have been caused by an infringement of the competition rules.

Article 3 recalls the principles of effectiveness and equivalence which must be complied with by national rules and procedures relating to actions for damages.

3.2. DISCLOSURE OF EVIDENCE

Establishing an infringement of the competition rules, quantifying antitrust damages, and establishing causality between the infringement and the harm suffered typically require a complex factual and economic analysis. Much of the relevant evidence a claimant will need to prove his case is in the possession of the defendant or of third persons and is often not sufficiently known or accessible to the claimants ('information asymmetry'). It is widely recognised that the difficulty a claimant encounters in obtaining all necessary evidence constitutes in many Member States one of the key obstacles to damages actions in competition cases. In so far as the burden of proof falls on the (allegedly) infringing undertaking, it too may need to have access to evidence in the hands of the claimant and/or of a third party. The opportunity to ask the

judge to order disclosure of information is therefore available to both parties to the proceedings.

At the same time, the proposed Directive avoids overly broad and costly disclosure obligations that could create undue burdens for the parties involved and risks of abuses. The Commission has also paid particular attention to ensuring that the proposal is compatible with the different legal orders of the Member States. To this end, the proposal follows the tradition of the great majority of Member States and relies on the central function of the court seized with an action for damages: disclosure of evidence held by the opposing party or a third party can only be ordered by judges and is subject to strict and active judicial control as to its necessity, scope and proportionality.

National courts should have at their disposal effective measures to protect any business secrets or otherwise confidential information disclosed during the proceedings. Furthermore, disclosure should not be allowed where it would be contrary to certain rights and obligations such as the obligation of professional secrecy. Courts must also be able to impose sanctions which are sufficiently deterrent to prevent destruction of relevant evidence or refusal to comply with a disclosure order.

To prevent that the disclosure of evidence jeopardises the public enforcement of the competition rules by a competition authority, the proposed Directive also establishes common EU-wide limits to disclosure of evidence held in the file of a competition authority:

First, it provides for absolute protection for two types of documents which are considered to be crucial for the effectiveness of public enforcement tools. The documents referred to are the leniency corporate statements and settlement submissions. The disclosure of these documents risks seriously affecting the effectiveness of the leniency programme and of settlements procedures. Under the proposed Directive, a national court can never order disclosure of such documents in an action for damages.

Second, it provides for temporary protection for documents that the parties have specifically prepared for the purpose of public enforcement proceedings (e.g. the party's replies to the authority's request for information) or that the competition authority has drawn up in the course of its proceedings (e.g. a statement of objections). Those documents can be disclosed for the purpose of an antitrust damages action only after the competition authority has closed its proceedings.

Apart from limiting the national court's ability to order disclosure, the above protective measures should also come into play if and when the protected documents have been obtained in the context of public enforcement proceedings (e.g. in the exercise of one of the parties' right of defence). Therefore, where one of the parties in the action for damages had obtained those documents from the file of a competition authority, such documents are not admissible as evidence in an action for damages (documents of category (a) above) or are admissible only when the authority has closed its proceedings (documents of category (b) above).

Documents which fall outside the above categories can be disclosed by court order at any moment in time. However, when doing so, national courts should refrain from ordering the disclosure of evidence by reference to information supplied to a competition authority for the purpose of its proceedings. While the investigation is on-going, such disclosure could hinder public enforcement proceedings, since it would reveal what information is in the file of a competition authority and could thus be used to unravel the authority's investigation strategy. However, the selection of pre-existing documents that are submitted to a competition authority for the purposes of the proceedings is in itself relevant, as undertakings are invited to supply targeted evidence in view of their cooperation. The willingness of undertakings to supply such evidence exhaustively or selectively when cooperating with competition authorities may be hindered by disclosure requests that identify a category of documents by reference to their presence in the file of a competition authority rather than their type, nature or object (e.g. requests for all documents in the file of a competition authority or all documents submitted thereto by a party). Therefore, such global disclosure requests for documents should normally be deemed by the court as disproportionate and not complying with the requesting party's duty to specify categories of evidence as precisely and narrowly as possible.

Finally, to prevent documents obtained through access to a competition authority's file becoming an object of trade, only the person who obtained access to the file (or his legal successor in the rights related to the claim) should be able to use those documents as evidence in an action for damages.

To achieve coherence regarding the rules on disclosure and the use of certain documents from the file of a competition authority, it is

necessary to also amend existing rules on the conduct of Commission's proceedings laid down in Commission Regulation 773/200444, notably as regards access to the Commission's file and use of documents obtained therefrom, and the explanatory Notices published by the Commission45. The Commission intends doing so once the present Directive is adopted by the European Parliament and Council.

3.3. EFFECT OF NATIONAL DECISIONS, LIMITATION PERIODS AND JOINT AND SEVERAL LIABILITY

3.3.1. PROBATIVE EFFECT OF NATIONAL DECISIONS

Pursuant to Article 16(1) of Regulation No 1/2003, a Commission decision relating to proceedings under Article 101 or 102 of the Treaty has a probative effect in subsequent actions for damages, as a national court cannot take a decision running counter to such Commission decision46. It is appropriate to give final infringement decisions by national competition authorities (or by a national review court) similar effect. If an infringement
decision has already been taken and has become final, the possibility for the infringing undertaking to re-litigate the same issues in subsequent damages actions would be inefficient, cause legal uncertainty and lead to unnecessary costs for all parties involved and for the judiciary.

The proposed probative effect of final infringement decisions of national competition authorities does not entail any lessening of judicial protection for the undertakings concerned, as infringement decisions by national competition authorities are still subject to judicial review. Moreover, throughout the EU, undertakings enjoy a comparable level of protection of their rights of defence, as enshrined in Article 48(2) of the EU Charter on Fundamental Rights. Finally, the rights and obligations of national courts under Article 267 of the Treaty remain unaffected by this rule.

3.3.2. LIMITATION PERIODS

To give victims of a competition law infringement a reasonable opportunity to bring a damages action, while ensuring an appropriate level of legal certainty for all parties involved, the Commission proposes that the national rules on limitation periods for a damages action:

– allow victims sufficient time (at least five years) to bring an action after they became aware of the infringement, the harm it caused and the identity of the infringer;

– prevent a limitation period from starting to run before the day on which a continuous or repeated infringement ceases; and

– in case a competition authority opens proceedings into a suspected infringement, the limitation period to bring an action for damages relating to such infringement is suspended until at least one year after a decision is final or proceedings are otherwise terminated.

3.3.3. JOINT AND SEVERAL LIABILITY

Where several undertakings infringe the competition rules jointly — typically in the case of a cartel — it is appropriate that they be jointly and severally liable for the entire harm caused by the infringement. While the proposed Directive builds on this general rule, it introduces certain modifications with regard to the liability regime of immunity recipients. The objective of these modifications is to safeguard the attractiveness of the leniency programmes of the Commission and of the NCAs, which are key instruments in detecting cartels and thus of crucial importance for the effective public enforcement of the competition rules.

Indeed, as leniency recipients are less likely to appeal an infringement decision, this decision often becomes final for them earlier than for other members of the same cartel. This may make leniency recipients the primary targets of damages actions. To limit the disadvantageous consequences of such exposure, while not unduly limiting the possibilities for injured parties to obtain full compensation for the loss suffered, it is proposed to limit the immunity recipient's liability, as well as his contribution owed to co-infringers under joint and several liability, to the harm he caused to his own direct or indirect purchasers or, in the case of a buying cartel, his direct or indirect providers. Where a cartel has caused harm only to others than the customers/providers of the infringing undertakings, the immunity recipient would be responsible only for his share of the harm caused by the cartel. How that share is determined (e.g. turnover, market share, role in the cartel, etc.), is left to the discretion of the Member States, as long as the principles of effectiveness and equivalence are respected.

The protection of immunity recipients cannot, however, interfere with the victims' EU right to full compensation. The proposed limitation

on the immunity recipient's liability cannot therefore be absolute: the immunity recipient remains fully liable as a last-resort debtor if the injured parties are unable to obtain full compensation from the other infringers. To guarantee the effet utile of this exception, Member States have to make sure that injured parties can still claim compensation from the immunity recipient at the time they have become aware that they cannot obtain full compensation from the co-cartelists.

3.4. PASSING-ON OF OVERCHARGES (CHAPTER IV: ARTICLES 12-15)

Persons who have suffered harm caused by an infringement of the competition rules are entitled to compensation, regardless of whether they are direct or indirect purchasers. Injured parties are entitled to compensation for actual loss (overcharge harm) and for loss of profit.

When an injured party has reduced his actual loss by passing it on, partly or entirely, to his own purchasers, the loss thus passed on no longer constitutes harm for which the party that passed it on has to be compensated. However, where a loss is passed on, the price increase by the direct purchaser is likely to lead to a reduction in the volume sold. That loss of profit, as well as the actual loss that was not passed on (in the case of partial passing-on) remains antitrust harm for which the injured party can claim compensation.

If the harm is suffered as a result of an infringement relating to a supply to the infringing undertaking, passing-on could also take place in an upwards direction on the supply chain.

This would, for example, be the case when, as a result of a buying cartel, the suppliers of the cartelists charge lower prices, and those suppliers then in turn require lower prices from their own suppliers.

To ensure that only the direct and indirect purchasers that actually suffered overcharge harm can effectively claim compensation, the proposed Directive explicitly recognises the possibility for the infringing undertaking to invoke the passing-on defence.

However, in situations where the overcharge was passed on to natural or legal persons at the next level of the supply chain for whom it is legally impossible to claim compensation, the passing-on defence cannot be invoked. Indirect purchasers may be faced with the legal impossibility of claiming compensation because of national rules on causality (including rules on foreseeability and remoteness). Allowing the

passing-on defence when it is legally impossible for the party to whom the overcharge was allegedly passed on to claim compensation would be unjustified, since it would mean that the infringing undertaking is unduly freed from liability for the harm he caused. The burden of proving the passing-on always lies with the infringing undertaking. In the case of an action for damages brought by an indirect purchaser, this implies a rebuttable presumption pursuant to which, subject tocertain conditions, a passing-on to that indirect purchaser occurred. As regards the quantification of the passing-on, the national court should have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers in the dispute pending before it. Where injured parties from different levels of the supply chain bring separate actions for damages that are related to the same competition law infringement, national courts should take due account, as far as allowed under applicable national or EU law, of parallel or preceding actions (or judgments resulting from such actions) in order to avoid under- and over-compensation of the harm caused by that infringement and to foster consistency between judgments resulting from such linked proceedings. Actions that are pending before the courts of different Member States may be considered as related within the meaning of Article 30 of Regulation No 1215/201247, meaning that they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. As a consequence, any court other than the court first seized may stay its proceedings or decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation of the actions.

Both Regulation No 1215/2012 and this proposed Directive thus seek to encourage consistency between judgments resulting from related actions. To achieve that, the proposed Directive has an even wider scope than Regulation No 1215/2012, as it also covers the situation of subsequent actions for damages relating to the same competition law infringement, brought by injured parties at different levels of the supply chain. These actions can be brought in the same court, in different courts in the same Member State or in different courts of different Member States. In all instances, the proposed Directive encourages the consistency of linked proceedings and judgments.

3.5. QUANTIFICATION OF HARM

Proving and quantifying antitrust harm is generally very fact-intensive and costly, as it may require the application of complex economic models. To assist victims of a cartel in quantifying the harm caused by the competition law infringement, this proposed Directive provides for a rebuttable presumption with regard to the existence of harm resulting from a cartel. Based on the finding that more than 9 out of 10 cartels indeed cause an illegal overcharge48, this alleviates the injured party's difficulties and costs related to proving that the cartel caused higher prices to be charged than if the cartel had not existed.

The infringing undertaking could rebut this presumption and use the evidence at its disposal to prove that the cartel did not cause harm. The burden of proof is thus placed on the party which already has in its possession the necessary evidence to meet this burden of proof. The costs of disclosure, which would most likely be necessary for the injured parties to prove the existence of harm, are thus avoided.

Apart from the above presumption, antitrust harm is quantified on the basis of national rules and procedures. These must, however, be in line with the principles of equivalence and of effectiveness. The latter, in particular, dictates that the burden and the level of proof may not render the injured party's right to damages practically impossible or excessively difficult. In terms of quantifying antitrust harm, where the actual situation needs to be compared with a hypothetical one, this means that judges must be able to estimate the amount of harm. This increases the likelihood that victims will actually obtain an adequate amount of compensation for the harm they have suffered.

To make it easier for national courts to quantify harm, the Commission is also providing nonbinding guidance on this topic in its Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union49. The Communication is accompanied by a Commission Staff Working Paper taking the form of a Practical Guide on quantifying harm in actions for damages based on breaches of EU competition law. This Practical Guide explains the strengths and weaknesses of various methods and techniques available to quantify antitrust harm. It also presents and discusses a range of practical examples, which illustrate the typical effects that infringements of the EU

competition rules tend to have and how the available methods and techniques can be applied in practice.

3.6. CONSENSUAL DISPUTE RESOLUTION (CHAPTER VI: ARTICLES 17-18)

One of the primary objectives of the proposed Directive is to enable victims of a competition law infringement to obtain full compensation for the harm suffered. That objective can be achieved either through a damages action in court or through a consensual out-of-court settlement between the parties. To incentivise parties to settle their dispute consensually, the proposed Directive aims at optimising the balance between out-of-court settlements and actions for damages.

It therefore contains the following provisions: suspension of limitation periods for bringing actions for damages as long as the infringing undertaking and the injured party are engaged in consensual dispute resolution; suspension of pending proceedings for the duration of consensual dispute resolution; reduction of the settling injured party's claim by the settling infringer's share of harm. For the remainder of the claim, the settling infringer could only be required to pay damages if the non-settling co-infringers were unable to fully compensate the injured party; and damages paid through consensual settlements to be taken into account when determining the contribution that a settling infringer needs to pay following a subsequent order to pay damages. In this context, 'contribution' refers to the situation where the settling infringer was not a defendant in the action for damages, but is asked by co-infringers who were ordered to pay damages to contribute under the rules of joint and several liability.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THE CONTRADICTIONS OF THE JUSTICE. THE METAPHYSICAL PRINCIPLES OF LAW

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Abstract:

This essay represents an attempt to highlight, from a philosophical perspective, the most significant contradictions that can affect the justice throughout a period of social crisis. The object of our analysis consists of the contradictions between: the law and justice; the justice and society and the act to fulfill the justice and what we have just called "the fall in exteriority" of justice. Within this context we refer to some aspects that characterize the person and personality of the judge. This essay is a pleading to refer to the principles, in the work for the law's creation and applying. Starting with the difference between "given" and 'constructed" we propose the distinction between the "metaphysical principles" outside the law, which by their contents have philosophical significances, and the "constructed principles" elaborated inside the law. We emphasize the obligation of the law maker, but also of the expert to refer to the principles in the work of legislation, interpretation and applying of the law. Arguments are brought for the updating, in certain limits, the justice – naturalistic concepts in the law.

Key words *Normative order / law and justice / the contradictions of the justice/ the fall in exteriority/ metaphysical principles and constructed principles.*

I INTRODUCTION

Justice should be a harmonious system in order to be in its truth and reality. "The truth is real only as a system"[2] said Hegel and by confirming this statement, justice is in its truth only if it satisfies this condition. The system means coherent order, functionality, suitability to the real and its purpose, but mainly unity in its diversion, a concrete universal in which each part to express the whole and this one to legitimize through the created order, the component parts. The system,

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2 Hegel , Fenomenologia spiritului , "Phenomenology of the Spirit" Academy Publishing House , Bucharest ,1965,p.18

including the justice one manifests itself dialectically, transforms itself, become a historical being, without losing the harmony and coherence. The thinker of Jena pointed out that "Truth is the whole. The whole is only the essence that fully accomplishes itself through its development"[1]. Like any other system, justice has its components or subsystems: ideal, value, normative, jurisprudential subsystem (the act of justice), institutional and perhaps the most important component, man as a producer, but also as a beneficiary of the act of justice. The truth of the judiciary system involves the making in its wholeness but also by each component of own existential purpose, which is at the same time its being, namely the *righteousness* as a values ideal but transposed into reality's concrete.

To the extent that the functions, we may say, the mission of justice, fulfill and express at the same time the functional harmony of a system, which at any time attempts the adequacy to its purpose as a value, the fulfilling of justice, justice finds itself in its truth, otherwise said, it gives its own legitimacy without waiting for it to be given, in forms sometimes inadequate, from outside.

The contradictions and in general any malfunction in the coherence of the system or inadequacy to the purpose are maladies, deficiencies of the justice, that departs it from its role and truth. When the maladies of the justice become chronical but with manifestations which lead towards aggravation, one may speak about a crisis of the system of justice. Our justice is obviously in such a chronical crisis with tendencies towards aggravation. The main cause is the ailing contradictions of the system. In contrast to the beneficial contradictions that give the becoming, the unhealthy ones tend to depart more and more the justice from its reality and truth.

II PAPER CONTENT

In the followings we try to emphasize the sickly contradictions of the justice system specific to the crisis in which this is located:

1. The fundamental contradiction of the justice, expression of the profound crisis in which this is between law and justice, and on the other side the constructive order of the norms and jurisprudence. The *law*, the justice do not represent the purposes and truth of justice, substituting these values, the law, norms and jurisprudence, that will find

[1] Hegel, quoted works. p.18

legitimacy in itself, in the abstract forms, the ephemeral realities, interests and precarious purposes but not in the ideal and reality of justice. Of course even when a judicial system is harmonious functional and does not have this malady, there isn't always a formal overlapping between law and justice. In the healthy justice system, between the justice and law there is a unilateral contradiction in the meaning that the law may contradict the justice, but this one does not contradict the law. The crisis of the judiciary system expresses sometimes in aggravated forms the inadequacy in absolute terms between the justice and law.

The above mentioned contradiction unleashed the "will of power" of the governors to impose their own order and legitimacy to justice by norming and legislating in the meaningless and illusory attempt to create an "order of the norms" that will replace the being and truth of justice: *the righteousness*. Reality shows that this false order proves itself inconsistent, contradictory and mostly inadequate to the realities it is destined for. The mere accumulation of rules, laws even codified, does not lead to the settlement into their being and purpose of the man, the "social" and justice if the norms do not express as a phenomenon the essence: the superior order of the values of justice, equity, truth, proportionality, tolerance. Jurisprudence is manifested the same in the exclusive concern to correspond to itself or to the norms, to be sufficient in itself and not be related to the higher order of the values named above. The act of justice accomplished by the magistrate obstinately seeks for exclusive legitimation only by the rules of law and not through the value order that should be its own.

This ailing contradiction is confirmed, but not made aware by the judicial technique and formalism. A judgement is not pronounced in the name of the justice but in the "name of the law". That is in the name of an order constructed by a temporary political will for the fulfilling of some temporary interests steeped into their particularity and often contrary to the common good and not, as it should naturally be done, in the name of the order *given* and not *constructed* of the values outside the justice but which represent its truth and purpose.

The doctrine asserts that the judge pronouncing a decision "is saying the law". It would be good to be so. In fact, most of times, the magistrate by the judgment pronounced "is saying the law" – when he is not doing it – trying to include his sentence in the order of law, which is not necessarily the order of justice, the judge if having the conscience of

achieving an act of justice, respecting his moral and professional statute, does not contradict the law, yet there are situations when he should and could do so in the name of a superior order formed out of the values subsumed to the justice concept . For such an act, that is not only an act of justice but also an act of righteousness, courage is needed. The magistrate must assume the risk to exceed the constructed imperfect order of the law in order to legitimate the act of justice achieved in the superior values reality of the metaphysical principles of law. Such an exiting from the normality of the inadequate forms of the concrete reality is risky for the judge, because the order constructed of the law can impose its coercive force. The contemporary justice is dominated by the order of normativity, of forms that are not abstracted from reality but ignores it.

The sickly rupture between the law and justice (the law as expression of the will of the legislator, of the temporary power, the only one seeking such a separation) should be reflected in the legal education plan. For a correct suitability to the crisis of justice emphasized by this contradiction, but also in order to reflect the order of law and not of righteousness, taught to the students, the faculties in speciality shouldn't be called "Law" Faculties but "Faculties of Laws", as it once was.

2. The contradiction between the justice and "world', throughout "world" we understand both the human in his individuality as the society as a whole. It seems it is increasingly present in the actuality of justice and placed in a place of honour the dictum *„ Fiat justiţia et pereat mundus*." It is not a simple dictum but a tragic reality, a disease of the justice consisting in the inauthentic legitimizing of the separation of justice from the world and man. Justice cannot live, triumph, *be* if the world dies. Bteween justice and the world there is a unilateral contradiction: justice can contradict the world, but the world cannot contradict the justice, because the world is the medium, the element that justifies the manifestations of justice. The righteousness through justice involves he man, both as a performer of the act of justice and as a beneficiary.

In its contemporary manifestations, the justice in crisis is increasingly making the dictum „Fiat justiţia et pereat mundus", tring to become a closed system, existing for itself and in some cases, even worse, directed against human, the only beneficiary of the act of justice, denying its own reason for being. The crisis of justice, by this disease, is

also found in the meaningless rethoric of proclamation of the "abstract man" through rights equally abstract with the intention to give teleological form to its manifestations. But the true existential meaning of justice and its finality at the same time is the man considered in his human dignity. The rhetoric specific to the separation between the justice and world in favour of the abstract man, impersonal has obvious manifestations. Before the court, in a judgment, man is no longer in the concrete of his dignity as a person, but he becomes the "named" at most identified through a locus standing equally impersonal.

The existential rupture between the justice and world, further more the attempt of justice to deny its own medium that justifies its own reason to be, cannot confirm the natural dialectical order that should characterize a good placing of justice in its truth, but may have at the end of the road the nothingness, justice as an empty form, void of the fullness which only the "just" is offering when existing in relation to human's dignity.

3. The contradiction between the justice understood and even in the acception of the normative order of law, and on the other side, the act of justice and the magistrate performing it. In philosophy one speaks about an autonomous world of the values existing per se and for itself independent even to man. As stated, justice is undeniable a reality and a normative institutional system but also a system of values. Unlike other systems of moral, religious values and in general cultural ones, the essence of justice consists also in its achieving and fulfilling through the act of justice of the magistrate without which the justice system does not close. One can speak at most about the autonomy of the right understood as an order of values, but not about the autonomy of justice outside the act by which it gets concretized. Unlike other systems of values or by other nature, justice is a clear example of a universal concrete fulfilled through the act of justice whose expression is firstly the decision of the judge.

Therefore the act of justice may confirm or refute the normative order of justice and equally as much the right as a system of values. It is a situation similar with the relation between the experiment and the scientific theory "the first being able to confirm or refure the theory, according to the case. Only that in the sphere of scientific theories an experiment may invalidate a theory legitimizing a new, superior order, that will include the old one such as it once happened with Einstein's

relativity theory. In contrast, the act of justice, if contrary to the normative order or the value order of law is only but a mere judiciary error, willfully, unintentionally or accidental of the magistrate which denies even the justice itself and implicitly the right abolishing thus the order of juridical and the lawful order having as finality not another order but the disorder, the chaos. How many judicial errors are now known or unknown.

One needs to emphasize the fact that the act of justice cannot dissociate the person of the one performing it from the magistrate. A judgment even anonymized is not anonymous: the act of justice contains in itself the person but also the personality of the magistrate. We can say that not only the magistrate is the author of the act of justice, but also the act of justice "makes" the magistrate. When the judiciary errors become obvious – the cause being the abandonment by the magistrate of the moral, social, professional statute, he being at peace with the disorder that is specific to the existential non-values – it is customary to say that these are isolated cases that do not characterize the justice system and lawful order. This is not true. Justice as a system of values needs to be confirmed in its own being, coming to truth by each act of justice, by each court judgment. A single judiciary error, a single corrupted or immoral magistrate "denies it by sending the judiciary and lawful order into nothingness, into non-existence. The contemporary reality still provides too many examples for such situations so that you wonder if there's anything left into the value being of justice. Here is an acute manifestation and not only a chronical one of crisis of justice.

Justice located into its being and truth imposes the magistrate, as a fact of conscience, the object of judgment: the deeds of the man and not the man, meaning the phenomenal that is specific to the humanity of man. Being aware at the principles of law and implicitly the justice as a value specific to an order higher than the normative one, the judge, by fulfilling the act of justice, must although to teleologically relate to the concrete man even if he will rule only over the deeds (actions and omissions) thereof. Unlike this, in case of a sickly justice, the judge imagines that he has the power to judge the man.

4. The falling in exteriority. Of course the justice made by man and for man is profane, to the "measures of man", but the sacred values are part of his being.

Being a component of the human temporary reality, the justice understood in its value dimension involves the relationship between transcendent and transcendental to which Kant and Heidegger referred to. As a reality of man and society, justice should not be transcendent, meaning "beyond" the man and the world and neither beyond his own reason for being. If this happens we are in the presence of a sickly manifestation specific to the crisis of justice, firstly by its separation from the "world" as mentioned above. Justice must be and remain in its *transcendental* being respectively "on this side" of the existential precariousnesses of this world and outside the conflicts and political interests of all kinds, without implications in the struggle for power or power games. The transcendental of justice is this one's being in its values dimension, is the right as justice manifested phenomenally through the act of justice.

The contemporary crisis of justice means falling from the immutability of the own existential and values transcendental into the social and political exteriority with the consequence of diminishing or even losing the very being of the "right as value". Unfortunately the examples are too numerous: conflicts and contradictions inside the institutional system of justice; transformation of justice into a tool for the political actors or of another kind; involving into the struggle for temporary power or into the power games both of the whole justice system and of the magistrates; shifting from the publicizing of the acts of justice, to the media justice, done by the prime mass media; magistrates' abandonment of the moral and professional statute for the illusory gain conferred by the involvement into the precariousnesses, sometimes miseries of the world; arrogarnt and aggressive rhetoric without substance by random using, and mainly for the satisfaction of some selfish interests many times immoral, in the sacred name of justice and law: "in the name of law", "in the name of the right" which become simple formulas for legitimizing of what is lacking legitimacy. The falling into exteriority is a painfull manifestation of the crisis of justice which is sensed not so much by the judiciary system itself but mainly by the system's beneficiaries: the man, people and society.

We discussed about the crisis of justice. There is a justice of the crisis consisting in the illusion of the system to exist through the sickly contradictions presented above in a world which is not in the realization of the "progress in the conscience of liberty" such as Hegel believed, but

mainly in a process of abolition, abandonment of the values cultural being and its replacing through civilization elements, excessive technicization, in a single word through the domination of the forms of civilization over the culture and not vice versa like normal. In social and political plan the world's *dissolution* process is manifested through *mass democracy* and the *democratic individualism* with the consequence of ignoring the man as person and personality, man becoming an individual in a political and economical normative, social order in which he does not confirm his *self* as he has become a mere number taken over by the rhetoric of forms and void ideals.

The crisis of justice cannot have a being as it is outside truth and its purpose like the society of crisis to which is trying to adapt itself. There can be no proper relation between the justice that is in serious sickly contradictions and a society that is in crisis with the purpose to legitimize the existence of a justice of crisis. The justice of crisis can however be a reality but devoid of truth, of being, because not all that exists it really *is*.

It is spoken, somhow with bewilderment about the lonliness and intransigence of the judge. The judge, the magistrate in general, cannot be lonely, he cannot isolate himself, cannot alienate himself. But he can be *a secluded one*. Living in community he must be in communion with the others and at the same time he can take in his being and mainly in his conscience as much of the feelings, values, aspirations of others, of course if all these bear the mark of the being, they are beneficial and not ailing. The common good, but only as a Christian value, must become the own good. The seclusion, the withdrawal in oneself does not imply abandoning the social environment on the contrary it implies its regaining and evaluation by one's own self: "is something deeper in us than ourselves" said Happy Augustin. Only by seclusion in own self, the judge may understand man, he can assimilate him, he may understand a few about the world's self. Seclusion but not loneliness: to be with you in deeper own self, but in communion with yours' another one.

The judge must relate to the concrete man, not to the abstract one, the latter as Goethe understood the sum of all people. He must bring closer to his being Eminescu's words" "in every man a world starts its existence", discovering and understanding this world in every man that comes before the judgment seat. In his solitude the joy of the judge must be that to which Kant is referring to:"two things fill the soul with ever

newer and growing admiration and veneration: the starry sky above me and the moral law inside me".

Of course, the judge is looking down the ground or (at the earth), such as Aristotel's hand is pointing to in Rafael's painting. Only thus can he take the real, the concrete, the existing, so that together with Plato, to rise up to the idea. The judge is looking down the earth naturally in order to feel, to know not only the rational in the real, but also the real as a rational and to be aware of piety's meanings."Taller is the man kneeling than standing" – pointed out father Arsenie Boca.

Intransigence can not be in the nature of a judge's being, because it implies the impersonal authority, manifested in the name of the law and justice, but in fact without man and without justice. Intransigence means being placed in the exclusive plan of the formal logic with its categoric distinction between the true and false, between "yes' and "no". Yet, how many senses, how much richness of meanings life is offering between these extreme values to which judicial needs be identified.

Not the intransigence, but piety, mercy should characterize the judge because only thus can he see and understand something of every person's humanity. Noica said:"one needs to have mercy for the insignificant ones to see their meaningness"[1] . The piety of the judge is the piety of justice. How well the being and meaning of justice was described on 1919 by the great legal expert Matei Cantacuzino, and how far we depart today from the truth of justice to immerse ourselves into the unauthentic of the "other justice", of the crisis: "In a small church in Rome I saw the painting with a woman holding the black earth into her hands. She warmly embraced it; her expression showed she was a mother, with her eyes turned up to the sky she seemed she was trying to pull the light out of the sky's blue. I was expecting to have written underneath: Charity or Justice or Philanthropy. It was not. It was *Justice*! A justice unblindfolded and understaning all pains, and not the other justice, blind with the sword in one hand and holding a scale with the other hand, so little, that it couldn't contain any of our miseries.

[1] Constantin Noica , Devenirea întru ființă. "Becoming into being" Humanitas Publishing House ,Bucharest,1998,p 257

III CONCLUSIONS

An argument for which the philosophy of law needs to be a reality present not only in the theoretical sphere but also in the practical activity for normative acts drafting or justice accomplishing, is represented by the existence of the general principles and branches of law, some of them being consecrated also in the Constitution.

The principles of law, by their nature, generality and profoundness, are themes for reflection firstly for law's philosophy, only after their construction in the sphere of law methaphysics, these principles can be transposed to the general theory of law, can be consecrated normatively and applied to jurisprudence. In addition, there is a dialectical circle because the "understandings" of the principles of law, after the normative consecration and the jurisprudential drafting, are subject to be elucidated also in the sphere of the philosophy of law. Such a finding however imposes the distinction between what we may call: *constructed principles of law* and on the other side *the metaphysical principles of law*.The distinction which we propose has as philosophical grounds the above shown difference between 'constructed" and "given" in the law.

The constructed principles of law are, by their nature, juridical rules of maximum generality, elaborated by the juridical doctrine by the law maker, in all situations consecrated explicitly by the norms of law. These principles can establish the internal structure of a group of juridical relationships, of a branch or even of the unitary system of law. The following features can be identified: 1) are being elaborated inside law, being as a rule, the expression of the manifestation of will of the law maker, consecrated in the norms of law; 2) are always explicitly expressed by the juridical norms; 3) the work of interpretation and enacting of law is able to recognize the meanings and determinations of the law's constructed principles which, obviously, cannot exceed their conceptual limits established by the juridical norm. In this category we find principles such as: publicity of the court's hearing, the adversarial principle, law supremacy and Constitution, the principle of non-retroactivity of law, etc.

Consequenlty, the law's constructed principles have, by their nature, first a juridical connotation and only in subsidiary, a metaphysical one. Being the result of an elaboration inside the law, the eventual significances and metaphysical meanings are to be, after their later

consecration, established by the metaphysic of law, at the same time, being norms of law, have a mandatory character and produce juridical effects like any other normative regulation. Is necessary to mention that the juridical norms which consecrate such principles are superior as a juridical force in relation to the usual regulations of law, because they aim, usually, the social relations considered to be essential first in the observance of the fundamental rights and of the legitimate interests recognized to the law subjects, but also for the stability and the equitable, predictable and transparent carry on of juridical procedures.

In case of a such category of principles, the above named dialectical circle has the following look: 1) the constructed principles are normatively drafted and consecrated by the law maker; 2) their interpretation is done in the work of law's enacting; 3) the significances of values of such principles are later being expressed in the sphere of metaphysics of law; 4) the metaphysical "meanings" can establish the theoretical base necessary to broaden the connotation and denotation of the principles or normative drafting of several such newer principles.

The number of the constructed principles of law can be determined to a certain moment of the juridical reality, but there is no preconstituted limit for them. For instance, we mention the "principle of subsidiarity", a construction in the European Union law, assumed in the legislation of several European states, included in Romania.

The metaphysical principles of law can be considered as a 'given" in relation to the juridical reality and by their nature, they are outside law. At their origin they have no juridical, normative, respectively jurisprudential elaboration. They are a transcendental 'given" and not a transcendent of the law, consequently, are not "beyond' the sphere of law, but are something else in the juridical system. In other words, they represent the law's essence of values, without which this constructed reality cannot have an ontological dimension.

Not being constructed, but representing a transcendental, metaphysical "given" of law, it is not necessary to be expressed explicitly by the juridical norms. The metaphysical principles may have also an implicit existence, discovered or valued throughout the work for law's interpretation. As implicit "given" and at the same time as transcendental substance of law these principles must eventually meet in the end in the contents of any juridical norm and in every document or manifestation that represents, as case is, the interpretation or enacting of the juridical

norm. It should be emphasized that the existence of metaphysical principles substantiates also the teleological nature of law, because every manifestation in the sphere of juridical, in order to be legitimate, must be suited to such principles.

In the juridical literature, such principles, without being called metaphysical, are identified by their generality and that's why they were called "general principles of law". We prefer to emphasize their metaphysical, value and transcendental dimension, which we consider metaphysical principles of juridical reality. As a transcendental 'given" and not a constructed one of the law, the principles in question are permanent, limited, but with determinants and meanings that can be diversified within the dialectical circle that contains them.

In our view, the metaphysical principles of law are: *principle of fairness; principle of truth; principle of equity and justice; principle of proportionality; principle of liberty.* In a future study, we will explain extensively the considerents that entitle us to identify the above named principles for having a metaphysical and a transcendental value in respect to the juridical realities.

The metaphysical dimension of such principles is undeniable, yet still remains to argument the normative dimension. An elaborate analysis of this problem is outside the objective of this study, which is an extensive expose about the philosophical dimension of the pruinciples of law. The contemporary ontology does not consider the reality by referral to classical concept, in substance or matter. In his work *„Substamzbegriff und Funktionsbegriff"* (1910) Ernest Cassirer opposes the modern concept of function to the ancient one of substance. Not what is the "thing" or actual reality, but their way of being, their inmost make, the structure concern the modern ones. Ahead of knowledge there are no real objects, but only "relations" and "functions". Somehow, for the scientifical knowledge, but not for the ontology, the things disappear and make space for the relations and functions. Such an approach is operational cognitive for the material reality, not for the ideal reality, that 'world of ideas" which Platon was talking about.[1]

The normative dimension of juridical reality seems to correspond very well to the observation made by Ernest Cassirer. What else is the juridical reality if not a set of social relations and functions that are

[1] For more details see also , Constantin Noica , *Devenirea întru fiinţă*, *Becoming into Being* Publishing House Humanitas,Bucureşti,1998,p. 332-334

transposed in the new ontological dimension of "juridical relations" by applying the law norms. The principles constructed applied to a sphere of social relations by means of juridical norms transforms them into juridical relations, so these principles correspond to a reality of judicial, understood as the relational and functional structure.

There is an order of reality more profound than the relations and functions. Constantin Noica said that we have to name an "element" in this order of reality, in which the things are accomplished, which make them *be*. Between the concept of substance and the one of function or relation a new concept is being imposed, that will maintain the substantiality without being dissolved in functioning, to manifest the functionality[1].

Assuming the great Romanian philosopher idea, one can assert that the metaphysical principles of law evoke not only the juridical relationships or functions, but the "valoric elements" of juridical reality, without which it would not exist.

The metaphysical principles of law have a normative value, even if not explicitly expressed by law norms. Furthermore, such as results from jurisprudence interpretations, they can even have a supernormative significance and thus, can legitimate the justnaturalist conceptions in law. These conceptions and the superjuridicality doctrine asserted by Francaise Geny, Leon Duguit and Maurice Duverger, consider that justice, the constitutional justice, in particular, must relate to rules and superconstitutional principles. In our view, such standards are expressed precisely by the metaphysical principles which we referred to. The juristprudential conceptions were applied by some constitutional courts. It is famous on this meaning, the decision on January 16th 1957 of the Federal Constitutional Court of Germany with regard to the liberty to leave the federal territory. The Court declares: "The laws are not constitutional unless they were not enacted with the observance of the norms foreseen Their substance must be in agreement with the supreme values established by the Consitution, but they need to be in conformity with the *unwritten elementary principles* (s.n.) and with the fundamental principles of the fundamental Law, mainly with the principles of lawfull state and the social state"[2].

[1] Constantin Noica , *quoted works. p. 327-367*
[2] For details see ,Andreescu Marius , *quoted works, p. 34-38*

One last thing we wish to emphasize refers to the role of the judge in applying the principles constructed especially the metaphysical principles of law. We consider that the fundamental rule is that of interpretation and implicitly of enacting any juridical regulation within the spirit and with the observance of the valoric contents of the constructed and metaphysical principles of law. Another rule refers to the situation in which there is an inconsistency between the common juridical regulations and on the other side the constructed principles and the metaphysical ones of the law. In such a situation we consider, in the light of the jurisprudence of the German constitutional court, that the metaphysical principles need to be applied with priority, even at the expense of a concrete norm. In this manner, the judge respects the character of being of the juridical system, not only the functions or juridical relations.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

THEORETICAL AND JURISPRUDENTIAL ASPECTS CONCERNING THE CONSTITUTIONALITY OF THE COURT APPEAL ON POINTS OF LAW

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Abstract:

The institution of the appeal on points of law has the role to ensure a unitary law interpretation and enforcing by the law courts. The legal nature of this procedure is determined not only by the civil and criminal normative dispositions that regulate it. In this study we bring arguments according to which this institution is of a constitutional nature, because according to the Constitution, the High Court of Cassation and Justice has the attribution to ensure the unitary interpretation of the law by the law courts. Thus are analyzed the constitutional nature consequences of this institution, the limits of compulsoriness of law interpretations given by the Supreme Court through the decisions ruled on this procedure, and also the relationship between the decisions of the Constitutional Court, respectively the decisions of the High Court of Cassation and Justice given for resolving the appeals on points of law. The recent jurisprudence of the Constitutional Court reveals new aspects regarding the possibility to verify the constitutionality of the decisions given in this matter.

Key Words: *Appeal on points of law/ the compulsoriness of the law interpretations for the law courts/ / The control of constitutionality of the decisions given for resolving the appeals on points of law/ Supremacy of Constitution.*

I INTRODUCTION

Such as its name is showing and such as results from the legal dispositions in the matter (Article 514-518 Civil Procedure Code and Article 471 - 474 of the new Criminal Procedure Code, respectively Article 414^2 -414^5 in the Criminal Procedure Code in force), the appeal on points of law is no remedy way with effects on the situation between the parties in the trial, but to ensure the unitary interpretation and application of the substantial and procedural laws throughout the entire country. Such a legal institution would not be required if all appeals shall be heard by the High Court of Cassation and Justice. In such a case the

Supreme Court may achieve the unitary interpretation and application of the law. The normative regulations in force however establish the competence of the law courts and appeal courts in solving the appeal, which creates the possibility to have a different interpretation, even a wrong one of the laws. Therefore the legal institution of the appeal on points of law has the purpose to ensure in a unitary mode across the entire country, the observance of the will of legislator expressed within the law spirit and letter.

We consider that the legal nature of the appeal on points of law arises only from the civil and criminal procedural provisions which consecrate it.

In compliance with the provisions of Article 126 paragraph (3) of the Constitution "The High Court of Cassation and Justice ensures the unitary interpretation and application of the law by other law courts, according to its competencies". The decisions given in the proceeding of appeal on points of law represents the main means through which the Supreme Court fulfills the constitutional duty to ensure a unitary interpretation and application of the law. That's why, the appeal on points of law is not only a civil and criminal procedural institution, but at the same time, has its legal basis in the constitutional norm named above.

The constitutional nature of the appeal on points of law has two main consequences. The first refers to the obligation of the legislator to regulate in the civil and criminal proceeding, the juridical instrument through which the High Court of Cassation and Justice may accomplish its constitutional prerogative to ensure the unitary interpretation and application of the laws by all law courts. The legislator has at his disposition two possibilities: the first may be to regulate the exclusive competence of the Supreme Court in resolving all appeals and the second, the procedure this is currently regulated, of the appeal on points of law. The constitutional provision contained by Article 126 paragraph 3 of the Constitution represents a guarantee of the fundamental law. Given the principle of conformity of the whole law with the constitutional norms, the legislator cannot regulate the material competence of the Supreme Court without having instituted also the procedural instrument through which this will ensure the unitary interpretation and application of the laws by all law courts.

The second consequence refers to the necessity of compliance of the decisions ruled in this proceeding with the constitutional norms. The

decisions of the High Court of Cassation and Justice shall be limited strictly to the interpretation of the law. The Supreme Court may complete, amend or repeal the regulations contained by the law. Otherwise it will be violated the principle of separation and balance of powers in the state, explicitly consecrated by the provisions of Article 1 paragraph 4 of the Constitution, because the law court exceeded the limits of judicial powers and would manifest itself as a legislative authority. We will refer to this consequence in chapter II of the present study.

II PAPER CONTENT

One of the most important aspects of the legal regimes that is specific to the appeal on points of law is the compulsoriness of law interpretation by the courts.

The constitutionality of the regulations that consecrates in the civil and criminal matter the obligation of the decisions given in the proceeding for appeal on points of law was contested both in the doctrine[1] as throughout the exceptions of non-constitutionality solved by the Constitutional Court, in relation to the provisions of Article 124 paragraph (3) of the Constitution, which establishes the principle of judge submission only to the law. The Constitutional Court in its jurisprudence has constantly stated that the statutory provisions that foresee the courts' obligation of the "law interpretations" given by the Supreme Court through the decisions rendered points of law are constitutional[2]. Our Constitutional Court has held that: "The principle of submission to the law, according to Article 123 paragraph (2) of the Constitution (presently Article 124 paragraph (3) n.m.) has not and cannot have the significance of a different applying, or even in contradictory of the same legal provision based solely on the subjectivity of the interpretation belonging

[1]Deleanu Ion, *Tratat de Procedură Civilă*, C.H. Beck Publ. House, Bucureşti, 2007,p.349; Ion Deleanu, Sergiu Deleanu, *Jurisprudenţa şi reverimentul jurisprudenţial*, Universul Juridic Publishing House, Bucureşti, 2013, pp. 93-97.

[2] See also: the Decision no 1014 /2007 published in the Official Gazette, part I, no. 816 November 29th no. 2007, Decision no. 928/2008 published in the Official Gazette, part I, no. 706 on October 17th 2008, the Decision no. 528 /1997 published in the Official Gazette, part I, no 90 on February 26th 1998, the decision no. 221/2010 published in the Official Gazette, part I, no 270 on April 26th 2010.

to different judges"[1]. However it has been noted that: "The ensuring of the unitary character of the practice of law is imposed also by the constitutional principle of equality of the citizens before the law and public authorities, therefore including before the legal authorities, because this principle would be otherwise severely affected, if in the application of one and the same law, the solution rendered by the law courts would be different or even in contradictory[2]. A topic of interest for our research study and for the substantiation of the constitutional court according to which: "The establishing of the compulsoriness character of the interpretations of the law issues judged by means of appeal on points of law, is only giving efficiency to the High Court of Cassation and Justice, contributing thus to the lawful state's consolidation [3].

In the separate opinion formulated by the Decision no. 221/2010 it is claimed that the normative provisions establishing the compulsoriness for the courts of the decisions rendered on points of law, are contrary to the provisions of Article 124 paragraph (3) of the Constitution. The author of the separate opinion emphasizes: "In this meaning we believe that providing a unitary interpretation has the significance of taking the needed actions for the unitary understanding, interpretation of the norm by each judge, of its letter and spirit, and not of offering/ imposing a certain solution, to the interpretation in a certain sense. The judge cannot be brought in the situation of an obedient executor, in relation to the interpretations given in resolving the appeal on points of law".[4]

From the analysis of the jurisprudence of the Constitutional Court, of the doctrine in the matter, but also of the regulations in the fundamental law, one can conclude that no constitutional text foresees clearly the compulsoriness of the decisions rendered by the High Court of Cassation and Justice, on points of law. Therefore, the compulsory character of such decisions for the law courts is not of a constitutional nature. The compulsoriness is conferred exclusively by the special regulations, to which we referred to in the Civil Procedure Code and, respectively the Criminal Procedure Code. We appreciate that it is necessary to achieve the distinction between the constitutional nature of

[1] Quoted works Decision no 528/1997
[2] Quoted works Decision no 907/2007
[3] Quoted works Decision no. 221/2010
[4] Tudorel Toader, dissenting opinion to Decision no 221/2010

the appeal on points of law, and on the other side, the constitutional character of the compulsoriness of the decisions ruled for the law courts.

The binding character of the "interpretation of law" given by the High Court of Cassation and Justice cannot be considered as an equivalent with the compulsoriness of the law norm. Therefore, the judge, in the work of interpretation and application of law, will have into consideration, firstly, the regulations with normative character, including the constitutional ones and, in subsidiary, the interpretation and the "clarifications of law" conferred through the procedural decisions given in the procedure of appeal on points of law. We appreciate that the procedural provisions that establish the compulsoriness character of such decisions are constitutional related with the provisions of Article 124 paragraph (3) of the Constitution, only in so far as it is interpreted that such an obligation does not prejudice the constitutional principle according to which the judges must grant priority and give efficiency to the law norms applicable in solving the cause and only in subsidiary, to the decisions rendered in this procedure.

At this time a scientific approach of the issue mentioned above would appear useless, having into consideration that the legislator eliminated, at least for the judges, any possibility to reflect upon this topic, because through the Law no. 24/2012 were brought important amendments in the sphere of disciplinary judicial misbehaviors of the judges, so that Article 99 letter **s** of Law 301/2004, in the form acquired throughout the normative act named above, establishes as a disciplinary misconduct "the non complying with the decisions given by the High Court of Cassation and Justice in resolving the appeal on points of law". It is regrettable such a brutal intervention of the legislator which, in our opinion, affects not only the scientific approach upon such a delicate matter, but it limits unconstitutionally the independence of the judges. The above named law test raises a concrete practical problem for the judges, namely how will the law court proceed in situation there are contradictions between a decision of the Constitutional Court and a decision of the High Court of Cassation and Justice given in resolving the appeal on points of law, both applicable in a case deduced to the judgment?

In the literature in specialty this problem was indicated previously to amending and completing of Law no. 303/2004 by Law no. 24/2011, having into consideration the concrete situation when the law courts

faced such contradictions between the decisions of the Constitutional Courts and the decisions of the High Court of Cassation and Justice given in the procedure of appeal on points of law, both categories of decisions having as matter the same text of law applicable in a case deduced to the judgment1. The author of the study which we are referring to concludes in the sense that: "Therefore in the given situation, the law courts, ascertaining contradictions between the decision of the Constitutional Court and the one of the united sections of the High Court of Cassation and Justice, must comply to those stated by the Constitutional Court and remove those decisions decided by the United Sections of the High Court of Cassation and Justice"[2]. The solution we consider as logic and justified as a judicial reasoning but presently inapplicable, having into consideration the law text that sanctions as disciplinary misconduct both equally the non-abiding of the decisions of the High Court of Cassation and Justice regarding the compulsory interpretations given for resolving some law issues, as the decisions of the Constitutional Court. It is obvious that the judge is facing a insoluble dilemma and he is subjected to a constraint that is severely prejudicing his independence, because no matter what solution will be rendered, he will be liable for disciplinary responsibility for failure, as the case may be, either of the decision of the Constitutional Court or of the decision of the High Court of Cassation and Justice. It should be noted that no legal provision in the procedure for the judicial control is sanctioning the non-abiding of the compulsoriness of the decisions of the Supreme Court that were given in the appeal on points of law.

In the civil matter, there are no legal norms sanctioning the nonobservance of the decisions of the Supreme Court given on points of law. By way of interpretation it may be inferred that such a sanction in the regulations of Article 488 paragraph (1) point 8 Civil Procedure Code, establishing as cassation grounds of the appealing decision, the violation or wrong application of the substantive law norms. Nevertheless, such an interpretation of the above named law texts is debatable, as such as emphasized in the literature in specialty, the very

[1] For development see Cristina Ştefăniţă, Manner to proceed of the law courts that face a contradiction between the decision of the Constitutional Courts and a judgment ruled by the High Court of Cassation and Justice, in the United sections, for the resolving of an appeal on points of law, in "the Law" no. 4/2010, pp. 119-135.
[2] Cristina Ştefăniţă, quoted works p.125.

interpretation itself of the Supreme Court will be implicitly brought into question, eventually it could be invoked only as argument in supporting the "legal" grounds of cassation. In any case, it by itself does not constitute such grounds[1].

In the Criminal Proceeding Code the cases to which cassation appeal can be done are regulated by the provisions of Article 438. In our opinion neither of these cases can be interpreted in the meaning that it is sanctioning the nonobservance of the compulsoriness of decisions given by the High Court of Cassation and Justice, through which was solved an appeal on points of law. In the actual criminal trial regulation, only by the interpretation way is possible to reach to the conclusion of sanctioning by the appeal court of non-abiding such a decision of the High Court of Cassation and Justice. Having into consideration the provisions of Article 385^9 paragraph (1) point 17^1 Criminal Procedure Code according to which the decisions are subject to cassation, if they are contrary to the law or when through the decision it was done a wrong application of the law. It worth mentioning that such dispositions were abrogated by Article 1 point 185 of the Law no. 356/2006, but by Decision no. 783 / 2009 the Constitutional Court declared such regulations as unconstitutional. For our research topic the arguments of the Constitutional Court are of interest, according to which, Article 146 letter d of the Constitution does not exempt from the constitutionality control the abrogation legal provisions and, in case it is ascertained their unconstitutionality, they cease their legal effects within the conditions foreseen by Article 147 paragraph 1 of the Constitution, and the legal provisions that constituted the substance of abrogation, keep producing effects.

Another aspect we wish to emphasize is that the Supreme Court has no legitimacy in conferring the force of an authentic interpretation to the legal norms. Such an interpretation is of the exclusive competence of the legislator. In the procedure of appeal on points of law, the High Court of Cassation and Justice makes a synthesis of the decisions given in relation to a certain law issue, ruling on its correctitude, conferring at the same time, a compulsory interpretation" of the law aspects solved differently by the law courts.[2]

[1] Ion Deleanu, Sergiu Deleanu, , "*The Jurisprudence and jurisprudential Revival*", Universul Juridic Publ. House, Bucureşti, 2013, pp. 92-94.
[2] For developments see Ion Deleanu, Sergiu Delenau, quoted works p.95.

The question arises if the decisions handed down by the Supreme Court in this procedure are formal springs of law. Constantly, in the literature in specialty the notion of spring of law is defined as "the form of expressing the judicial norms that are determined by their enactment or sanctioning by the state" [1]. In our opinion, the decisions rendered by the High Court of Cassation and Justice cannot be springs of the law because they cannot contain law norms. Moreover, in our legal system the jurisprudence is not a formal spring of law. In this respect, the Constitutional Court stated: "The interpretative solutions given in the appeal on points of law named "interpretations of law" cannot be considered springs of law, in the usual meaning of this term2. Such interpretative solutions, constant and unitary, that do not concern certain parties and have no effect on the prior given solutions that entered the res judicata, are invoked by the doctrine as a judicial precedent, being considered by the legal literature "secondary springs of law" or "interpretative springs". In relation to the foregoing, we express our opinion that these decisions can be considered as sources of law, but not formal springs of law, opinion consistent with the Constitutional Court jurisprudence.

Another aspect we consider relates to the time at which the decisions given in the resolution of the appeals on points of law, start enforcing judicial effects. According to the procedural provisions "the decisions are published in Romania's Official Gazette – Part I, and on the internet page of the High Court of Cassation and Justice. These are brought to the knowledge of the courts also by the Ministry of Justice". From the interpretation of the legal dispositions results that such decisions cannot produce judicial effects with their ruling and their effects are only for the future. The decisions' publishing on the internet page of the High Court of Cassation and Justice and their communication to the courts by the Ministry of Justice cannot be considered as moments since when they start producing effects because the legislator did not foresee expressly this fact, and much more, neither of the above named

[1] Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*, C.H.Beck Publishing House, Bucharest, 2003, vol. I, p. 26. For developments see also Radu Motica, Mihai Gheorghe, *Teoria generală a dreptului*, Alma Mater Publ. House, Timişoara, 1999; Nicolae Popa, *Teoria generală a dreptului*, Actami Publ. House, Bucharest, 1999.

[2] Decision no . 93/200, published in the Official Gazette part I, no. 444 on September 8th 2000

procedures has presently in the Romanian Law the judicial value of the act of communication or publishing. We consider that the moment since when the decisions ruled in the procedure of appeal on points of law start producing judicial effects is the one of publishing in the Official Gazette. This solution is imposed by the general binding character of the decisions, and also by their quality as source of the law, which clearly distinguish them in terms of legal nature from other types of judgments.

The Civil Procedure Code, by Article 518, comes to clarify, at least in the civil matter, the issue of the effect of decisions on points of law. The normative regulations state that: "the decision on points of law ceases its applicability since the date of amending, abrogation or finding unconstitutional the statutory provision that made the object of the interpretation". The Criminal Procedure Code does not contain such regulations and therefore, in the criminal matter, remains opened the problem of applicability of the decisions on points of law in the hypothesis of abrogation or finding unconstitutional the statutory provision that made the object of the interpretation. It is necessary that the legislator intervenes to regulate in a unitary manner this aspect in the sphere of criminal justice.

Before referring to the recent jurisprudence of our constitutional court in this matter, we consider appropriate to our research topic to emphasize briefly the nature of the relationships between the decisions of the Constitutional Court and the decisions of the High Court of Cassation and Justice ruled on points of law[1]. The first distinctive note is with regard to the effects of the two categories of decisions: the decisions of the Constitutional Court are compulsory in general, therefore not only for the law courts and including for the Supreme Court, but also for any other law topic. In contrast, the decisions of the High Court of Cassation and Justice ruled in the procedure of appeal on points of law are compulsory only for the law courts. Another aspect that distinguishes the two categories of legal acts is represented by the different nature of litigations that are resolved. The decisions of the Constitutional Court are rendered only to resolute a constitutional litigation and have as object the verification and analysis of the consistency or not of the legal norms examined with the Fundamental Law. The decisions of the Supreme Court are exclusively given with the purpose of a unitary interpretation and application of the law by the law courts and they concern the

[1] For developments see Ion Deleanu, Sergiu Deleanu, quoted works, pp 97-98.

compliance or not of the law courts' practice in the authentic meaning of the legal provisions examined.

The Constitutional Court stated constantly in its jurisprudence that starting with 2000, in the exercising of the responsibilities provided by Article 126 paragraph (3) of the Constitution, the High Court of Cassation and Justice has the obligation to provide the unitary interpretation and application of the law by the law courts, with the observance of the fundamental principle of the separation of powers consecrated by Article 1 paragraph (4) of Romania Constitution. The Supreme Court does not have the constitutional competence to establish, amend or abrogate the judicial norms with law powers, or to do their control of constitutionality. The interpretations given by the Supreme Court to the law matters is mandatory for the other courts in as far as its objective is to promote a correct interpretation to the legal norms in force, and not to elaborate new norms. One cannot consider that the decision rendered by the High Court of cassation and Justice, in such appeals, would represent a task aiming at the law making prerogative, situation in which the named text would violate the provisions of Article 58 paragraph 1 of Constitution. 1

Starting from a comprehensive jurisprudence analysis, the authors of a recent study2 emphasize: "The decisions thus ruled have the role to give a correct interpretation to law matters over which they have appeal on points of law; however, proceeding to such an analysis, the High Court of Cassation and Justice is forbidden to violate the competence of the legislative power or executive power or that of the Constitutional Court. Therefore, this instrument is and remains a tool for the law interpretation and application, so like any other court decision, it cannot constitute a spring of law in the Romanian constitutional system"3. We share the view expressed.

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[1] See Decision no 93/2000, published in the Official Gazette part I, no. 444 on September 8th 2000 and Decision no 838/2009 , published in the Official Gazette part I, no 461 on July 3rd 2009.

[2] Mihaela Senia Costinescu, Karoly Benke, *The effects of the general compulsory character of the decisions of the Constitutional Court regarding the decisions ruled by the High Court of Cassation and Justice in resolving the appeal on points of law*, in the "Law" no. 4/2013, pp 134-162.

[3] Mihaela Senia Costinescu, Karoly Benke, quoted works. p. 135.

It is necessary to notice the limits of the control of constitutionality related to the decisions ruled by the Supreme Court in the procedure of appeal on points of law.

Constantly, until recently, the Constitutional Court refused to arrogate such a power, emphasizing the limits for constitutionality control in respect to the decisions ruled by the Supreme Court in the procedure for appeal on points of law. The Constitutional Court stated that a decision rendered on points of law cannot constitute an object of censorship of the constitutional litigation court[1]. Recently the Constitutional Court by Decision no. 854/2011[2] confirmed its previous case law. The Constitutional Court stated that " in regard to the censuring of the provisions of a decision given in an appeal on points of law, it cannot constitute an object of exception of unconstitutionality, being from this perspective, inadmissible , because the constitutional litigation court, in agreement with the provisions of Article 146 of the fundamental law, has not the competence of censoring the constitutionality of the statutory decisions, no matter if they are rule in the interpretation of some common law matters or in view of a unitary interpretation or application of the law". There are some nuance aspects in the constitutional court jurisprudence. Thus, quite recently the Constitutional Court emphasized: "The circumstance that throughout a decision given in an appeal on points of law, a certain interpretation is given to a legal text, is not to be converted in a non-receiving ending that obliges the Court, which despite its guarantor role of the Constitution supremacy, not to analyze the text in question, in the interpretation given by the Supreme Court"[3].

The recent doctrine expresses a similar point of view, in the meaning that the Constitutional Court has the competence to establish the non constitutionality of the statutory norm in the interpretation given by the High Court of Cassation and Justice:"Having into consideration those mentioned above, it comes out that the High Court of Cassation and Justice, being held by the decisions of the Constitutional Court on the track of a decision rendered in resolution of an appeal on points of law,

[1] Decision no 409 on November 4th 2003, published in the Official Gazette part I no 848 on November 27th 2003.
[2] Published in the Official Gazette, part I, no 672 on September 21st 2011.
3 Decision no. 8 on January 18th 2011, published in the Official Gazette part I, no. 186 on March 17th 2011.

cannot establish the application of an interpretation which *per se* would give a sense of unconstitutionality to the norm interpreted. Therefore the Court has the competence to establish the unconstitutionality of the norm in the interpretation given by the High Court of Cassation and Justice in the situation in which:

-The Supreme Court by interpreting the norm disobeyed an interpretative decision ruled by the Constitutional Court in regard to that statutory norm;

-The Supreme Court by interpreting the norm exceeded the jurisdiction of the law legislative power (judicial power n. m.);

-The Supreme Court interpreted that norm in a manner capable to breach the fundamental rights and freedoms".

Nevertheless it is acknowledged the jurisdiction of the Constitutional Court to declare the unconstitutionality of the law norm in the interpretation conferred through the decision ruled by the High Court of Cassation and Justice, but not the unconstitutionality in itself of the decision through which was resolved the appeal on points of law.

The Decision no. 206 on 29th of April 2013 of the Constitutional Court[1] represents in our opinion, a legal revival in the matter of the jurisprudence of the Constitutional Court, because it clarifies the relationship between the decisions of this Court, and on the other side, the decisions of the High Court of Cassation and Justice ruled on points of law, and also a reconsidering of the competence of the Constitutional Court to censor under the aspect of this decision's constitutionality.

From considerations of the decision to which we made referral it comes out that the Constitutional Court was informed about the exception of non-constitutionality of the provisions of Article 414^5 paragraph 4 of the Criminal Procedure Code. The authors of the non-constitutionality exception consider the text criticized as unconstitutional, because it establishes the binding compulsory nature of the interpretations given in the law matters, judged by the High Court of Cassation and Justice by means of appeal on points of law, and thus are violated the provisions of Constitutions regarding the separation and balance of the powers in the state, the equality before the law, the free access to the justice and last, the role of the Parliament as a sole legislative authority.

[1] Published in the Official Gazette part I, no 350 /13th of June 2013.

Concretely, the authors of the information towards the Constitutional Court have in consideration the decision no. 8/ 2010 given by the High Court of Cassation and Justice, in the procedure of appeal on points of law, by which it was admitted the appeal made by the General Attorney of the Prosecution besides the High Court of Cassation and Justice with regard to the consequences of the decisions of the Constitutional Court no. 62 / 2007 on the activity of the provisions of Articles 205, 206 and 207 of the Criminal Code. The Supreme Court established that: "The rules incriminating the insult and defamation contained by Article 205 and 206 of the Criminal Code, and also the provisions of Article 207 of the Criminal Code regarding the proof of truth, abrogated by the provisions of Article 1 point 56 of the Law no. 278/2006, provisions declared unconstitutional through the decision no. 62 on January 18th 2007 of the Constitutional Court, are not in force".

At the end of this comprehensive and pertinent argumentation, the Constitutional Court admits the exception of unconstitutionality having as objective the provisions of Article 414^5 paragraph 4 of the Criminal Procedure Code and finds that the "interpretation given to the the law matters, judged by the decision of the High Court of Cassation and Justice - United Sections no. 8 on October 18th 2010 … is unconstitutional, contravening to the provisions of Article 1 paragraphs 3, 4 and 5 and Article 126 paragraph (3), Article 142 paragraph (1) and Article 147 paragraph (1) and (4) of the Constitution and the decision of the Constitutional Court no. 62 on January 18th 2007". In support of this solution the Court notes that it is imposed the sanctioning of any interpretation of the statutory norms criticized for unconstitutionality that regulates the obligation of the clarifications given in the law matters by means of appeal on points of law, in the sense that it would offer to the Supreme Court the possibility that by this way, within the grounds of an infra-constitutional norm, to give compulsory interpretations that contravene to the Constitution and to the Constitutional Courts' decisions. From the contents of the decision clearly results that our Constitutional Court ruled on the constitutionality of the decision of the High Court of Cassation and Justice through which solved an appeal on points of law. It is a radical change of the previous jurisprudence through which constantly were rejected as inadmissible the complaints with constitutionality of such decisions.

The decision no. 206/2013 of the Constitutional Court presents a technical and practical importance for many aspects, of which we remember:

1. The Constitutional Court declared itself competent to rule on the constitutionality of the decisions delivered by the High Court of Cassation and Justice in the proceeding of appeal on points of law, which fact changes the previous jurisprudence of the Constitutional Court. We appreciate that the solution is correct even if neither the Basic Law nor the the special law for the Constitutional Court's organizing foresee expressly such a material prerogative. The legal basis is that any legal act of interpretation of such a judicial norm, mostly when it is about a compulsory judgment of a law court, cannot be dissociated by the judicial norm interpreted. In consequence, the Constitutional Court ruling on the constitutionality of the legal provisions that establish the compulsoriness of the decisions rendered in the appeal on points of law, has the competence to examine concretely any judgment of the High Court of Cassation and Justice, that confers an interpretation to a text of law and establishes a compulsory interpretation of law for the law courts. There is no „non-receiving ending" in the event that the author of an exception of unconstitutionality is invoking the unconstitutionality of a decision rendered by the High Court of Cassation and Justice in the proceeding of appeal on points of law.

1.The Constitutional Court clarifies the relationships existing between the decisions of this law court, and on the other side, the decisions ruled by the High Court of Cassation and Justice. The interpretation conferred to the infra-constitutional law texts and the compulsory interpretations of law of the Supreme Court cannot contravene either to the Constitution or to the decisions of the Constitutional Court.

2. We appreciate that new possibility opens for the notification of the Constitutional Court in the procedure of exception of unconstitutionality. Thus the participants in the civil or criminal suits or court, ex officio, may appeal to the Constitutional Court, a plea of unconstitutionality, having as object the statutory regulations, but with specific reference to a decision of the High Court of Cassation and Justice in the proceeding of appeal on points of law, if appreciated that throughout of the compulsory interpretations of the law, the constitutional regulations or the decisions of the Constitutional Court are contravened. In such a circumstance, the Constitutional Court can ascertain the constitutionality of the the legal

regulations mentioned in the exception of unconstitutionality, but may rule on the unconstitutionality of the decisions through which is solved the appeal on points of law, to the extent they conflict with the provisions of the Constitution or with the Constitutional Court decisions.
3. This decision, the ideas contained in the motivation constitute an argument for the legitimacy of the common law courts to examine the constitutionality of some legal acts, other than those that are subject to the exclusive jurisdiction of the Constitutional Court. Obviously the examination of constitutionality does not always equate with the right of the courts to rule on the constitutionality of such legal acts.

III CONCLUSIONS

In relation to the foregoing, we appreciate that the judge has the possibility to notify to the Constitutional Court, for ascertaining the unconstitutionality of a decision ruled on points of law, certainly by invoking the statutory regulations interpreted throughout the respective decision, with referral to the constitutional norms violated by the High Court of Cassation and Justice through the compulsory interpretation given and, such as the case be, with referral to the decisions of the Constitutional Court whose general binding effect was not observed by the Supreme Court by the judgment ruled in resolving the appeal on points of law.

It is obvious that, under the conditions mentioned before, deduced from the contents of the decision no. 206/2013, the Constitutional Court may find unconstitutional such a decision. Worth mentioning that the decision of the Constitutional Court being binding has as a lawful consequence the cessation of the effects of the decision of the High Court of cassation and Justice for all law courts and not only for the specific case deducted concretely to the judgment. Therefore this is another termination situation of the effects of the decisions ruled for resolving the appeals on points of law.

In the concept of the Romanian constituent legislator the control of constitutionality done by the Constitutional Court has as objective only the law as a legal act of the Parliament, or the statutory regulations with a legal force equal with that of the law. In relation to this aspect in the doctrine is claimed that the issue of the control of constitutionality does not arise in the same terms for the legal acts with administrative

character or the judicial acts of the law courts. The control of lawfulness and implicitly that of the constitutionality of the legal acts issued by the administration authorities or the law courts is performed within a judicial control, in compliance with the material competences of the law courts[1].

Such a legal reality, which is determined by the rules of Constitution, leaves outside the control of legality and implicitly of constitutionality, categories of important legal documents. We consider the decisions of the High Court of Cassation and Justice in solving appeals on points of law. As noted before the decisions ruled by the Supreme Court in this procedure, throughout the solutions adopted, may be unconstitutional at least by exceeding the limits of the judicial powers. The unconstitutionality of these legal acts may consist in the unjustified restraining of the exercising of some rights and fundamental liberties recognized and guaranteed by the Constitution or in violating some of the Constitutional Court decisions.

The lack of statutory regulations that establish the control of constitutionality by means of the Constitutional Court over the decisions ruled in the procedure of appeal on points of law, is likely to allow the excess of power in the Supreme Court's activity with serious consequences on the compliance of the lawful state requirements, citizens' fundamental human rights and freedom.

There are other categories of legal acts that not only that they do not make the subject of the Constitutional reviewing but are also exempted from the judicial review. According to the provisions of Article 126 paragraph 6 of Constitution and Article 5 of the Administrative Litigation Law no. 554/2004, the acts that concern the relations with the Parliament and acts of military Command, cannot be subject to Constitutionality reviewing. This matter requires a separate analysis. In this context we emphasize only the fact the contemporary reality has shown the existence of legal acts of the executive in the relationship with the Parliament that are likely to violate seriously the letter and spirit of Constitution. The Parliamentary control of these acts is not sufficient to ensure the supremacy of Constitution and the requirements for democracy of the lawful state.

For our topic of research it is important to emphasize that there are Constitutions stipulating the competence of the Constitutional Courts to exercise the constitutionality review over other categories of individual

[1] Ioan Muraru, Elena Simina Tănăsescu, quoted works, vol I, p. 68.

and normative legal acts and not only on laws. Thus, the Belgian Constitutional Court is competent to exercise control, when being notified about a jurisdiction regarding the compliance with the rules for the division of powers between state authorities. The German Constitutional Court has the competence to exercise a subsequent specific control over some legal or administrative acts at the notification of the court or the direct notifying from the citizens, by constitutional appeal. Similarly, Spain Constitution on 1978 stipulated the competence of the Constitutional Court, by way of "de amparo" appeal proceeding, to verify the the constitutionality of some final judgments. An illustrative example is Hungary, where the Constitutional Court exercises a posteriori abstract or concrete on delegated acts and on ministerial acts.

All these arguments entitle us to support, along with other authors[1],, the proposal for ferenda law that in the light of revising the Constitution to be provided the competence of the Constitutional Court to exercise the constitutional control on the decisions ruled by the High Court of Cassation and Justice in the appeal on points of law procedure and on the legal acts exempted from the judicial reviewing. The subjects of law that may notify the Constitutional Court in such a procedure may be: the General Prosecutor of the Prosecution besides the High Court of Cassation and Justice, the People's Lawyer and courts.

[1] See Mircea Criste, Considerations regarding the necessity to revise some texts of România Constitution concerning the Constitutional Court in the "Law" no. .6/2013, p. 152-172. The author emphasizes: "Having into consideration the effects of the decisions ruled by the High Court of Cassation and Justice in the matter of appeal on points of law and more recently of the decisions through which are given solutions in principle of some law matters, related to the experience of some European countries, we believe that should be conferred to the Constitutional Court also the competence of censoring the constitutionality of some of the High Court decisions" p 170.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

CESSATION OF THE LOCAL ELECTED MANDATE

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Abstract:
The mandate of the local elected lasts four years and may be extended under the law, but it may also be terminated prematurely, in which case one could speak of the mandate legal termination or of the mandate termination as a result of a local referendum. By local elected, according to the law on the status of the local elected, one understands the elected mayor, the deputy mayor, the president of the county council, the deputy of the county council, local and county councilors and village delegate.
Keywords*: local elected officials, cessation of mandate, law, jurisprudence, local public administration*

1. GENERAL ASPECTS REGARDING THE LOCAL ELECTED

The notion of *local elected* refers, according to the *Dictionary of public law*[1], to the person who was chosen as a result of local elections. The designation of local elected officials is done through elections, and their status is established by law. In art. 1 and 2 of Law no. 393/2004 on the Status of the local electees it is stated that elected officials include local and county councilors, the mayor, the deputy mayor and deputy president of the county council and the village delegate. Local elected are designated by universal, direct, secret and freely expressed by citizens voting in the territorial-administrative unit in which the elections are held. They are to have reached the age of 23, up to the elections day, unless they are forbidden to join political parties, according to art. 40, paragraph 3 of the Romanian Constitution.

Elected officials are entrusted a four-year term by the citizens' vote; they fulfill a function of public authority and are protected by law.

[*] This papar was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.
[1] Verginia Vedinaş, Teodor Narcis Godeanu, Emanuel Constantinescu, *Dicţionar de drept public. Drept constituţional şi administrativ*, C.H.Beck Publishing House, Bucharest, 2010, p. 11.

By exercising their mandate, elected officials serve the local community and are accountable to it. According to art. 3, paragraph 1 of Law no. 393/2004, the participation of elected officials in the activity of local authorities is public and legitimate, and in agreement with the general interests of the community in which they hold office. Universal suffrage confers to the autonomous local authorities not only a political affiliation, but also the position of democratic bodies[1].

2. THE MANDATE OF THE LOCAL ELECTED - A MANDATE TO REPRESANT THE INTERESTS OF LOCAL COMMUNITY

The activity of the local elected is conducted throughout their mandate and entrusted by citizens' voting. It is a mandate of public law – i.e. administrative law, differing essentially from the mandate in civil law. As literature[2] asserts, the mandate of local elected provides them the exercising of an authority public function in order to achieve local autonomy. Local autonomy, as a constitutional and legal principle, allows each local authority to appoint its own decision-makers, their own authorities, which are different from those of the state and which can best represent their interests. The government authorities to represent local autonomy in communes and towns are local councils and mayors, and - at the county level -, the county council and the county council president. Local autonomy is exercised on the basis and within the limits of the law and regards the organization, functioning, powers and duties, as well as the management of the resources which, by law, belong to the village, town, city or county[3]. By the power entrusted by citizens, the elected officials composing these local governments are in the service of the local community and have to manage their public affairs. In terms of local authority competence, local autonomy confers them the right, within the law, to have initiatives in all areas except those that are expressly given to other public authorities, stipulation which best reflects the European principle of subsidiarity, thus providing the possibility that

[1] Corneliu-Liviu Popescu, *Autonomia locală şi integrarea europeană*, All Beck Publishing House, Bucharest, 1999, p. 108.
[2] Corneliu Manda, Cezar C.Manda, *Dreptul colectivităţilor locale*, 4th edition, revised and amended, Universul Juridic Publishing House, Bucharest, 2008, p. 236.
[3] Art.4 par. 1 and 2 of *Law no. 215/2001 of local public administration*, republished in Monitorul Oficial al României, Part I, no. 123/ 20 February 2007, with subsequent amnedments

most of the decisions to be taken by the authorities in close proximity to citizen.

The representation mandate that local officials receive from citizens confers them a number of rights, but also a series of obligations that they are due to meet. The doctrine[1] of the administrative law has established that the local elected mandate is characterized by generality, independence and irrevocability, traits to be seen also in case of parliamentary mandate. The doctrine[2] also reveals a series of discussions on the mandate of the elected officials and on the parliamentary mandate, emphasizing that both are mandates of representation and cannot be imperative. The constitutional rule stipulated in article 69 par. 2 "Any imperative mandate is null" finds its application in case of local elected office. Therefore, we consider that a public law mandate, which is a representative mandate, cannot be mandatory, whether one takes into account the representation of the nation or local community representation. The utterance "Any imperative mandate is null" is comprised only in the article devoted to the representative office of senators and deputies, and not in the section of the Constitution referring to local authorities and, therefore, there is a difference in legal status between the two types of mandate, the text thus distinguishing between national public mandate and local public law mandate, local legislature imposing some limits to the local public law office. This conclusion may also be drawn from the jurisprudence of the Romanian Constitutional Court, which states, by Decision no. 915 of 18 October 2007 or by Decision no. 613 of 12 May 2011, that there are differences between the parliamentary mandate and that of the local elected, differences resulting mainly from their different status and modality of election.

The mandate of a local elected lasts four years and ceases, in case of county or local council, at the date when the new elected council is declared legally constituted, and, in case of mayors and county council president, with the oath of the newly elected mayor or county president, or it may be extended by law. For the deputy mayor, the deputy president of the county council or for the village delegate, mandate ends on the date the new local or county council is declared legally constituted. There

[1] Corneliu Manda, Cezar C. Manda, *op.cit.* p. 237.
[2]Camelia Florentina Stoica, *Mandatul aleşilor locali- mandat de drept public. Consecinţe juridice* in *Revista Transilvană de Ştiinţe Administrative*, no. 2(29)2011, pp.191-198.

may be, however, situations in which the mandate of the local elected ceases prematurely, as either a legal termination or as a result of a local referendum. For the deputy mayor or the vice-president of the county council, the end of the mandate as a counselor results in legal termination of these qualities, that of a deputy mayor or vice-president of the county council. The mandate of the deputy mayor, of the vice-president of the county council or that of the village delegate may end before term, in case of replacement - for the deputy mayor or vice-president of the county council, or dismissal - for the village delegate. These forms of mandate cessation for the local elected will be analyzed below.

3. EARLY CESSATION OF THE LOCAL ELECTED MANDATE

Early termination of the mandate of the elected officials is regulated both by Law no. 215/2001 on local government, republished and Law no. 393/ 2004 on the Status of the local elected.

- **TEMINATION OF THE LOCAL AND COUNTY COUNCILORS**

According to art. 9, paragraph 2 of Law no. 393/ 2004 on the Statute of the local elected, the quality of local or county councilor ceases before the normal expiration of the mandate in the following cases:

a) resignation;
b) incompatibility;
c) change of residence to another administrative-territorial unit, including the case of its reorganization;
d) unjustified absence from more than three consecutive ordinary meetings of the board;
e) impossibility to exercise the office for more than 6 consecutive months, excepting the cases provided by law;
f) conviction by final court decision to a custodial sentence;
g) placing under judicial interdiction;
h) loss of voting rights;
i) loss of membership of the political party or organization of national minorities on whose list they were elected;
j) death.

The law provides that councilor mandate termination shall be established by the local or county council, by resolution, and that the

draft resolution may be initiated by the mayor, the county council president or by any local or county councilor. Article 12 of Law no. 393/2004 states that in all cases of mandate cessation before its normal expiration, local or county authority adopts a deliberative forum, at the first ordinary meeting and at the proposal of the mayor or county council president, a decision which notes the new situation and declares the position as vacant. The resolution adopted by the city or county council should be based in all cases on a confirming report signed by the mayor and by the municipality or city secretary, in case of a local counselor mandate termination, respectively by the president and secretary of the county council, when there cease the mandate of a county councilor and the report will be accompanied by supporting documents. If a councilor is dissatisfied with the decision adopted, (s)he may appeal to the administrative court, the law establishing a special procedure derogating from the common law, namely Law no. 554/ 2004[1]. Thus, unless there is incompatibility, case in which it is applied the procedure provided by the administrative contentious law, in all the other cases there applies the special procedure established by art. 9 paragraph 4 of Law no. 393/ 2004. According to it, the decision of the board may be appealed by the discontent councilor to the administrative court within 10 days from notice and the court must decide no later than 30 days. Also, the preliminary procedure in this case no longer applies, and the decision of the first court remains final and irrevocable.

It is interesting that the legislature includes among the cases in which a councilor may appeal the administrative court the case in which (s)he lost his membership of the party on whose list (s)he was chosen, which led to the termination of his/her mandate. This case of counselor mandate cessation before term was introduced by Law no. 249/2006 and pursued stopping the phenomenon of political migration. Serious consequences, such as the loss of the mandate as a local elected, have determined the constitutional control authority to fundamentally change their jurisprudence and to enable the person who lost his/her party membership to appeal administrative court. Therefore, a local elected who lost his/her party membership by exclusion, for example, may appeal the administrative court to annul the administrative act issued / adopted by the political party on whose list they were elected. They also have the possibility, if the local or county council adopted a resolution

[1] Published in Monitorul Oficial al României, Part I, no. 1154/ 7 December 2004.

stating the termination of the mandate as a local or county councilor, to address the administrative court again, this time in order to cancel the decision of the local or county council.

In case of resignation and change of residence to another administrative unit, the law on the status of locally elected officials establishes special rules. Resignation, as a unilateral act of will of the local or county councilor, shall be submitted in writing to the chairman of the meeting, for the local council, or the county council president, for the county council, and the president proposes to the council to take a decision which notes resignation and declares the councilor seat vacant. As a unilateral act, resignation is irrevocable, from the moment the local authority takes note of it and therefore, it can be retracted until the adoption of the decision which notes it[1]. Councilor mandate termination in case of change of residence to another administrative unit may occur only after the appropriate indication in the identity document of the person concerned by the body empowered by law.

- **MANDATE CESSATION FOR LOCAL AND COUNTY COUNCILORS AS A RESULT OF COUNCIL DISSOLUTION OR FOR A LOCAL OR COUNTY-LEVEL REFERENDUM**

The mandate of local or county councilors may terminate before term in case of dissolution of the local or county council or after a county or local referendum.

Local or county council shall be dissolved:

- if they have not met for two consecutive months, although it was convened according to law;

- if they have not adopted any decision in three consecutive meetings;

- in case the number of local or county councilors falls below half past one without the possibility to be completed with substitutes.

Law no. 59/2010 introduced a stipulation which provides for the mayor, the deputy mayor, the secretary of the administrative- territorial unit, the prefect or any other interest person to notice administrative court on cases above mentioned, regulation which also applies to the local council. After the referral, the court examines the facts and determines,

[1] For further data on resignation, see Alexandru Ţiclea, *Demisia. Teorie şi jurisprudenţă*, Universul Juridic Publishing House, Bucharest, 2013.

by resolution, on the dissolution of the local council. The court decision is final and shall be communicated to the prefect.

In case of legal dissolution of the county council, art. 99, paragraph 2 of Law no. 215/ 2001 establishes that the County Secretary or any other interested person notifies the administrative court on any legal dissolution of the county council. As in the case of local council dissolution, when the county council is to dissolve, the court examines the facts and decides on the dissolution of the county council. Court's decision is final and shall be communicated to the prefect. In accordance with art. 55, paragraph 3 of Law no. 215/2001, local council may be dissolved by local referendum organized within the law[1]. The referendum shall be held following a request to the prefect of at least 25 % of the voting citizens enrolled in the lists of the administrative-territorial unit. Expenses for the local referendum shall be borne by the local budget. Direct consultation of the population is organized by a committee appointed by prefect order, committee which includes a representative of the prefect, a representative of the mayor, of the local and of the county council and a judge of the court in whose jurisdiction it is the administrative-territorial unit in question. Also, the committee secretary is provided by the prefect.

The referendum is declared valid if at the polls there were at least half plus one of the total voting population. The mandate of the council may end before term if there were expressed in this respect at least half plus one of the total number of valid votes[2]. The date of elections for the local council dissolved as a result of the local referendum shall be established by the government at the proposal of the prefect. Elections shall be held within 90 days from the final and irrevocable judgment stating the dissolution of the local council or, when the case, from the validation of the referendum results[3].
The county council may in its turn be dissolved by referendum under the law. If for the referendum to dissolve the local council, the request sent to the prefect is to be signed by at least 25 % of voters voting on the lists of the electoral administrative-territorial unit, in case of a referendum to dissolve the county council, the necessary percentage is of at least 20 %

[1] *Law no. 3/2000 on the organization and conducting of the referendum*, amended, published in Monitorul Oficial al României, Part I, no. 84/ 24 February 2000
[2] Art. 55 para. 6, *Law no. 215/2001*, republished, with subsequent amendments
[3] Art. 55 para. 7, *Law no. 215/2001*, republished, with subsequent amendments.

of the number of citizens entitled to vote on the lists of that electoral administrative-territorial unit.

The county referendum is organized, under the law, by a commission composed of the prefect, a representative of the county council appointed by a resolution of the county council and a judge of the court and the committee secretariat is provided by the institution of the prefect. As in the case of the local council, the referendum is valid if at the polls there were at least half plus one of the total voting population. The County Council mandate ends prematurely if at least half plus one of the total number of valid votes decide so. It can be concluded that the termination of the local or county council mandate, legally or as a result of a local referendum, automatically leads to the mandate cessation of each locally elected official, member of the local or county deliberative forum.

- ***TERMINATION OF THE MAYOR AND OF THE COUNTY COUNCIL PRESIDENT MANDATE***

According to art. 15, paragraph 2 of Law no. 393/ 2004 on the status of local elected officials, the positions of mayor and county council president shall automatically cease before the normal expiration of their mandate in the following cases:

a) resignation;
b) incompatibility;
c) change of residence to another administrative-territorial unit;
d) conviction by final court decision to a custodial sentence;
e) placing under judicial interdiction;
f) loss of voting rights;
g) loss, as a result of resignation, of the membership of the political party or organization of national minorities on whose list they were elected;
h) death.

The status of the local elected states in art. 16 that the prefect is the authority to establish by order the cessation of the mayor mandate or that of the county council president respectively, as both the mayor and the president of the county council are public local authorities elected by uninominal voting. The order of the prefect must be based on a report signed by the secretary of the commune or town, and - for the county council president - by the county secretary, and on legal documents which show the reason for terminating the mandate.

As one can see from the analysis of the legal text, the legislature does not specify any more the right of the mayor or of the county council president to address the administrative court if they consider themselves wronged by an administrative act, but this right cannot be restricted, especially in the current context when European regulations require guaranteeing access to justice and to a fair trial. Compared to regulations applicable to local and county councils, in case a mayor or county council president is sent to court, because there is no special procedure for the analyzed cases of mandate termination, there shall be applied the general provisions contained in the Administrative Litigation Law.

Termination of the mayor's mandate before term can also be due to resignation. In case of resignation, the mayor must notify the local council and prefect in writing. The chairman of the council meeting notes at the first board meeting of the mayor resignation, and this is recorded in the minutes of the council meeting. After this phase, there is the procedural phase in which the prefect notes by order of the mayor's resignation. The prefect's order, which must be based on a report of the Secretary of the administrative -territorial unit and other legal documents which show the reasons for mandate termination, as well as an extract from the minutes of the meeting of the local council, shall be submitted to the Ministry of Regional Development and Public Administration, which proposes to the government the setting of the date to elect a new mayor. Even if the law is not specific, on the basis of legal symmetry, in the absence of special procedures and in accordance with the law principle of '*actus interpretandus potius east valley ut quam ut perea't*[1], the procedure previously presented applies to the county council president as well.

The termination of the mayor or county council president mandate, in case of change of residence to another administrative unit, may occur only after operating the change in the identification card of the person concerned by the body empowered by law.

Cases of legal mandate termination for the mayor or county council president stipulated by the law on the status of local elected officials is supplemented by two other cases covered by art. 69, paragraph 2 of Law no. 215/2001 on local government, republished, namely:

[1] Act must be interpretated so it may rather stay valid than perish.

-If (s)he is unable to perform their function because of a serious, certified illness, which does not enable working in good conditions for 6 months during a calendar year;

-If (s)he does not exercise, unduly, their mandate for 45 consecutive days.

In these cases, the prefect also notes by order the cessation of the mayor or county council president's mandate. For these two cases, the legislature established a special procedure relating to the right of the mayor or of the county council president to address the administrative court provided they feel affected to a right or legitimate interest. The law states that the order of the prefect may be attacked by the mayor or president of the county council in the administrative court within 10 days from notice and that court is obliged to rule within 30 days. In this case, the preliminary procedure is no longer in action, and the decision of the first court is final and irrevocable. The prefect proposes the government to organize elections for the mayor or county council president and the government has the obligation to hold elections within 90 days from the moment there expires the term in which the complaining person had the right to go to court, or in case (s)he addressed to court, from the date of the court decision, given the fact that the first instance judgment is final and irrevocable .

- ***TERMINATION OF THE MAYOR AND OF THE COUNTY COUNCIL PRESIDENT MANDATE AS A RESULT OF A LOCAL REFERENDUM***

The mandate of the mayor or of the county council president can end as a result of a local referendum on his/her dismissal. The referendum for early termination of the mandate of the mayor or of the county council president is held at the request of at least 25 % of the people voting in that commune, town, city or county, request sent to the prefect, due to the mayor or the county council president disregarding the general interests of the local community or to non-exercising their duties under the law. A condition that is not stipulated in the referendum procedure for dissolving the local or county council, being a procedure specific for the dismissal of the mayor or of the county council president, is that the percentage of 25% of the people voting should be reached in each of the localities composing the village, town, city or county.

According to art. 70, paragraph 3 of the Local Public Administration Law, the request sent to the prefect must include a

motivation, the name and surname, date and place of birth, the series and number of identity card and the handwritten signatures of the citizens who have called for referendum. We take the liberty of analyzing the way in which the legislator uses certain terms. If initially it was used the phrase "*inhabitants of the village, town, city or county*", in the provision on the request sent to the prefect it was preferred the term "*citizens*". We believe that the legislator should use only the term "*citizen*" in all situations calling for a referendum to dissolve or dismiss local authority, as the use of different terms may trigger confusion and blockage in the administrative practice.

The referendum for dismissing the mayor or the county council president is considered valid if at least half plus one of the total voting population go to polls. The mandate ends prematurely if at least half plus one of the total number of valid votes rule for that.

Setting the date for the election of a new mayor or president of the county council is made by the government at the proposal of the prefect. Elections are to be held within 90 days from the final and irrevocable judgment stating the dismissal of the mayor or of the county council president or, where appropriate, from the validation of the referendum results.

4. TERMINATION OF THE DEPUTY MAYOR, VICE-PRESIDENT OF THE COUNTY COUNCIL AND VILLAGE DELEGATE MANDATE

Even if the Law no. 215/ 2001 on the local government includes in the category of the elected officials only the mayor, local councilors, the president of the county council and county councilors, Law no. 393/ 2004 on the status of the locally elected officials promote a broader conception regarding the notion of "locally elected", adding to the positions already mentioned, that of deputy mayor, vice-president of the county council and village delegate.

The termination before term of the deputy mayor and of the county council vice-president mandate occurs as a result of the cessation of the local or county councilor mandate, under the law and before term, as both the deputy mayor and the county council vice-president have also the quality of local councilor, county councilor respectively; hence, the loss of the councilor status automatically triggers the loss of the position

of deputy mayor and county council vice-president, respectively. Early termination of the deputy mayor and county council vice-president mandate occurs also in case of dissolution of the local council, and county council respectively.

A specific case of early termination of the deputy mayor or county council vice-president mandate is the change of the deputy mayor or the dismissal of the county council vice-president, respectively. The dismissal of the deputy mayor can be done by the local council, based on a resolution voted by the majority of the elected councilors, at the mayor's proposal or that of a third of the local councilors. Change of function leads to loss of the deputy mayor mandate, the person maintaining the quality of local councilor.

The dismissal of the county council vice-president is made by secret vote of the majority of county councilors, at the proposal of at least one third of their number. Compared to the deputy mayor, in case of dismissing a vice-president of the county council, the law establishes a time limit, i.e. the dismissal cannot be done in the last six months of the vice-president mandate. The law sets a different regime for changing the deputy mayor and the vice-president of the county council. If the change of the deputy mayor can be initiated by the mayor or by one third of the local councilors in office, the dismissal of the vice-president of the county council is to be proposed by at least one third of the county councilors in office, this right not being acknowledged to the executive authority.

Early termination of the village delegate mandate legally occurs in case the local council dissolves due to local referendum or when the assembly that elected the village delegate decides his/her release from office. We cannot conclude our presentation without mentioning that there is a legal case of mandate termination for all categories of local elected and governed by art. 82 paragraph 2 of Law no. 393/2004 on the status of the locally elected officials, namely the refusal to submit the declaration of the local elected personal interests[1].

[1] Regarding to this, see also Mihai Cristian Apostolache, *Primarul în România şi Uniunea Europeană*, Editura Universul Juridic, Bucureşti, 2012, p. 231.

5. CONCLUSIONS

The mandate of the locally elected officials may end before term in the forms and under the procedures prescribed by the law. Thus, the mandate of the elected officials may legally terminate, due to the results of a local referendum, or in case of the deputy mayor, the vice-president of the county council or the village delegate, by changing or releasing them from these functions. The analysis that we have undertaken has allowed us to identify the ways of early termination of the mandate of an elected local, as well as the legislative and technical deficiencies which affect the clarity of the law, parallelisms and legislation gaps on the termination of the locally elected' mandate. As a conclusion, we consider that it is necessary to revise the legal provisions of the local government law and of the law on the status of local elected officials who, by their lack of predictability may affect the proper application of these laws and, therefore, the activity of the local public administration and citizens' rights and freedoms. It is necessary to improve the existing legislation on local government so that it may fit the dynamic context of the European law and properly regulate current reality.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

CONCEPTUAL ISSUES REGARDING CRIME AND PUNISHMENT IN MUSLIM CRIMINAL LAW

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Abstract:

The existence of any society is impossible without full security system values on which it is based, or whatever the way of organizing the society cannot be conceived without compliance by its members values such as life, health freedom, inviolability of territorial etc. In this context, a basic tool of qualification antisocial acts that system is the well thought of legal norms, and in particular that of the criminal rules. Just remember that, criminal law, as a branch of law that represents totally legal rules adopted by the legislative body that regulates relations defense of social values by prohibiting offenses as socially dangerous acts, and by establishing criminal penalties to be applied to individuals they have committed.

Keywords: *criminal law, crime, punishment, stream, evolution.*

In comparison terms of defining peculiarity of Muslim criminal law we mention, it lies in its religious nature, the main sources are the sources of Islam as a religion - Quran and Sunna. Muslim law , being a part of the Islamic socio- legal regulation is a set of rules , the object of which is the relationship between people, based on the provisions of the Muslim religion and includes all obligations , which by law şariatului are imposed on a Muslim in his capacity triple believer, man and citizen of the theocratic state. Defending these rules by the state conclude that special significance for society and their violation represents a social danger which lyses the interests of the whole community, or with the emergence of Islam, Islamic law was born and where are interspersed the legal of Şariat, ethical and religious. Islam and Muslim legal doctrine assigns unique function of the Şariat legislator; the case free of religion is unacceptable to Muslims. On the other hand, as mentioned Rene David: "Muslim judge must not interpret the Quran authoritative interpretation as this book was given by theorists, and the judge need only to refer to their works. More than that vision researcher Abdallah Husein Arab in his works ”mudjitahizilor” that have a binding character for those who

apply the rules of Muslim law.

A notice that is required in connection with the structure made Muslim law is that all conclusions of schools included in the works of jurists where recognized equally valid, even if when they are contradictory. Alternatively, in Sunni Islam have survived in the XV century there were four schools of law: Hanifa, Malik, Safi, Hanbalita.

Sources and evolution of criminal law is inextricably linked to Muslim sources and evolution of the law itself, which can be explained by a unity of culture, history and religion. Classical school of Muslim law recognizes four basic sources called roots of Muslim jurisprudence (Usul al-fukx) exposed the word of God in the Koran, the word of divinely inspired prophet Muhammad (SUNA), analogy (kiyas) and consensus (idjma).

Each Muslim national legal system has several types of sources of law, the role of which is still the same: usually one of them is paramount in some Arab countries - Muslim law doctrine (eg, Saudi Arabia, Yemen) when in most of Arab countries - new legislation in the form of the Criminal Code are worked out based on the models of European law having been based on classical Muslim law provisions.

Since the second half of the nineteenth century, the provisions of Muslim law and Muslim criminal law amendments have occurred essential, consisting in the fact that the legal system of many Muslim countries doctrine (fikh) gave way to the law, founded based on legal models Reception Western European countries.

Muslim law delineates the adjustment and criminal legal relations called "ucubat" and establish facts that are crimes, the punishment for committing them. Offenses, like other acts prohibited or disapproved or jump alleged are defined as a huddud Allah (Allah's will breach). In Koran, it is mentioned that there is divine law, not allowed to be violated.

Blood, honor and property of a Muslim are inviolable for another Muslim.

Dividing classical Muslim law branch is less pronounced compared to European law. Muslim criminal law includes criminal procedure rules, and the rules of criminal-executive. Separateness rules: materials, process and execution is one of the peculiarities of traditional Muslim criminal law.

Given that Muslim law represents a religious law, the concept of crime (djarima) also carries religious. Any offense is not only earthly

infringement, which results earthly punishment, but it is a sin, which leads to the divine punishment. Either term ”djarima" (offense) is interpreted by Muslim ideologists under three headings: first, as a negative social phenomenon that brings considerable damage state, the individual and society, secondly, as the doctrinal and normative definition and third, as a concrete fact, some of its own specific signs.

In most Arab countries, do not find the notion of crime legislation, legal doctrine Muslims paid little attention to the scientific definition of the concept of crime, and limit themselves to a formal definition of illicit criminals. Few Muslims doctrinarians definitions can be divided into viewers based on theological and secular approach to illicit criminal (ucubat).

Elaborate system of punishments in Muslim criminal law Muslim jurists and scholars refer to the following philosophical and theological concepts:

1) According to Muslim criminal law, the penalty shall prevent the crime, the action is addressed to the society (general prevention) and which is carried the Quran and Sunnah the time. Here, it is about time the criminal offense was committed before. However, if the offense, the punishment must be proportionate to the size of the correction and prevention convicted of other offenses committed by this person and others as well.

This approach aims and other works of Muslim jurists. For example, Mussa Al-Hidjaui Al-Macdesi, Ibn Al-Hamam notes that criminal punishment somehow prevent the crime, but the punishment it prevents the person committing the offense in becoming a recidivist.

Setting limits criminal punishment depends on the extent to which it responds social interests. The more the higher the level of social danger of the crime and the person who committed it, the higher is the correctional-educational elements of criminal punishment. Defending overall basic social interests as a criminal charges Muslim criminal law undoubtedly represents the interests of the people and protect them from crime, having no important type of criminal law (divine or laic).

2) If the protection of society from criminals and criminal consequences of their actions requires their destruction, then must be applied the most severe punishment against them (or the death penalty or detention and isolation from society even when you die or will repent).

By this conclusion, the court must be sure of the impossibility of correction or reeducation of killer.

3) Any solution in the fight against criminal law crimes corresponds to the social interests and self-protection of society against breaches of the conditions of existence in Muslim law considers legal punishment. Therefore, Muslim criminal law listing the types of penalties included in "tazir" is not strictly determined.

4) The punishment into the criminal law Muslim far not that of revenge, on the contrary, the overwhelming majority committing offenses applies educational-correctional punishment. Based on this Abdullah Ahmed Al-Naim believes that "different types of punishment imposed in criminal law aimed at rehabilitation Muslim, correction and prevention sentenced to others"

Important in our view is the fact that the system of punishment in criminal law Muslim divide into two groups earthly punishment (penalty established by court jump) and transcendent punishment (punishment of Allah).

Concluded, we mention that all penalties taken together, provided the sources of criminal law Muslim (Qur'an, Sunna, al-idjma, al-kiyas) which provides three separate systems of punishment depending on reporting criminal abuse in the "hadd" "Kissas and diya "," tazir ".

Being a primary mechanism of protecting the interests and welfare of Muslim society the punishment system, especially the "tazir" is strictly based on the equity sentence given the nature and degree of social danger of the crime committed, the personality of the guilty and which reduce circumstances of the case and worse punishment, the court applies the choice, a certain type of punishment.

For the individualization of punishment there is assumed not only the variety of sentence and the possibility of applying to the discretion of judges and punishment for the offense a concrete personal action, to cause as little hardship offender's family ensure the implementation of the principle of personal responsibility: only the guilty who has found reflection in the Koran: "... who do evil, it shall be rewarded for it ..." "... and not a soul burdened with sins not put them on the shoulders of another ...".

In view of the Russian researcher L. P. Siukieainen " Any serious offense is perceived as a violation of the prohibitions Muslim meaning of which is in the general direction of Islam , in particular the rules and

legal principles , to defend the five core values - religion , life , reason, continuity of generations (off spring) and property " .

In the system, the hierarchy of values of Islam religion ranks first. Exactly two inseparable principles - human and divine - the core of Islam which is not only a religious doctrine, but also a code of rules and principles relating to all aspects of the life of man, his relations with other people ."

The second group of offenses are those that concern human life and health. Life in Islam is considered holy, unquestionable value given by Allah. For those in Islam is severely punished for committing premeditated Koran murder which provides the death penalty. Although it provides the right to retribution, the Qur'an calls the same place on avenging the guilty forgiveness, nothing "he who forgives and humble, one receives reward from Allah." For personal injury applies to the extent possible, as retaliation punishment (reward) or a part of diya (ERS).

A third value of Islam, an offense that violates the property, which is considered sacred and inviolable. Threat to property theft as "Sarica" laboring" hairaba" are severely punished (cutting off the body parts). Other attacks on property, except theft and robbery, shall be punished by "tazir" (correctional penalties) at the discretion of the judge.

The fourth group of attacks, depending on the interests and values of Islam, are so-called crimes that threaten the reason, one of the most protected Islamic values , without which it is inconceivable faith in Allah. Muhammad Abu Zahra believes that the reason is not human property. Based on this , Muslims must not destroy reason but must beware of different attacks in this case is about the use of substances that affect the brain through reason and human psychology which are prohibited by Islam, which set a general rule , that the consumption of addictive substances and missing man reason is prohibited (alcohol , drugs) .

The last group of facts are those that threaten the interests of survivors and families.

The birth rate and education of children must be the result of legal marriage. The Qur'an legal marriage, which says: "And his sign, which he for you and you did husbands, as to live together (and increase followers). He put between you love and mercy "otherwise, sex outside of marriage (adultery), according to Muslim criminal law is considered severely punishable offense (corporal punishment, exile and death

penalty), and the false accusation of adultery (punishment body recognition convict unable to witness the future).

Revealing the penalty issue in Muslim law, Muhammad Abu Zahra believes that Islamic values listed above represent the general interests of the Muslim community, for the breach of which there are established groups of penalties.

For Muslim criminal law is its own punishment classification into three categories, which attracts as we previously convinced, quadratic classification offenses, namely: concrete punishment, ie strictly limited - hadd revenge on the principle of retaliation - Kissas and diya and correctional punishment (of education) - tazir.

Hadd (huddud) Muslim into the criminal law system is absolutely determined by punishments established for committing a limited number of offenses in the Koran and / or sounds. In other words, Koran itself or Suna, here being provided the penalties for their commission, has criminalized some offenses. Hida hadd defines the following: "the letter of the law means hadd punishment, defined as divine right."

Kissas punishment inflicted damage of the equivalence principle (revenge the same penalty) and apply committing humor and causation of injuries. Premeditated murder is the death penalty, and for intentional infliction of bodily injury - mutilation (mutilation) the principle of retaliation. Revenge of the same punishment as the vendetta and talion law originated in the period before Islam, after being sanctioned by the Koran.

Tazir is the system of punishments for offenses under the Koran and Suna.

In the the works of Muslim doctrinarians, the concept of criminal punishment "tazir" meaningful use unit. Egyptian jurist Muhammad Beltadji in this regard says: "Punishment tazir is a type of punishment to the discretion of judges, considering the proportionality of punishment to the crime, the offender's personality and circumstances of the offense". Ibn Cudama assume that "tazir" is not established expressly in Shariat punishment applicable to commit crime (zanb). Define 'tazir "Ibn Al-Ascalan Nedjir writes," is a term applied tazir jump in proportions not established for committing any sin, not established some punishment. "

Therefore, the system of punishment "tazir" represents a broad spectrum of indeterminate sentences, starting with simple sentences (the reprimand) and ending with the most severe (death penalty).

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Pitesti, 23 - 24 May 2014

STUDY UPON SOME PARTICULARITIES OF SECURITIES USED INTO DOMESTIC AND EUROPEAN TRANSACTIONS

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Abstract

A study of the the particularities of securities used into both intern and european transactions is necessary and actual, in view of the increasing of the active role of these documents and the specific problems caused by multidisciplinary subject. The relevance of this study is both theoretical and practical.

In this context, the use of the electronic format of the document must be analyzed and made safe in order to maintain his advantage against the inherent risk.

Key words (3-5)*: securities, electronic, particularity*

1. INTRODUCTION

The concept of "value title" („title of value") requires a multidisciplinary approach and fixation of the terminology for the purpose of a complex analysis required into the contemporary context marked by technical development and extension documents electronically.

The identification of features of such documents is a doctrinaire approach with real practical implications, so such as to allow the development of methodological standards and regulatory changes or practical, to ensure secure and efficient everything securities transactions**.**

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2. CONTENT

In the term of "value title" the jurist and the economist expresses concepts that do not overlap in their entirety and there are particularities that impose a fixing correct terminology which requires an epistemological approach to the origins of the concept**.**

With the expansion of the use of these documents and manifest tendency to generalize their electronic format issue the problem of security of electronic transactions in securities[1], part of the broader concept of economic security, is added to the inconsistencies in terminology and leads us to seek to identify features of such documents.

"Title of value" as the document that incorporates a property[2] right has been used since ancient times in different legal systems. For example, in the system of Roman law[3], where, among various types of society and the first forms of banks, known as *societas argentariorium*[4] , companies that were operating with documents - security. However, in the context specificity religious systems (islam), islamic banks offer various "produce bank" and deal with securities.

On the other hand, we note that the concept of "value title" is defined and perceived differently in each legal system to which we refer[5], as well as into the same system of law. Thus, in Italian doctrine all the instruments through which the credit is mobilizes are called "debt securities" and in the French doctrine, the titles which gives to the holder legitimized the right to exercise certain rights attached are called "commercial titles negotiable".

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[1] Performance of the obligation by paying the security can be achieved by cropping. In such a case can be used either electronic signature or advanced electronic signature, under Law no. 455/2001 on electronic signature (Official Gazette no 847/2001), Government Emergency Ordinance nr.39/2008 (Official Gazette no 284/2008), Norm no. 6/2008 (Official Gazette no 2008) etc..

[2] S. Angheni**,** M. Volonciu**,** C. Stoica**,** *Commercial Law***,** ed. 3rd, All Beck Publishing House, Bucharest, 2004, p. 441.

[3] Mommsen, *History of Rome*, *Book I, Agriculture and Trade*, p. 250 and next, www.cambridge.org.

[4] Buckland, *Roman Law Texts from Augustus to Justinian M.A.*, F.B.A., Ed. Cambridge, 1921, p. 510, www.cambridge.org.

[5] A.D.D.Dumitrescu, *Securites*, C.H.Beck Publishing House, Bucharest, 2011, p. 6 and next.

In this context, acknowledging the need for conceptual unity of these documents, ideologists[1] tried to define and classify the security , outlining the various views . The promoters of the idea of the securities unit[2], such as the german jurist Brunner and, later, the italian jurist Cesare Vivante believed that all documents bearing property rights include billes of exchange, titles, titles representative of goods, investments titles, while other jurists[3] consider that there are distinct titles represented by the effects of commerce, negotiable instruments and securities (mobile values), etc..

The classifications of securities made by jurists are using a lot of criterions such as the complexity of the right that is incoporated, the economic function of the title, the cause or the content of the title, the mode of movement that the document used or the specific market of the transaction. Between this criterious, thos of the economic function of the document and the specific market gives us an basis for understanding the conceptual differences expressed by lawyers and economists.

Thus, according to the economic function and the mode of issuance of the securities we observed that the jurists takes the view that there are bills (bills of exchange, check, etc..), securities representing goods (bill of lading, delivery order, receipt - warrant etc.) and values securities (shares[4], bonds etc.). On the other hand, on the basis of the specific[5] market are identified: a). securities which operates in the money market, inter bank and options contracts, futures, swaps derived from bills (receipts, certificates inter - bank notes negotiable currency, euro - currency etc.). b). the commodity market and options contracts, futures, forward commodity derived from securities representative; c). the market of securities wich is organising the stock market, the bond market, the futures market, options, swaps in shares, etc..

From the point of view of the impact of modern technology on securities transactions, point out that another feature of these documents is represented by the expansion of electronic trading. In this general key,

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[1] E.Florescu, *Legal Regime of debt instruments and securities*, Rosetti Publishing House, Bucharest, 2005, p. 42.
[2] A.D.D.Dumitrescu, *Securites*, p. 7.
[3] I. Dogaru, L. Săuleanu, A.Calotă Ponea, *Theory and practice in commercial securities - bill of exchange, promissory notes, checks*, Publishing House E.D.P. – R.A., Bucharest, 2006, p. 6 and next.
[4] M.Bratiş, *Securities Trading, Commercial Law Review*, no. 5/2005, p. 29.
[5] E.Florescu, *op.cit*., p. 42.

of the need to secure electronic commerce, we should be read also the activity the United Nations Commission on International Law[1], especially in setting up, since 1997 the Working Group no.IV, a group for electronic commerce, and the activity of this group. During his recent[2] work the Working Group no. IV approached the issue of the documents that are transfered by using electronical devices and a normative project concerning this documents is under development.

Managing the impact of the IT on transactions of securities determines in all plans the economic security and it represents a necessity for the potential banking union[3] into the eurozone.

3. CONCLUSIONS

In the end of the material we conclude that the peculiarities of securities derived from several situations, and their study is a necessity recognized on the national, european and international level**.**

So, the peculiarities of securities are resulting from interdisciplinary of those documents which embodied through the different meanings of economists and jurists, but also from the impact of technological development on the area and from the increased number of electronic transactions with securities. It also can result from specificities that can be developed by a individual kind of document.

The security of the transactions with securities (titles of value) is a part of the broad concept of economic security and it presents many levels such as legal, economic and IT.). The security of this transactions is also a goal pursued by all relevant actors (national, european, international) because the profit they are expecting can be achieved only into these conditions.

[1] The activity of the United Nations Commission for International Trade Law before setting the Working Group IV includes an illustrative list of projects such as: negotiable instruments (1973 - 1987), international payments (1988-1992), e-commerce (1997) etc..

[2] We are referring to the two meetings from december 2013 (9-13 december 2013, Vienna) and april -may 2014 (28 april - 2 may 2014, New York) of the Working Group for commerce (IV)..

[3] See the article "A banking union in the euro area", prepared by the International Monetary Fund in February 2013. It explains the beneficial effects (harmonization, security, cooperation, etc..) of such a unions and methods - steps that must be considered for materialization of such a project. www.fmi.ro.

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Pitesti, 23 - 24 May 2014

DIGNITY, A MULTIFACED NOTION

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Abstract:
In legal literature, it was admitted that the concept of dignity does not contain any elements or criteria for defining objective and the enigmatic character opposes it to be fixed in a form determined and to manifest in a single representation. This material is important in the proposed objective, namely to review the distinctions that the foreign legal doctrine proposes in order to provide a useful understanding of this multifaceted concept that is at the center of numerous controversies.
Keywords*: Dignitas; the human being; the human person.*

1.INTRODUCTION

In legal literature, the authors stress, ab initio, that the concept of dignity has a plural nature[2]. In this respect, dignity is regarded as having a multifaceted fundamental nature, being characterized as a multiforme principle, with a multidimensional character[3]. The conclusion reached by multidisciplinary analysis (philosophically, legal, political, economic and medical) of Thomas de Koninck and Gilbert Larochelle is eloquent: "the richness of the word seems to have prevailed on its clarity"[4]. Dignity is proving to be an uncomfortable notion, especially in terms of finding a definition: "Law shows a certain difficulty in defining human dignity as it needs to find its contents to define what makes the humanity of the

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[2] C. Girard, S. Hennette-Vauchez, *Analyses*, in C. Girard, S. Hennette-Vauchez, La dignité de la personne humaine. Recherche sur un processus de juridicisation, P.U.F., Paris, 2005, p.254.
[3] V. Gimeno-Cabrera, *Le traitement jurisprudentiel du principe de dignité de la personne humaine dans la jurisprudence du Conseil constitutionnel français et du Tribunal constitutionnel espagnol*, L.G.D.J., Paris, 2004, p.146.
[4] T. De Konink, G. Larochelle, *Avant-propos*, in T. De Koninck şi G. Larochelle, La dignité humaine: philosophie, droit, politique, économie, médicine, coll. Débats philosophiques, P.U.F., Paris, 2005, p.11.

human being, or, this response is essentially philosophical. The legal contour of the notion of dignity remains uncertain. The concept has a multiple meaning"[1].

2. PROVIDING A DEFINITION – A DIFFICULT ENDEAVOR

The concept is present in international, European and Romanian law, but is not defined in any of the legal texts. Currently, much of the doctrine emphasizes the impossibility of defining dignity. It is eloquent Professor Benoît Jorion position who considers that dignity is an intuitive notion more easily perceived than defined, and therefore the positive law be waived or fail to define the human dignity. Moreover, the author believes that, ultimately, to define dignity means to define "what makes the humanity of the human being", answer that the law does not offer it because the answer is primarily philosophical, and the philosophy itself failed to definitively settle the issue[2]. The doctrinal position that insists on the impossibility of defining dignity is one well defined. It retains categorically that it is about "the most vague abstract definition" and that "no one knows exactly what it is about, but everyone knows what his absence means: the Homeless, the barbarians, the misery and the hardship reign" so that "in this manner, entirely negative, can we know what human dignity is: it occurs when it is ignored, ridiculed or scorned"[3].

Each of us understands in a different way the forms of treatment that are inconsistent with the dignity or imposed by it, so what is worthy for himself or for a human being. Which is in accordance with human dignity known variations from one era to another, from one society to another, from one person to another and the meaning of each person on forms of treatment affecting his dignity is likely to vary over time. Many monographs belonging to the German, French, South African, Spanish, American and English legal literature were devoted to the concept of

[1] C. Laurent, *Bioéthique et ordre public*, these de doctorat, Faculté de droit, Université Montpellier I, Lille, Atelier de reproduction des theses, 2002, p.219.
[2] B. Jorion, *La dignité de la personne humaine ou la difficile insertion d'une règle morale dans le droit positif*, R.D.P., 1999, p.200.
[3] D. De Béchillon, *Porter atteinte aux categories anthropologiques fondamentales*, R.T.D.C., 47/2002, p.60.

human dignity. Further we refer to those works that provide a useful understanding of this multifaceted concept.

3. "THE DIGNITY IN ACTION" AND "THE FUNDAMENTAL DIGNITY"

In a valuable monograph on the principle of the respect for the human dignity in the jurisprudence of the European Court of Human Rights, Beatrice Maurer develops several distinctions, to which we refer to as.

The presentation has the merit to admit that there is a personal conception of dignity "for itself" that is conditional on education, social background and the image that others have of us. It is evolving; the individual must continually to call it into question, to compare it with the "dignity for us" and to try to make it evolve into "dignity itself". Dignity "for us" express the social consensus that exists at some point in respect of the acts and the behaviors that are consistent with human dignity. The dignity itself is "the purpose and the finality of the human person", representing "within anthropologies that occur in the future, an equivalent of the specific difference between man and other living beings. From this man's essential brand, then deducting the ethical obligation to meet that mark in specific actions or to apply strategies for avoiding the depravity of essential nature of the human being"[1].The human dignity has a double meaning: static, the difference between man and the rest of the universe, and dynamic, requires an action, a certain behavior.

Also, the author retains three possible meanings of the term. In the first sense, the "social dignity" in the sense of extrinsic honor command respect, being related to the rank that someone has in society in relation to the personal merits or in relation to the function that he performs. In the second sense, "the fundamental dignity" is "the first quality of a human being" and requires respect for the human being independent of any extrinsic conditioning, by the very fact that it belongs to the human species. In the last sense, "the dignity of the action" is

[1] B. Maurer, *Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme*, Documentation française, Paris, 1999, p.17.

relative; it is about action and may be limited. In the latter outlook, the author believes that we can understand the meaning of expression "losing your dignity". A person who keeps "the fundamental dignity" can know living conditions that are so humiliating or can act against itself in a manner so disrespectful and so contrary to the principles of humanity, so to lose it, but in this case is about the "dignity of action", a dignity with multiple manifestations and the fundamental dignity remain. The human dignity is not progressing, it is the same always and everywhere, however, its respect is evolving.

4. TENSIONS ON HUMAN DIGNITY

The considerations of Viviana Bohórquez Monsalve and Javier Aguirre Román[1] must be understood to illustrate the tensions related to the concept of the dignity, namely: the tension between his natural character and his artificially character; the tension between his abstract character and his concrete character and the tension between his universal and his individual character. Make some comments on each of them. First, the dignity is an element of the idea of human nature, which essentially characterizes every human being that is part of the human species, regardless of the random characteristics (ethnicity, social status); the nature or God gives every person belonging to the human species the essential attribute called human dignity that will be present in humans from conception. Opposed to this view - and this is the first tension – the dignity is an artificial feature which is consensual attributed by the states to all human beings that is useful for ensuring peaceful coexistence, therefore, has no correlation with an alleged reality of human nature, which also can be questioned. The second tension concerns the need for any definition of dignity to be linked to specific aspects of the human life, for example, if the definition of a pervasive "dignity means that man should be treated as an end, not only as a means" to clarify when a man is treated as an end in itself and when it is treated only as a means. In the third tension, the idea of an absolute and universal value of dignity

[1] V. B. Monsalve şi J. A.Román, *Tensions of human dignity: conceptualization and application to international human rights law*, International Journal of Human Rights, vol. 6, nr.11, dec. 2009, pp.39-59.

antagonizes a concept that folds each culture, place and time. In the latter regard, it is recognized that "human dignity becomes a value behind different lifestyles as societies describe their own perceptions about how people should relate to each other. When people in western democracies look the liberalism as the cornerstone of their dignified human existence, in many Asian cultures, the rights and the freedoms of individuals are interwoven with their tasks and roles set by religion or norme"[1].

5. THE DIGNITY OF THE HUMAN BEING AND DIGNITY OF THE HUMAN PERSON

Professor Xavier Bioy, in "*Le concept de personne humaine en droit public. Recherche sur le sujet des droits fondamentaux*"[2] distinguish between two forms of dignity depending on the titular. It shows that the human being is the bearer of the human dignity, dignity belonging to humanity and the human person which is nothing else than the unity that encompasses the qualities of the human being and the conditions of his socialization has its own dignity. The human dignity is the value assigned to this unit which is composed of the components of the person. It is estimated that this distinction remains very artificial, because the person does not oppose the human being, she is the human being, plus the elements of her rationality. However, because the human being is normally called to become automatic and natural a person, nothing prevents to make the qualities of the person qualities of the humanity which opposes itself to the animal kingdom. Therefore, the human being implies to be a person. To ensure a complete protection of the subject, can say that the law in a generic way (and by a fiction) should attribute to any individual which belongs to the human species the qualities of a human person, which gives him the quality of the human being; at the turn, he must be held accountable of the use of these qualities, which employ him at any time. The expression the "human person" is a valued image of the human being, which it is more descriptive and designate the individual who belongs to humanity whom for its mere existence are recognized rights. Dignity is what is due to a

[1] Lee M. Y. Karen, *Universal Human Dignity: Some reflections in the Asian Context*, Asian Journal of Comparative Law, vol. 3/2008, n.1, p.30.
[2] X. Bioy, *Le concept de personne humaine en droit public. Recherche sur le sujet des droits fondamentaux*, Dalloz, Paris, 2003, p. 416.

man to three dimensions: biological, spiritual and relational. So, the dignity of the human person is the value assigned to the unity consisting of the components of the person and the human person appears as a unit formed by the human being (itself a unity of body and spirit) entered into a social connection.

6. THE DIGNITY OF THE FUNCTION, THE SOCIAL DIGNITY AND THE DIGNITY OF THE HUMAN PERSON

Provides an useful understanding of the concept Stephanie Hennette- Vauchez and Charlotte Girard in *„La dignité de la personne humaine. Recherche sur un processus de juridicisation"*, the approach of the two authors is taken over by other eminent authors who have elaborated on the concept, such as C. Brunelle, in the article *"La dignité dans la Charte des droits et libertés de la personne: de l'ubicuité à l'ambiguïté d'une norme fondamentale"*. The authors have three perspectives, three substantive definitions of the principle of dignity: the dignity of the function, the social dignity and the dignity of the human person. Diachronic, these are meanings evolutionary, whose stages correspond to the evolution of the concept of person; synchronous, express in an unequivocal manner the idea that dignity can't be defined in a final and one-dimensional manner[1].

The first approach is considered the "traditional approach" because it refers to the concept of "dignitas" which in ancient Rome was associated with a public function and designate the obligations taken by the person occupying the function. The third party is incumbent upon a general obligation of respect for this function or senior position in the hierarchy of the state or ecclesiastical, which is legally sanctioned. The violation of the dignity in this first sense means an interference with the image of the function[2]. This first type of dignity is gained, but at the same time, it is possible a dispossession. We find this meaning today: dignity as post, job, situation or rank in the state, in a large organization. It is worth noting that the ethical rules of certain professions sanctioned

[1] S. Henette-Vauchez şi C.Girard, *La dignité de la personne humaine. Recherche sur un processus de juridicisation*, PUF, Paris, 2005, pp. 24- 28.
[2] V. Saint-James, *La dignité en droit public français*, in S. Gaboriau, H. Pauliat (coord.), Justice, éthique et dignité, Pulim, 2006, p.161.

the acts that are derogatory to the dignity of a particular profession. Are examples: the Staff of the Old Rite Orthodox Church in Romania that concerns the dignity of a priest, which is hierarchical. Article 92 paragraph (1) provides: "The priest, after hierarchical dignity, is subordinated, according to church canons, do not guardians of the parish church or parish council, but his diocesan bishop, whose provisions is bound to meet them without objections and which is entitled and power to obey him, for misconduct, to various spiritual punishments, including to prohibit celebrating the divine services". The dignity is associated with the function in the Order no. 312/2012 of the Ministry of Defense, which sets in the article 4 d) that the volunteer soldier must manifest in all circumstances a dignified and civilized behavior and to defend the honor and the dignity of the soldier. We here mention that the Law no. 47/1992 on the organization and functioning of the Constitutional Court established in article 64 that the Constitutional Court judges are obliged to refrain from any activity or event contrary to the independence and the dignity of their office. Likewise, the article 231 (2) of Law no. 68/2010 approving Government Emergency Ordinance no. 49/2009 on the freedom of establishment for service providers and the freedom to provide services that "Commercial communications by the regulated professions comply with professional rules thereof, in accordance with EU legislation on the independence, dignity and integrity of the profession and the professional secrecy, according to the specific nature of each profession". In all these cases, the meaning is different from the modern sense of the term, namely human dignity recognized simply to be born human.

The second approach is the individualistic perspective, which is makes the dignity a quality of the human person. It is shown that, in this configuration, dignity is a "marker of the human person and allows equal recognition". It covers the general idea of respect owed by the third parties to any person. It affirms this view of the dignity in criminal law which criminalize the damages to the dignity, in the social legislation which on behalf of equal dignity provides protection from the state (granting a minimum core of the right to health, food, shelter), or in anti-discrimination legislation.

In this respect, dignity includes a moral dimension and a corporal dimension[1]. The moral dimension refers to the fact of adopting a dignified behaviour, to demonstrate dignity, to respect conveniences, in the Latin sense of decorum[2]. Are taken into account a person's moral qualities like courage, the attitude to pain, self-control. In the corporal dimension, the dignity refers to the control of the body and the image in the eyes of others. The term „the dignity" covers the intrinsic value of someone, a behavior that we esteem, or social consideration regarding this individual or his action. In this approach, the dignity does not depend on the function or of one's social rank.

According to the third approach, in its universalist sense, the dignity is a quality that a third party can oppose to a man. In the latter approach, the dignity absorbs the general obligations of respect for the humanity that is dignified. In the latter approach, the human person should be treated only as an end in itself, never as a mere means to achieve a goal that is stranger. In this respect, the dignity is not acquired, but innate, ontological. Man can not affect his own dignity and has no right to do what he wants with himself because "every denial of his own dignity is felt by the collective whole"[3]. Dignity being the quality of belonging to the "human kind", to violate human dignity generally means to prejudice every person in particular. Every human being is worthy for the mere fact of belonging to the human genus, the dignity being a quality that is acquired by each person from birth equally, that can't be lost and do not depend on the qualities, merits, function or rank. Every human being is equally worthy, independent of everything outside or inside that can to demean her, to humiliate or to destroy. The dignity of this kind confers protection to humanity. The dignity, in its universalist meaning is unavailable, because no one can give up to his own dignity and can't willingly to exclude himself from humanity. Then, human dignity becomes attached to the human in a manner so intrinsic, that is

[1] Ph. Pedrot, *La dignité de la personne: principe consensual ou valeur incantatoire?*, în Ph. Pedrot, Ethique, droit et dignité de la personne. Mélanges Christian Bolze, Economica, 1999, p.12.
[2] A. Gewirth, *Human dignity as a basis of rights*, in M.J. Meyer și W.A. Parent, The Constitution of Rights: Human dignity and American Values, Ithaca, Cornell University Press, 1992, p.12.
[3] H. Moutouh, *La dignité de l'homme en droit*, Revue de droit public, nr. 1/1999, p.191.

inalienable, and the human will is ineffective when it comes to his own dignity.

7. THE KANTIAN DIGNITY, THE ARISTOCRATIC DIGNITY, THE WORTHY BEHAVIOR AND THE MERITORIOUS DIGNITY

Doris Schroeder identifies four concepts of dignity. The first is the "Kantian dignity". In this first sense, the dignity is an inviolable property of all human beings, which gives the holder the right to be treated never as a means but always at the same time as an end[1]. The second category is the "aristocratic dignity". This idea derives from the Latin meaning of the term "dignitas" of ancient societies and indicates that the holder had a rank or a quality that separates it from ordinary people. Dignity was necessarily something that was possessed by few. Schroeder summarizes this way: "Dignity is a quality displayed outside of a human being acting in accordance with his superior rank or position". Thirdly, it refers to the "dignified" behaviors which connect the dignity with external exposures. Dignity here is seen as "a quality displayed outside of a human being acting in accordance with the behavior and attire good-mannered". Fourth, the author refers to "the dignity of merit" which is an Aristotelian idea. A person with dignity in this regard will have four cardinal virtues: balance, courage, justice and wisdom, and will work best in circumstances in which there is: her virtuous nature will not give up to the vicissitudes of the life. In the author's opinion, the dignity is a virtue, which includes the four cardinal virtues and the sense that someone has about his value.

The analysis leads to the conclusion that dignity is more than respect for autonomy, but the jurists should keep their modesty: must not expect that the "dignity to have a single meaning, clearly defined".

8. OTHER DOCTRINAL POSITIONS

In the legal literature, Claire Neirinck supported the view that in philosophical language, the dignity has two main meanings, which are

[1] D. Schroeder, *Dignity: two riddles and four concepts*, Cambridge Quaterly of heathcare ethics, 17/2008, pp. 230-238.

the extremes poles and it has intermediate meanings, too[1]. According to her, dignity has a socio-political meaning and a moral meaning. The socio-political meaning, the dignity refers to the qualities of respect, consideration, prestige that make someone worthy, and to the public function, to the eminent rank to which a person stands by means of the position that she occupy, the dignitary; in the moral sense, the dignity is the result of the Enlightenment philosophy, being subject to particular developments from Kant. In the latter sense, the dignity, which is the absolute and significant value that a human being can not lose it, means to unite body and spirit.

The view expressed by Professor Jean-Marie Pontier confirm the trend to operate a distinction between the human dignity and the dignity of the human person. The author indicates that the human dignity characterizes the human being which in her universality, while the dignity of the human person characterize the human being in its uniqueness[2].

In conclusion, we retain with Paul Kristeller that „when we try to understand the idea of human dignity we should not be satisfied with a too easy solution"[3]. Part of it that is indefinite, highlights the fact that our understanding of its meaning is in the making.

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[2] J.-M Pontier., *Avant propos*, în J.M. Pontier, La dignité, P.U.A.M., 2003, p. 13.
[3] P.O.Kristeller, *Renaissance concepts of man and other essays*, New York Harper & Row, 1972, p.21.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

JUDICIAL EXPERTISE UNDER THE LAWS OF REPUBLIC OF MOLDOVA

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***Abstract*:**

Under the Laws of Republic of Moldova forensic science (hereinafter judicial expertise) makes subject of regulation of several normative acts such as Law on judicial expertise, procedural laws, technical –scientific statemens and other regulations as well as internatioanl treaties that Republic of Moldova is a party to. Foresic science itself is govermed by principle of legality, independence, objectivity and plenitude of investigational procedures. Judicial expertise may be launched by an order of the criminal investigation authority, by the prosecutor, the body authorized to consider cases on administrative offenses, the court of its own motion or at the request of the parties under the law of criminal procedure, civil procedure, legislation administrative offences and the Law on judicial expertise, technical-scientific and forensic statements. The order of judicial expertise shall include: date of ordering expertise; name and title or name of ordering officer; the institution which is to designated to perform the expertise; grounds for ordering the examination; questions submitted to the expert; list of documents and objects that will be made available to the expert; if necessary, will be given the special conditions of behavior to objects under examination, and other circumstances if so provided by the law of procedure.

Key words : *judicial expertise, legal expert, expertise report.*

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Judicial expertise may be launched by an order of the criminal investigation authority, by the prosecutor, the body authorized to consider cases on administrative offenses, the court of its own motion or at the request of the parties under the law of criminal procedure, civil

procedure, legislation administrative offences and the Law on judicial expertise, technical-scientific and forensic statements.

The order of judicial expertise shall include: date of ordering expertise; name and title or name of ordering officer; the institution which is to designated to perform the expertise; grounds for ordering the examination; questions submitted to the expert; list of documents and objects that will be made available to the expert; if necessary, will be given the special conditions of behavior to objects under examination, and other circumstances if so provided by the law of procedure.

Legal expertise is also carried out at the initiative of the parties or their representatives, and the ombudsman, to establish the circumstances which, according to the parties, may serve as evidence to defend their interests. [1]

If judicial expertise was lauched while in civil proceedings , then the ordering of court shall also include : name of the court that ordered the expertise , disposition date of issue , date of ordering , the name or designation of the parties, the facts for the sake of which the examination is performed, questions to the expert, the expert's name or the name of the institution entrusted with the expertise, materials sent to expertise, other relevant expertise data, the deadline for submission of the report, other data if so provided by law. This conclusion also stipulates that the expert is summoned by the court or by the head of the expert institution (if the expert is appointed by the head of the institution) criminal liability for knowingly presenting a false expertise report report [2].

In civil proceedings such expertise shall be conducted by persons designated under art.149 of CCP. Several experts may be appointed.

Expertise can be performed in a local court or elsewhere, depending on the nature of the research or the circumstances that make it difficult or even impossible to bring the research object in court. The parties and other participants have the right to attend the expertise, except where their presence is not required or could prevent the experts to act appropriately [1].

In criminal proceedings expertise amy be ordered whereas for finding, clarifying and assessing the circumstances that may have evidentiary significance for the criminal case, requires specialized knowledge in science, technology, art, craft, or other fields. The possession of such specialized knowledge by the person conducting the prosecution or the judge does not preclude the need to order the

examination. Layout expertise is at the request of the parties, by the prosecution or by the court and ex officio by the prosecution. Parties, on their own initiative are entitled to submit request an expert to ascertain the circumstances which they consider to be important to defend their interests. The report of the designated expert has to be prosented to the criminal prosecution body or the court, morever it shall be attached to the materials of the criminal case and should be considered along with other evidences.

The criminal investigation authority as well as the court, in the end, may request expertise if the parties haven't requested so, when there is a belief that such expertise if of need to receive some special character evidence. The document must include: who initiated the appointment of expertise; grounds for requiring the expertise; objects, documents and other materials presented to the expert stating when and under what circumstances were discovered and raised; questions to the expert; expert institution name, name of the person to whom it is made to bear the expertise. Order or the report of the expertise in layout is mandatory for the institution or person to carry out surveys [3].

Requests for an expertise shall be in writing, stating the facts and circumstances and subject to finding objects, materials to be investigated by the expert [3].

Body ordering the expertise hands over the document stating the opening of such procedure, explains the rights and obligations provided for in Article 88 of the Code of Criminal Procedure, and prevents him from responsibility under Article 312 of the Criminal Code, for aknowledged presentation of false reports. The statements are recorded in the same consequence they were presented,confirmed by the signature of expertise and expert. Same procedure is followed for any additional comments and requests of the expert. The entitled authority may decline the experts request if such decision is motivated and enclosed in an additional order [3].

In case of expertise performed by initiative and on behalf of the parties, the expert shall be given the list of questions, objects and materials from the parties or submitted their application by the prosecution to prepare a report according to Art. 260 and 261 of the Criminal Procedure Code.

The suspect, accused or the injured party may also request from criminal prosecution body or, where appropriate, to order expertise. The

refusal may be appealed according to the provisions of the Code of Criminal Procedure.

When conducting judicial expertise the prosecution authority or the court, summons the parties and the expert appointed to inform them about the subject of expertise and questions the expert must give answers to and explain to them the right to comment on these questions and ask them to amend or supplement. At the same time the parties are informed about their rights to request appointment of one recommended expert by each of them to participate in expertise.After considering objections and requests submitted by the parties and the expert, the prosecution or the court shall set a date for completing the expertise, informing him at the same time, the expert whether its performance will attend parties [3].

According to Article 15¹ of the Law on judicial expertise, technical-scientific statements and forensic expertise the head of judicial expertise addresses one or more experts nominated in the order, in the conclusion received by the prosecution authirity, the prosecutor the court, the body authorized to consider cases on administrative offenses in the application of natural and legal persons. And if the expert (experts) is not named specifically, and if addressing natural or legal person, the head of legal expertise authority designates a specific expert or group of experts for conducting the judicial expertise [1].

The chairman of the expertise authority is entitled to explain rights and obligations to the expert which are set out in the Code of Criminal Procedure, and the prevention of criminal liability for knowingly presenting false statements, making organizing expertise, ensuring preservation of objects presented for investigation fixing terms making expertise. Expertise head has no right to give instructions that would determine the course and content of the investigation.

In criminal cases expertise is of no charge, unless the legal expertise is in a need to engage an non-titular expert.In civil cases is done by expert only after the tax is paid, by the person indicated by the body that ordered the expertise or the natural or legal person who requested the finding [1].

Finally the expert received registered materials under the direction of the Head of the institution of judicial expertise, preventive examination follows within 2-3 days, and in simple cases are to be pronounced on immediately in regards to existence or non-existence of self-recusation reasons, sufficient or insufficient research objects,

involvement of specialists being holders need the full solving the problems placed before judicial expertise [1].

According to civil proceedings as an expert can be a person that is detached in solving the case at issue, which is registered in the state register of accredited forensic experts. Parties shall jointly appoint expert or expert institution to be designated by the court to perform expertise . In the absence of such agreement of the parties, the court will designate the expert or institution to perform expertise. If the conclusion of the judicial expertise is indicated only institution to carry out expertise, head of the institution concerned to appoint an expert to inform this court that ordered the examination. Once the expert has been appointed, the court calls for a meeting attended by the parties and the expert, in which it sets out the link between the expert and the parties, the stage in which the parties may be allowed to participate in investigations. Bothe the parties and the expert are notified about the subject matter aş the list of questions to which the expert is expected to provide answers and explain that tthe parties have the right to comment on these questions and ask for amendments or additional statemetns. In cases where the expert can deliver an opinion right away, he shall be heard în the court during the same hearing and his statements are recorded in a report prepared in accordance with art. 220 of the Code of Civil Procedure.

Legal experts may be challenged on the grounds provided în Article 51 of the Code of Civil Procedure, but only when the reason for the challenge is proved. A challenge request is to be submitted to the court that ordered the expertise within 5 days after notification of such appointment, if only the ground for refusal exists at that time. In other cases, the period runs from the date of ground for recusal evolvement. The challenging shall become effective with no regard to this limit of time only if the interested person proves that the reasons of noncomplies are well founded and prevented him to submit such request within the required terms. An objection shall be heard in court, summoning the trial participants and the expert. The court shall issue a decision in this regard. Thi conclusion cannot be subject of appeal.

A matter of high importance is the independent status of the legal experts be it direct or indirect in connection to, the officer of expertise, the parties and other interested third parties who find an interest in the outcome of the case. On the same basis there is a prohibition of influencing forensic expert by authorizing public authorities or private

individuals for purposes of the providing surveys in favor of one another participants in the trial or in the interest of other interested sides. Those responsible of such influence shall bare consequences under the laws of Republic of Moldova.

Besides the rights and obligations of the experts, he may refuse legal expertise in the following cases:

a) violation of ordering procedure, if it prevents or makes it impossible to perform;

b) the submitted questions overcome the competence of the expert

c) not sufficient materials to elaborate the report

d) lack of conditions, methods and technical resources to complete research;

e) danger to the life and health of the expert that goes beyond professional risk;

f) non-payment of service tax [1].

In civil cases the expert may refuse to present the report, if convinced that he can not perform such activity, based on special required skills or knowledge level he/she posesses, or that the materials presented are insufficient for appropriate research and deductions. Thus, the expert gives an explanation in writing not to carry out expertise, stating the reasons. He also shall return to the court materials that have been submitted for examination. If expertise was brought to an official institution of judicial expertise, the above specified actios are carried out by the head if the institution.

Expertise Report is evaluated in accordance with the procedural law in terms of accuracy, objectivity and cplenitude of the research, and the efficiency and fundamental research methods used at the examination. Expert conclusions are not binding on the court, however these ought to be well founded and reasonably motivated [1].

[1] Law on judicial expertise, technical-scientific and forensic research No. 1086-XIV of 23.06.2000 (Official Monitor no.144-145 of 16.11.2000).
[2] Code of Civil Procedure of Republic of Moldova no 225-XV, of 30.05.2003 (Official Monitor no.111-115 of 12.06.2003).
[3] Code of Criminal Procedure of Republic fo Moldova, nr.122-XV, din 14.03.2003 (Official Monitor nr.104-110 of 07.06.2003).

THE ANALYSIS OF THEIR OWN MOTION AND THE MODIFICATION OF UNFAIR TERMS BY THE COURT IN THE CREDIT AGREEMENT

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Abstract

The national court is required only to exclude the application of an unfair contractual term in order that the contract must continue in existence without any amendment and only if the continuity of the contract is legally possible.

It cannot be imposed a certain price of the contract without taking into consideration individual negotiation between parties, the right of property and without the respect of the rules of law and with infringement of national and community jurisprudence.

The national court must to do a distinct and detailed assessment to the contractual terms, from case to case by referring to all the circumstances of the individual case.

Key-words*: unfair contractual, term good, faith property, rules of law, circumstances*

INTRODUCTION

The first Community consumer policy program was adopted in 1975[1] and the need for an European initiative to ensure consumer protection had become so obvious that the first preliminary draft Directives were in place one year later.

By the Council Directive 93/13/EEC on Unfair Terns in Consumer Contracts[2] (the Directive) was regulated for the first time uniform rules of law in the matter of the unfair terms which it is applied also to the credit agreement concluded between the banks and the consumers.

The purposes of this Directive is to give equal protection to the bank and the consumer and to ensure that unfair terms are not used in

[1] Council Resolution of 14.4.1975, OJ C 92/1, 24.4.1975. Besides, on 14 February 1984 the Commission presented a Communication to the Council (COM(84)55 final) on unfair terms in consumer contracts. 2 COM(90)322 final, OJ C 243, 28.9.1990.
[2]http://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1400440119670&uri=CELEX:01993L0013-20111212.

contracts and the contact will continue in existence without the unfair provisions.

The Directive remained largely unchanged since it was adopted and still raises various legal issues as to both substance and procedure. In connection with it was adopted the Directive 2011/83/EU on consumer rights[1] which made only minor amendments to Directive 93/13/EEC based in the harmonization of national consumer protection provisions.

The question of the implementation of the Directive 93/13/EEC is interesting not only from legal point of view but also from a more theoretical perspective. It was stated that the annex to the directive contains a list of terms that may be deemed unfair but the mere fact that a term appears on that list does not necessarily mean that it must also be classified as unfair.

This paper focuses how the national court must make that judgment, taking into account individual negotiation between parties, the right of property and the respect of the rules of law with infringement of national and community jurisprudence.

1. THE CONCEPT OF UNFAIR TERMS

The Article 3 of the Directive 93/13/EEC defines only abstractly the factors that make a term that has not been individually negotiated unfair and makes no reference to national legal concept[2]. The concept of good faith and a significant imbalance in the parties rights and obligations arising under the contract is expressed only in general terms[3].

In the Pannon[4] the European Court of Justice (the Court) held that in that case, in exercising the jurisdiction conferred on it by Article 234 EC, it interpreted the general criteria used by the Community legislature in order to define the concept of unfair terms.

The Court it not empowered to apply the rules of Community law to individual cases and can only give a ruling on how the Directive it

[1] http://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1400440206533&uri=CELEX:32011L0083.

[2] Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 17, and Case -237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 20.

[3] Pfeiffer, in *Das Recht der Europäischen Union* (ed. Grabitz/Hilf), Volume IV, Commentary on Richtlinie 93/13, Preliminary Remarks, A5, paragraph 28, p. 14.

[4] Case C-243/08 *Pannon* [2009] ECR I-4713.

to be interpreted in relation to a specific term[1]. In the case Freiburger Kommunalbauten the Court held that may not rule in the application of the general criteria to a particular term, which must be considered in the light of the particular circumstances of the case question[2].

The task of the Court must be to give specific expression to the abstract criteria for reviewing whether a term may be classified as unfair and in time, with increasing experience to establish a profile for reviewing the unfairness of terms at the level of the Community law. It is for the national court to assess the unfairness of a contractual term in the light of the abstract findings given by the Court in its judgment[3].

The Annex to which Article 3 (3) of the Directive refers contains only an indicative and non-exhaustive list of terms that may be regarded as unfair. A term appearing on the list need not necessarily be considered unfair and, conversely, term that does not appear on the list may non the less be regarded as unfair.

A standard contractual terms and terms in a consumer contract which have not been individually negotiated are to be regarded as unfair if, contrary to the requirements of good faith they establish the parties rights and obligations arising under the contract unilaterally and unjustifiably, to the detriment of the contracting party which did not stipulate those terms.

Also a contractual term cannot be regarded as unfair if it has been laid down by a rule of law or has been drafted in conformity with a rule of law.

In the view of the Court the national courts must take into account in each case the nature of the goods of services for which the contract was concluded and all the circumstances attending the conclusion of the contract[4].

[1] Opinion in Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-0000, point 69.
[2] Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403.
[3] Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941.
[4] Opinion of Advocate General Poiares Maduro in Case C-210/06 *Cartesio* [2008] ECR I-9641, point 21.

2. THE DUTY OF THE NATIONAL COURT TO EXAMINE THE UNFAIR CONTRACTUAL TERM

The Court held in the Pannon Case that the task of the national court is not limited to a mere power to rule on the possible unfairness of a contractual term but also consists of an obligation to do so. The role of the national court is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion where it has available to it the legal and factual elements necessary for that task.

On the other hand, the national court has the possibility of applying the term in question if the consumer after having been informed of it by that court, does not intend to assert its unfair status.

The national court must apply the rules of procedure as in the case of national public policy provisions, in accordance with the Community-law principle of equivalence. In so far as national law provides for the power of or the obligation on the courts to undertake an examination on their own motion when applying provisions of public policy, the same must apply to the assessment of unfair terms in consumer contracts.

Civil law is characterized by the principle that it is for the parties to take the initiative for submitting all relevant facts on which the court must base its decision. The obligation of the court to undertake an examination arises only where pleas in law and arguments of the parties or the other circumstances of the case contain evidence indicating that a term may be unfair.

According with Article 6 (1) of Directive 93/13/EEC " the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms". So, unfair terms are not binding on the consumer is mandatory provision which replace the formal balance with one effective which re-establishes equality between them[1]. The imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action of the national court unconnected with the parties to the contract.

The objective pursued by the European Union legislature in connection with Directive 93/13/EEC consists, not in annulling all contracts containing unfair terms, but in restoring the balance between

[1] Case C-618/10 *Banco Español de Crédito* [2012] ECR I-0000, paragraph 20.

the parties while in principle preserving the validity of the contract as a whole.

The Directive not preclude the possibility, in compliance with European Union law that a contract concluded between a bank and a consumer which contains one or more unfair terms may be declared invalid as a whole where that will ensure better protection of the consumer[1].

A national court "has the power under its internal procedural rules to examine any grounds for invalidity clearly apparent from the elements submitted in the case and if is necessary to redefine the legal basis relied upon to establish that the contractual terms are invalid" of its own motion without waiting for the consumer to make an application in that regard[2].

The Article 6 (1) must be interpreted as meaning that in the case where it has established that a clause in a contract is unfair the national court it is not authorized to reduce the amount of the price but requires it to exclude the application of that clause in its entirety with regard to the consumer[3]. The Court observed that this interpretation is, moreover, borne out by the objective and overall scheme of the directive.

If it was possible that the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of the Directive, since it would weaken the dissuasive effect on banks of the straightforward non-application of those unfair terms with regard to the consumer[4].

From the wording of the second part of Article 6 (1) that the contract concluded between the seller or supplier and the consumer is to continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms, the Court has inferred that national courts are required to exclude the application of an unfair contractual

[1] Case C-453/10 *Pereničová and Perenič* [2012] ECR I-0000, paragraph 31 and 35.
[2] Case C-397/11 Jőrös
http://old.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0397:EN:HTML.
[3] Case C-488/11 Case C-488/11 Dirk Frederik Asbeek Brusse, Katrina de Man Garabito
http://old.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0488:EN:HTML.
[4] Case C-618/10 *Banco Español de Crédito* [2012] ECR I-0000, paragraph 65 to 69.

term in order that it does not produce binding effects with regard to the consumer, without being authorized to revise the content of the term.

Article 4 of the Directive states that "Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject-matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods in exchange, on the other in so far as these terms are in plain intelligible language".

Where a bank provides for a unilateral amendment of a contract term without explicitly describing the method by which prices vary or giving valid reasons in the contact, that contract term is unfair ipos jure.

Terms that create a right to amend contracts unilaterally are not automatically unfair, but only those that permit amendments without a valid reason or which do not state the reason for the amendment in the term itself. The consumer is sufficiently protected if from the outset he is informed of the possibility of and the conditions for the amendment of the contract.

It does not have to be completely impossible to comply with every facet of the contractual description on the services for there to be a valid reason. Any sufficiently important legal reason for possible amendment of the description of the services pursuant to the term is sufficient. If the reason is not stated, the term is typically deemed unfair on the ground alone. The description of the reason must be plain and intelligible to the consumer.

However, the final assessment for classifying the term as unfair lies with the competent national court.

3. THE PRINCIPLE OF AUDI ALTERAM PARTEM

This principle requires that the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter to challenge the views of the other party in accordance with the national rules of procedure[1].

This principle must be applied by taking into account, inter alia, the basic principles of the domestic judicial system, such as protection of

[1] *Banif Plus Bank* [2013] ECR I-0000, paragraph 31 and 36.

the rights of the defense, of which the principle of audi alteram partem is an element[1].

In accordance with the principle of audi alteram partem the court must invite both the financial institution and the consumer to submit their observations on the court`s assessment as to the unfair nature of the term in dispute.

The starting point of this principle is the opposing interest of the parties which interests demand a balance of rights and obligations and equality of opportunity in relation to procedural conduct.

The court must take also into consideration the fact that the main aim of a bank activity is to obtain profit and not to pay the expenses for the credits taken by the consumers.

The claims are included in the opinion of European Court of Human Rights in the notion of goods[2].

To deprive financial institution by the price of the contract is a violation of the right of property and freedom to conduct a business regulated by the Article 1 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms and the Article 16 and 17 of European Charter on Human Rights "The freedom to conduct a business in accordance with Community law and national laws and practices is recognized".

CONCLUSION

The court must to do a distinct and detailed assessment to the contractual terms, from case to case by referring to all the circumstances of the individual case and taking into account the nature of the goods or services for which the contract was concluded and to all the other terms of the contract or of another contract on which the term is dependent.

Financial relationship must be brought into line with the legal situation consistent with the law.

The non-binding nature of the unfair terms therefore exists ipso jure and is not dependent on any judicial decision. The national court simply finds that the provisions in question could not bind the consumer.

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[1] Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 39.

[2] *Case of Mosteanu and others v. Romania 33176/96 din 26 noiembrie 2002 ECHR http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"itemid":["001-122785"]}.*

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 23 - 24 May 2014

INCRIMINATION OF ACTS TO THE ENVIRONMENTAL PROTECTION UNDER THE NEW CRIMINAL CODE

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Abstract:
The author presents the changes made to the implementation of the new Criminal Code in the field of the environmental offenses, highlighting controversial issues which were solved and those that still require attention from the law giver as it may cause some problems of interpretation and application.
Key-words: *new Criminal Code, implementation, environmental protection, offenses, controversial issues.*

1. GENERAL CONSIDERATIONS

The implementation of the new Criminal Code, through the Law no. 286/2009[1] caused a true work of revising the incriminations rules under special laws.

As stated in the explanatory memorandum to the normative act[2], has been found that there were (at the time) about 300 special criminal laws or extra-criminal containing criminal provisions with numerous overlapping texts, implied repeal of which there is uncertainty, the legal penalties between which flagrant differences existed despite the similar nature of the incriminated facts.

Out of these, an important part aimed at environmental protection, in general, or the protection of environmental factors or natural biotic /

[1] Law no. 187/2012 published in the Official Gazette of Romania, part I, no. 757 of November 12th, 2012.
[2] The Explanatory memorandum to the draft Law for the implementation of the Criminal Code and amending and completing some certain normative acts containing criminal provisions, p. 2.

abiotic resources, as well as regulation of some activities with an impact on their.

2. THE MAIN CHANGES OF THE RULES OF INCRIMINATION CONTAINED IN SPECIAL LAWS ON ENVIRONMENTAL PROTECTION

It was claimed[1] that were analyzed all the provisions contained in special laws, aiming:

- the repeal of some texts of special legislation of incrimination (due to their inclusion in the Special Part of the new Criminal Code or to eliminate any unnecessary duplication of texts that protect the same social values);

- the adapting of punishments for crimes that remain in the specific legislation (according to the logic of sanctioning in the new Criminal Code);

- the updating of references to the rules of the Special Part of the Criminal Code (made by the texts of special legislation);

- desincrimination of some offenses under special laws and making them contraventional (where necessary).

Thereby:

a). examples of texts of incrimination from special legislation in the field, repealed (due to their inclusion in the Special Part of the new Criminal Code or to eliminate any unnecessary duplication of text that protect the same social values)[2]:

- Article 111 of Law no. 46/2008 (Forest Code), which criminalizes acts of destruction covered by Article 253-255 of the Criminal Code;

- Article 107 of Law no. 18/1991 (the Land Law) which governs acts of destruction or degradation of land, crops, etc., facts covered by the provisions of Article 253 of the Criminal Code;

- Article 44 paragraph (2) e), f) and g) of Law no. 255/1998 (regarding the protection of new varieties of plants), the facts are retrieved in the Criminal Code offenses of forgery;

- Article 23 and 25 of Law no. 289/2002 (regarding forest belts) the incriminating facts covered by the provisions of Article 256 of the Penal Code (trespass) and in Article 108 of Law no. 46/2008 (Forest Code);

[1] *Idem*.
[2] *Idem*, p. 4, 7-9.

- Article 80 GEO no. 202/2002 (on the management of Coastal Zone) was eliminated from the content of the material element of the offense as „evacuation throwing or injection into territorial sea (...)", which is provided by Article 92 of Law no. 107/1996 (Water Law);

- Article 44^2 of GO no. 11/2004 (concerning the production, trade and use of forest reproductive material) that criminalize acts that are found in Article 98 paragraph (3) section 14 of GEO no. 195/2005 (concerning environmental protection);

b). examples of adaptation of punishments for crimes that remains in the specific legislation in this area (according to the logic of sanctioning of the new Criminal Code)[1]:

- Article 48^1 of Law no. 17/1990 (concerning the legal regime of internal waters, territorial sea, contiguous zone and the economic zone of Romania);

- Article 81 GEO no. 202/2002 (regarding the management of Coastal Zone);

- Article 110 of Law no. 46/2008 (Forest Code) relating to the theft of wooden material has been modified correlation of the sanctioning treatment and circumstances of qualifiers with the provisions of Article 228-229 of the Criminal Code concerning the theft;

c). examples of desincrimination of certain offenses under special legislation in the field and making them contraventional (where necessary)[2]:

- Article 93 paragraph (2) e) of the Law no. 107/1996 (Water Law);

d). examples of explicit provision of the sanctioning negligent omission in the case of some offenses under special legislation in the field (where it was considered that this method of committing presents a gravity sufficient depending on nature and importance of the social value protected)[3]:

- Article 48^1 of Law no. 17/1990 (concerning the legal regime of internal waters, territorial sea, contiguous zone and the economic zone of Romania);

- Article 31 paragraph (2) of Law no. 10/1995 (concerning construction quality);

[1] *idem*, p. 9-11.
[2] *idem*, p. 11-12.
[3] *idem*, p. 13-14.

- Article 32 of Ordinance no. 43/2000 (concerning the protection of archaeological heritage and declaring some archaeological sites as areas of national interest);

e). examples of repeal or reformulation of some contraventional texts contained in the criminal laws in the area (to the extent that those provisions overlap)[1]:

- Article 110[1] a) of Law no. 18/1991 (Land Law) for the purpose of repealing this text, since the act constitutes an offense of abuse of authority incriminated by Article 297 of the Criminal Code.

3. ANALYSIS OF THE MAIN CHANGES OF THE INCRIMINATION NORMS CONTAINED IN THE FRAMEWORK REGULATION ON ENVIRONMENT PROTECTION

In the framework regulation on environment protection, GEO no. 195/2005[2], systematization of environmental law offenses (in general), was made depending on the degree of social danger of the crime.

Prior to implementation of the new Criminal Code, in Article 98 were provided in four groups, 25 distinct facts[3]. Through Article 171 of Law no. 187/2012, the law giver intended to modify, in whole Article 98 of GEO no. 195/2005. Thereby:

a). has been dropped the incrimination of six acts, namely:

- failure to comply with the restrictions or interdictions set for the protection of water and air stipulated in the applying legal norms [provided for by paragraph (2) Section 2 (as previously in force)];

- using dangerous bait or electric means to kill wild animals and fish for consumption or selling purposes [provided for by paragraph (2) section 3 (as previously in force)];

[1] *idem*, p. 17.

[2] Government Emergency Ordinance no. 195/2005 on environment protection published in the Official Gazette no. 1196 of December 30th, 2005.

[3] See: Ioniță-Burda Ș.-D., *Eco-crime*, PhD. Thesis, 2012, p. 225; Ioniță G.-I., Ioniță-Burda Ș.-D., *Environmental Protection Law*, 2nd ed., Universul Juridic Publishig House, Bucharest, 2012, p. 309; Ioniță G.-I., Ioniță-Burda Ș.-D., *Environmental Protection Law*, 3th ed., Pro Universitaria Publishig House, Bucharest, 2014, p. 312; Ioniță G.-I., Ioniță G.-I., Ioniță-Burda Ș.-D., *Suggestions for a better systematization of offences referring to environment protection*, Romanian Penal Law Journal, no. 3/2012, p. 49.

- failure to comply with the restrictions and interdictions on fishing and hunting protected species or species which are temporarily banned by law and in areas with full protection regime, according to the specific regulations [provided for by paragraph (2) section 5 (as previously in force)];

- presenting, in works on environment evaluation, the assessment of the impact on the environment, the environment balance or the introduction of false conclusions and information [provided for by paragraph (2) section 8 (as previously in force)];

- inappropriate application or failure to take intervention measures in case of a nuclear accident [provided for by paragraph (4) section 5 (as previously in force)];

- willingly causing pollution by evicting or immersing hazardous substances or waste in natural waters, directly or from ships or floating platforms [provided for by paragraph (4) section 6 (as previously in force)];

b). has been dropped the provision of the aggravating variants respectively the situation [provided by paragraph (5) (as in force before)] in which the offenses punished under paragraph (3) and (4) [as previously in force] if they endangered the health or bodily integrity of a large number of persons, if they had any of the consequences specified at art. 182 of the Penal Code (1969) or caused a significant material damage (penalty provided was imprisonment from 3 to 10 years and interdiction of certain rights) respectively if there was death of one or several persons or important damage to national economy (penalty provided was imprisonment from 7 to 20 years and interdiction of certain rights);

c). has been renounced at the qualification of the author (legal entity) provided [the paragraph (2) section 14 (as previously in force)] for the act of unfolding of activities with genetically modified organisms or their products without requesting and obtaining the agreement of import / export or authorizations required by specific regulations;

d). was conditioned the incrimination of some acts as:

- omission to immediately report any major accident [provided by paragraph (2) section 12 (as previously in force)], in the sense that only those „persons who have in attributions this obligation";

- production, delivery and use of chemical fertilizers and plant protection products unauthorized [provided by paragraph (2) section 13

(as previously in force)] in the sense that must be "crops intended for marketing";

- continuing the work after its termination disposition (activities) [provided to paragraph (4) section 1 (as previously in force)] in the sense that it comes to continuing the work „that caused the pollution" (as in force);

e). was incriminated a new offense, namely the cultivation of genetically modified higher plants in order to test or for commercial purposes without the registration required by law [provided by paragraph (3) e)];

f). were resistematizate other facts, by splitting into two groups [that have become paragraph (2) and (3)] of the facts provided by paragraph (2) [as previously in force] to which was added [at paragraph (2)] the act of non-agricultural land use prohibitions on plant protection products and fertilizers [provided by paragraph (3) section 1 (as previously in force)]; systematization which was done in five groups, as follows:

f.1.) The *first group* (for which punishment is imprisonment from 3 months to one year or a criminal fine), if the actions "were likely to endanger human, animal or vegetal life or health"[1]:

- burning stubble, cane, scrubs and herbal vegetation on protected areas and on plots subject to eco reconstruction;

- accidental pollution due to failure to supervise new works, installations, technological treatment and neutralization equipment, mentioned in the provisions of the environment agreement and/or environment authorization/integrated environment authorization;

f.2.) The *second group* (for which the punishment is imprisonment between 6 months and 3 years or a criminal fine), if the actions "were likely to endanger human, animal or vegetal life or health"[2]:

- pollution following willing eviction of waste or hazardous substances in the water, air or soil;

- producing noise over the accepted limits, if this endangers human health;

- continuing activity after suspension of the environment agreement or the environment authorization/integrated environment authorization;

[1] Article 98 paragraph (1), a)-b).
[2] Article 98 paragraph (2) a)-g).

- the import and export of forbidden or restricted hazardous substances and materials;

- the omission to immediately report any major accident by people who have in attributions this obligation;

- the production, delivery and use of unauthorized chemical fertilizers and plant protection products, for crops intended for marketing;

- failure to comply with the interdictions on the use of plant protection products or chemical fertilizers on agricultural land.

f.3.) The *third group* (for which the punishment is imprisonment between 6 months and 3 years), if the actions "were likely to endanger human, animal or vegetal life or health"[1]:

- failure to supervise and insure warehouses of waste and hazardous substances and failure to comply with the obligation to store chemical fertilizers and plant protection products only packed and in protected places;

- manufacturing and/or importing for the purpose of launching on the market and using hazardous substances and materials, without compliance with the provisions of the applying legal norms and the introduction on Romania's territory of waste of whatever nature for the purpose of removing them;

- the transport and transit of hazardous substances and materials with failure to comply with applying legal provisions;

- carrying out activities with genetically modified organisms or produce thereof, without asking for and obtaining the import/export permit or the authorizations stipulated by specific regulations;

- cultivating genetically modified higher plants in order to test or for commercial purposes, without registration provided by the law.

f.4.) The *fourth group* (for which the punishment is imprisonment from 1 to 5 years), if the actions "were likely to endanger human, animal or vegetal life or health"[2]:

- causing, due to failure to supervise sources of ionizing radiations, environment contamination and/or the exposure of the population to ionizing radiations, the omission to immediately report the increase of environment contamination over the accepted limits, the inappropriate

[1] Article 98 paragraph (3) a)-e).
[2] Article 98 paragraph (4) a)-b).

application or failure to take intervention measures in case of nuclear accident;

- discharging waste water and waste from ships or floating platforms directly into natural waters or willingly causing pollution by evicting or immersing hazardous substances or waste in natural waters, directly or from ships or floating platforms.

f.5.) The *fifth group* (for which the punishment is imprisonment from 2 to 7 years)[1]:

- continuing the activity which caused the pollution after a decision to interrupt his activities;

- failure to take measures for the total removal of hazardous substances and materials that became waste;

- refusal of intervention in case of accidental pollution of water and coastal areas;

- refusal to accept the control upon the introduction and removal from the country of hazardous substances and materials and the introduction in the country of microorganism cultures, plants and live animals from the wild flora and fauna, without the agreement issued by the central public authority for environment protection.

4. CONCLUSIONS

About the risks assumed by the law giver at the time he chooses the systematization of a large number of diverse acts as the ones of environmental protection regime (generally) based on the criterion of social danger of them, I did, along with other authors, some comments[2].

Noteworthy that was solved one of the issues raised, namely that the double incrimination, meaning that the same act of provocation, with knowledge, of pollution by discharging or sinking into natural waters directly or from ships or floating platforms of substances or hazardous wastes, was incriminated in two texts of regulating framework [in

[1] Article 98 paragraph (5) a)-d).

[2] See: Duţu M., *Environmental Law*, 3th ed., C.H. Beck Publishig House, Bucharest, 2010, p. 282; Ioniţă G.-I., Ioniţă-Burda Ş.-D., *Environmental Protection Law*, 2nd ed., op. cit., p. 310; Ioniţă G.-I., Ioniţă-Burda Ş.-D., *Environmental Protection Law*, 3th ed., op. cit., pp. 312-313; Ioniţă G.-I., Ioniţă-Burda Ş.-D., *Suggestions for a better systematization of offences referring to environment protection*, Romanian Penal Law Journal, no. 3/2012, pp. 49-57.

paragraph (3) section 3 sentence II and in paragraph (4) section 6 (as previously in force)].

As we claimed[1], was interesting the fact that the circumstances and limits of punishment set were different, namely from 1 to 5 years, if the act was likely to endanger the life or health of human, animal or vegetable, and from 2 to 7 years without the offense to be conditioned by such a state of danger.

This was a more reason of criticism, since, having regard the penalties established by the law giver, we should consider that this committed act present a lower social risk when was likely to endanger the life or health of human, animal or plant, to where it would not be such a feature set, which was incomprehensible.

Resolving of this situation was achieved by removing the incrimination contained in paragraph (4) section 6 (as previously in force).

However, the other aspect highlighted, regarding the conditioning of incrimination all acts in the first paragraphs of Article 98 [paragraph (1)-(3) as previously in force, and paragraph (1)-(4) as in force], the fact that „if they were likely to endanger life or human, animal or plant", has not been resolved.

As we claimed[2], from our point of view, this requirement expressly provided for the acts mentioned, does not justify the presence, being unnecessary, whereas it is understood (by itself) that these acts are likely to endanger life or human, animal or plant, as they are (in fact) breaches set just to avoid these consequences.

Thus, it came to a situation at least strange as to criminalize the production of noise above permissible limits, if this seriously endanger human health „if it was likely to endanger the life or health of human, animal or plant" [in paragraph (2) section 4 of the form previously in force, maintained by paragraph (2) b) as in force] which is a nonsense.

It is true that the requirement of the material element respectively that by exceeding the permissible limits for the production noise is not

[1] See: Ioniță G.-I., Ioniță-Burda Ș.-D., *Environmental Protection Law*, 2nd ed., op. cit., pp. 309-310; Ioniță G.-I., Ioniță-Burda Ș.-D., *Environmental Protection Law*, 3th ed., op. cit., p. 313; Ioniță G.-I., Ioniță-Burda Ș.-D., *Suggestions for a better systematization of offences referring to environment protection*, Romanian Penal Law Journal, no. 3/2012, p. 52.
[2] *idem*.

seriously endangered human health is properly formulated and justified in the context, but it just makes it unnecessary the condition laid down in the same text respectively the act was not likely to jeopardize (life) human health (animal or vegetable).

In this context, the expression appears tautological: how would „seriously endanger human health" if „was not likely to endanger human health"?

As already stated, we consider that the law giver should still reflect on the wording of texts and norms of incrimination, especially on the criteria of systematization, as it may cause problems of interpretation and application.

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