UNIVERSITY OF PITESTI
FACULTY OF LAW AND SCIENCE ADMINISTRATIVE

LEGAL AND ADMINISTRATIVE STUDIES

STUDII JURIDICE ŞI ADMINISTRATIVE

Journal

YEAR XII, No. 1 (12) - 2013

ISSN: 2344-6900
ISSN-L: 1583-0772

Journal
LEGAL AND ADMINISTRATIVE STUDIES
ISSN: 2344-6900
ISSN-L: 1583-0772
No.1 (12), Year XII, 2013

Type of journal: scientific/academic
First appearance: 2002
Publication frequency: a single number per year, nr. 1/December
Edition: English

University of Piteşti
Faculty of Law and Science Administrative
Editorial address: avenue Republicii no.71, Piteşti, code 110014, county Argeş
Tel/fax: +400348.453.400
E-mail: **rsja@upit.ro**.
Web-site: **www.rsja.upit.ro**

EDITORIAL BORD

CONTENTS

LEGAL AND ADMINISTRATIVE STUDIES
Journal

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp. 5- 27

THE PERSONALITY RIGHTS. THE EUROPEAN REGULATION AND THE ROMANIAN ONE

Professor Ph.D. Eugen Chelaru
University of Pitesti, Romania

Abstract

Personality rights are rights which man acquires through its existence, and not because of his actions. In Europe, these rights are covered, along with other human rights, by the European Convention on Human Rights and fundamental freedoms (the right to life, the right to a fair trial, before an independent tribunal, the right to privacy and family life, the freedom of thought, conscience and religion, the freedom of expression, the right to marry, prohibiting inhuman or degrading treatment). After the European Court of Justice, with enough reticence declared as admissible the petitions that required to give consideration to human rights violations, some of these rights have been included in the European Union Charter of Fundamental Rights.

Recently entered into force a new Romanian Civil Code, which establishes a comprehensive regulatory personality rights (the right to life, health, physical and mental integrity, to dignity, the right to privacy, the right to own image and non-property rights generated by scientific, artistic, literary or technical and personal data protection law).

The comparative presentation of its provisions with those contained in the two European treaties mentioned above is subject to this paper.

Keywords: *Human rights, personality rights, civil freedoms.*

1. The notion of "personality rights". The notion and the theory of the personality rights have been worked out by the German doctrine, at the end of the XIXth century. They were elaborated as a remedy for the impossibility

to utilize in a supple mode the tort liability, in order to sanction the prejudices brought to the person[1].

The personality rights, named also as "the primordial rights of the human being"[2] are inherent in the particular person, fact which means that they are directly attached to the existing person and they are inseparable from her. As a consequence, by the protection given to such rights, the legislator protects the natural person herself.

In comparison with the rights of estate and those of debt, these rights are not obtained as an effect of the human actions[3].

The theory of the personality rights is the answer of the doctrine concerning the dangers that threaten the human being, dangers that are related to the development of the social and economic life, to the formidable progresses that have been achieved in domains as biology and medicine. This theory has also caused a change of position in the legislative domain because the human being started to be seen as a complex and concrete reality in which the principal place is represented by her biological and psychical existence. Thus, the man became the object of the juridical protection.

There are controversies in doctrine regarding the identification of the personality rights. But, the majority of the authors agree that the rights with such juridical nature are as it follows: the right to physical integrity, the right to dignity, the right to image, the right to one's own voice, the right to respect for private and family life, the right to reply, the right to a name and others.

Besides these rights, it also exists a number of freedoms that are legally stated in the domestic law or in the international one. They have the same goal , respectively, they ensure a direct legal protection to the human being. Thus, concerning the liberties stated by the Constitution, it has been shown that they are genuine rights and that "the right is a liberty and the liberty is a

[1] Regarding the genesis of the theory of personality rights, to be seen F. Zenati-Castaing, Th. Revet, *Manuel de droit des personnes*, Presses Universitaires de France Publishing house, Paris, 2006, p. 210-213.

[2] G. Cornu, *Droit civil. Introduction.Les persones.Les biens*, 12th edition, Montchrestien Publishing house, Paris, 2005, p. 215.

[3] To be seen, Ph. Malaurie, L. Aynes, *Les personnes. Les incapacités*, 5th edition, Cujas Publishing house, Paris, 1999, p. 113.

right"[1], from the juridical point of view. Concerning the international conventions assigned to rights and freedoms, it has been said that there is the same equivalence between rights-public liberties as it exists in the national law, but these are named as "the human rights", as values which are universally acknowledged[2].

But, the bound between rights and freedoms is a permeable one, because many of the actual rights had the statute of liberties in the past. The evolution of the society was the one that imposed the guarantee of an increased juridical protection, fact which is predictable that it will continue to produce[3].

The juridical nature of the personality rights is that of personal non-patrimonial rights. From the international law perspective, they belong to the category of human rights.

The content of the personality rights is established by making reference to a series of generic notions which are incompatible with a precise defining, as it would be the liberty, the honour, the private life, the respect. For this reason, the judge that has to solve the litigations derived from the prejudices brought to these rights, he has an important role in establishing their content. The judge will take into consideration the circumstances of the case[4].

2. The European regulation of the personality rights. The most solid juridical instrument regarding the protection of the personality rights, as part of the protection granted to human rights in general, it has been the European Convention for the Protection of Human Rights and Fundamental Freedoms (which is often known as the European Convention on Human rights). The convention was elaborated within the European Council and it was signed at Rome, on 4th November 1950. Subsequently, 14 Additional Protocols were added to the Convention.

Romania signed the Convention and the Additional Protocols that were in force on the date of its adhering to it, respectively on 7th October 1993 and it ratified them by Law number 30/1994. These international juridical

---

[1] *I. Muraru, E.S. Tănăsescu*, Drept constituţional şi instituţii politice, volume I, XIth edition, All Beck Publishing house, Bucharest, 2003, p. 141.

[2] *C. Bîrsan,* Convenţia europeană a drepturilor omului. Comentariu pe articole, volume I. Drepturi şi libertăţi, All Beck Publishing house, Bucharest, 2005, p. 11.

[3] To be seen, *D. Terré*, Les questions morales du droit, Presses Universitaires de France Publishing house, Paris, 2007, p. 16-17.

[4] To be seen, *G. Cornu,* op. cit., p. 254.

acts had legal effects for Romania beginning with the date of 20 June 1994, when Romania handed in the ratification instruments to the General Secretary of the European Council, as it is stated in article 66, paragraph 3 of the Convention.

The following rights and freedoms that are established by the European Convention on Human Rights can be considered as a part of the personality rights: the right to life (art. 2), the right to a fair trial with a reasonable duration, in front of an independent tribunal (art. 6), the right to respect for private and family life (art. 8), the freedom of thought, of conscience and of religion (art. 9), the freedom of expression (art. 10), the right to marry (art. 12) and the prohibition of inhuman or degrading treatments (art. 3)[1].

The European Convention on Human Rights has its own mechanism which guarantees its provisions and its functioning is ensured by the European Court of Human Rights (CEDO). Thus, any person who considers that one of his rights established by the Convention was broken up, then that person can directly inform CEDO with a request against the state which commited the supposed infringement, but only after he had utilized, without luck, all the procedural ordinary national means.

A wide case law of CEDO that has been adopted within the interpretation of the Convention, it led to the creation of a set of its own notions.

For instance, regarding the right to respect for private and family life, the Convention states the following in article 8, paragraph 1: "Everyone has the right to respect for his private and family life, his home and his correspondence".

Concerning the interpretation of this provision, the case law of CEDO has established that the notion of "private life" involves the following components: the person's physical and moral integrity, the individual's intimate sphere (that includes the right to image, the right to a name, the confidential character of the information regarding the person's health, the right to a good moral reputation, the protection of the data which have a personal character), the individual's right to establish and develop relations with other persons, inclusively within the professional and commercial activities; the combination between the individual's personal and social life; the right to correspondence; the right to home; the right to a healthy

[1] To be seen too, *Ph. Malaurie, L. Aynès*, op. cit., p. 114-115.

environment. Regarding the notion of "family life" it has been decided that it covers both relations that derive from marriage and those that are "a type of the family relations", respectively, those that result from factual unions; the relations between children and parents; the entrusting of the child to certain institutions of protection; the right to re-uniting; the expulsion of a foreign that has founded a family in the respective state; the successions[1].

3. The regulation of human rights within the European Union, before the entry into force of the Treaty of Lisboa. In comparison with other international organizations, the European Union is an organization of integration[2]. At the beginning, this integration only had an economic dimension which it increased by the creation of the Common Market and then by the Economic and Monetary Union which is provided by the Treaty of Maastricht.

Taking into account exclusively the economic dimension of the Union, initially the European Communities Court of Justice has refused to exercise the legality control over the community acts regarding the observance of the fundamental rights, which were only guaranteed by the constitutions of the member states and they had no correspondent in the constitutive acts[3].

But not after a long time, the community instances have created a real "case law" within their framework, they interpreted the provisions of the constitutive treaties or they completed their lacunae[4] and they (the instances) also changed their optics.

This process started in 1969 when the community instances got to the conclusion that the European Union has to base on a community of values, too.

The beginning was made by the European Court of Justice on 12th November 1969, in the case *Stauder* (aff. 29/69, 419) when it has implicitly retained the possibility of exercise the judicial control over the community acts under the aspect related to the observance of human rights.

The imposing of the protection of human rights as principle of the community law was made an year later, by the pronouncement of the decicion in the case *Internationale Handelsgesellschaft* (aff. 11/70, 1125), on 17th December 1970. The Court stated that „the observance of the

[1] To be seen, *C. Bîrsan,* op. cit., pages 98-664.
[2] Regarding the notion of „integration" and its implications, to be seen *J.-M. Favert*, Droit et pratique de l'Union européenne, Gualino éditeur Publishing house, Paris, 2005, p. 42-44.
[3] We give as example, the case *Storck* , 1959.
[4] To be seen, *J.-M. Favert,* op. cit., pages 373-378.

fundamental rights is an integrant part of the general principles of law of which protection is ensured by the Court".

An important moment was represented by the solutioning of the case *Nold*, on 14th May 1974 when the Court decided that, in the absence of some express community regulations, it has to be resorted to the common constitutional traditions of the member states and to the international instruments regarding the protection of fundamental rights, at which the states co-operated in or at which they adhered to[1].

The Court has expressly refered to the European Convention on Human Rights as being one of the international instruments which is able to offer „instructions" under the aspect of the fundamental rights within the European Community.

Beginning with the case *Rutili* (1975), the Court has established that the European Convention on Human Rights is a reference norm in the matter of fundamental rights[2].

In fact, in the case law which was adopted beginning with 1975, the Tribunal of Luxemburg and the Court have made references to a series of rights that are regulated by the European Convention on Human Rights and they also took up, in most cases, the interpretation given by CEDO to the relevant provisions of the Convention. A part of the adopted decisions had as an object complaints by which it was claimed the infringement of some personality rights, as the right to respect for private and family life, the freedom of assembly, the right to a fair trial.

But, the European Convention on Human Rights didn't belong to the community juridical order. The case law of the Tribunal of Luxemburg and the one of the European Court of Justice made a voluntary enforcement of some of its provisions, fact which generated the risk of some interpretation divergences[3].

This case law has decisively contributed to the awareness of the necessity of working out its own regulations that would guarantee the observance of human rights at the level of the European Union.

---

[1] To be seen, *B. Selejan-Guțan,* Protecția europeană a drepturilor omului, 2nd edition, C.H. Beck Publishing house, Bucharest, 2006, p. 206.

[2] *Idem,* p. 209.

[3] To be seen, *F. Sudre,* Droit européen et international des droits de l'homme, 6th edition, Presses Universitaires de France Publishing house, Paris, 2003, p. 143.

The first concrete result of the new tendency materialized in the enactment of a political declaration concerning the fundamental rights and freedoms which was made by the European Parliament, in 1989. Then, the Community Charter of the Fundamental Social Rights was adopted.

Thus, it remained just one step to be made in order to codify the fundamental rights and freedoms. And it was carried out by the adoption of the European Union Charter of Fundamental Rights, which was made by the European Council, within the Summit at Nisa, on 7th December 2000.

4. The European Union Charter of Fundamental Rights. The European Union Charter of Fundamental Rights takes its inspiration from the European Convention on Human Rights and from the case law of CEDO. These aspects not only result from reading its content, but also they are mentioned in the preamble. It is also stated that they (the Convention and the case law of CEDO) are essential elements which are to be taken into consideration in the interpretation of the Charter made by the European Union jurisdictions and by the member states. Also, the explanations established and updated under the authority of the Convention presidium that elaborated it, they are to be considered. These explanations were initially established under the authority of the Convention presidium that worked out the Charter and they were updated under the responsibility of the European Convention presidium, taking into account the interpretations brought to the Charter texts and the evolution of the European Union law from the moment of its adoption to the adoption of the Treaty of Lisboa.

Even more, article 52 paragraph 3 states that „As far as the present Charter contains rights that correspond to the rights guaranteed by the European Convention for Protection the Fundamental Rights and Freedoms, then their sense and extent are the same as those conferred by this convention. This provision does not prevent the European Union law from granting a more extended protection".

In comparison with the European Convention on Human Rights which limits to the civil and political rights, the Charter of Fundamental Rights has a larger content and it regulates not only social rights, but also rights that belong to new domains which are directly related to personality rights, as the bioethics norms that are inserted into article 3 that states the person's right to integrity.

The Charter regulates the following personality rights: the right to dignity (art. 1); the right to life (art. 2); the right to integrity which includes,amongst others, the rights to physical and mental integrity, the

prohibition of the eugenics practices, of conferring a patrimonial value to the human body or to certain parts of it and the prohibition of human being's reproductive cloning (art. 3); the prohibition of torture and of inhuman or degrading punishments or treatments (art. 4); the prohibition of slavery and of forces labour (art. 5); the right to liberty and safety (art. 6); the rspect for the private and family life (art. 7); the protection of the data with personal character (art. 8); the right to marry and the right to found a family (art. 9); the freedom of thought, of conscience and of religion (art. 10); the freedom of expression and information (art. 11); the freedom of assembly and association (art. 12); the freedom of arts and sciences (art. 13); the protection in case of banishment, of expulsion and extradition; the family life and the professional life (art. 33).

Concerning the Charter's field of application, art. 51 states that its provisions address to European Union institutions, bodies and structures in the observance of the principle of subsidiarity and also they address to the member states only in the situations in which they enforce the E.U. law (our underlining – E.C.).

Within the explanations related to the Charter of Fundamental Rights it is stated that regarding the member states, they have the obligation to observe the fundamental rights defined in the Charter only if they act within the field of application of the E.U. law, as it clearly results from the Court's case law. It is also stated that this rule enforces in the same way not only to the central authorities, but also to the regional and local ones and to the public bodies when they put in action the Union's law.

At the moment of the Charter's adoption, it hasn't been arisen the matter of its juridical force.

As it has been stated in the specialized literature, the Charter is an interinstitutional agreement from the juridical point of view, and it is a reference text from the political point of view. As a consequence, it had juridical force only if it was included in a treaty[1].

This fact was realized by the adoption of the the Treaty of Lisboa, after its entry into force.

5. The protection of the personality rights after the entry into force of the Treaty of Lisboa. The treaty resulted from the desire to reform the European Union in order to confer to it the vigour and the suppleness that are necessary in order to cope with the challenges of the XXIth century.

[1] To be seen *B. Selejan-Guțan,* op. cit., p. 210.

Also, taking into account the considerable increasement of its members, the Treaty of alteration of the Treaty regarding the European Union and of the Treaty of institutioning the European Community (the Treaty of Lisboa) is rather a reforming treaty than a refounding one[1]. The statement must be understood in the sense that the Treaty of Lisboa doesn't take the place of the existing treaties, but it completes and it improves them.

Concerning the human rights protection from which a part is represented by the personality rights, the Treaty of Lisboa has a revolutionary character because it has conferred a compulsory juridical force to the Charter of Fundamental Rights.

Thus, as a consequence of its alteration brought by the Treaty of Lisboa, art. 6 paragraph 1 of the Treaty regarding the European Union (TUE) states the following: „The Union acknowledges the rights, the freedoms and the principles formulated in the Charter of Fundamental Rights on 7th December 2007, as it has been adopted on 12th December 2007, its juridical force is equal to the treaties' juridical force".

Therefore, not only the institutions , the bodies and the structures of the European Union but also the member states (except for Great Britain and Poland that, by protocol, they have made reserves, regarding the Charter enforcement) are obliged to observe the Charter provisions when they enforce the European Union law. Even more, the citizens and the enterprises could directly invoke the Charter provisions on the supposition that they will consider that a right guaranteed by the Charter was infringed by a measure adopted by a competent entity of the E.U., or that belongs to a member state, when enforcing the Union's law[2].

The observance of the Charter provisions is ensured by the European Court of Justice.

Even more than that, according to art. 6 paragraph 2 of TUE, „The Union adheres to the European Convention of Human Rights and Fundamental Freedoms. This adhesion doesn't alter the Union's competence as they are defined in the treaties".

The European Union's adhesion to the European Convention on Human Rights became possible as a consequence of the fact that a juridical personality was conferred to the European Union (art. 47 of T.U.E.).

---

[1] To be seen *J-L. Sauron,* Comprendre le Traité de Lisbone, Gualino éditeur Publishing house, Paris, 2008, p. 24.
[2] *Idem,* p. 39.

From the aspects mentioned above, it results that the provisions of the Charter of Fundamental Rights and those of the European Convention on Human Rights, when they refere to the same rights, then they have a complementary character for the European Union and for the member states[1].

This new juridical situation will generate the problem of establishing the competences that fall on the Union's instances and on the European Court of Human Rights in order to solve the litigations in which it is claimed the infringement of one of the human rights that are provided both in the Charter and in the Convention, when the source of the supposed infringement is the EU law enforcement.

Thus, in accordance with art. 35, paragraph 1 of the European Convention on Human Rights, „The Court can only be informed after using up all the domestic recourse means and within a term of 6 months beginning with the date of the internal final decision, as it can be understood from the principles of law which are internationally acknowledged".

On the other hand, according to art. 263 of the Treaty regarding the functionment of the European Union – the text which was consolidated after the alteration brought by the Treaty of Lisboa, the European Court of Justice is competent to check up the acts of the European Parliament, of the European Council and of the unional bodies and structures which are meant to produce judicial consequences for the third persons.

Consequently, we consider that on supposition that it is pretended the infringement of one of the personality rights made by such acts, right which is regulated not only by the Charter but also by the Convention, then the proceeding that is developed in front of the European Court of Justice is assimilated to the national recourse, which is compulsory to be exercised and to be solved before the possible informing of CEDO.

Regarding the enforcement of the Charter provisions, art. 6 paragraph 3 of TUE adds the following: „The fundamental rights, as they are guaranteed by the European Convention of Human Rights and Fundamental Freedoms and as they result from the common constitutional traditions of the member states, they are part of the Union's law as general principles".

The reference to the common constitutional traditions of the member states, as reference norms in the matter of human rights protection, it's the

[1] *Ibidem.*

result of the European Court's of Justice case law which based on these traditions when it pronounced ones of the solutions adopted before the Charter's adoption.

6. The Romanian regulation of the personality rights. Romania, as a member state of the European Union (beginning with the date of 1st January 2007) that ratified the Treaty of Lisboa without any reserve, it has to observe the Charter provisions whenever it enforces the E.U. law. These provisions could be directly invoked in front of the Romanian instances.

At the same time, Romania contributes to the crystallization of the common constitutional traditions which are mentioned in art. 6 paragraph 3 of TUE. Thus, concerning the personality rights which represent the central theme of our paper, the Constitution of Romania regulates the following rights: the persons' right to life, to physical and psychical integrity and also the prohibition of torture and of any inhuman or degrading punishments or treatments (art. 22); the individual freedom (art. 23); the intimate life, the family and private life (art. 26); the inviolability of one's home (art. 27); the secrecy of correspondence (art. 28); the freedom of conscience (art. 29); the freedom of expression which involves the freedom of the press (art. 30) and the right to a healthy environment (art. 35).

The national protection of the personality rights doesn't limit to their enunciation within the Constitution. Thus, the new Romanian civil Code – Law number 287/2009 that came into force on 1st October 2011, it acknowledges the civil rights and freedoms to the natural persons, by art. 26.

The civil rights which the new regulation protects and guarantees are all the rights that the civil law acknowledges to all civil law subjects.

When it's about rights that belong to a certain person, then the doctrine utilizes the term of civil subjective rights. But, the civil law guarantees and protects the personal non-patrimonial rights and the patrimonial rights, no matter they belong to natural persons or to legal entities[1].

The personality rights occupy the central position within the personal non-patrimonial rights that belong to the natural persons. Amongst the personality rights of which existence was pointed out by the doctrine, the new civil Code regulates the right to life, the right to health, to physical and

[1] For the classification of the civil subjective rights, to be seen G. Boroi, *Drept civil. Partea generală. Persoanele,* IIIrd edition, revised and enlarged, Hamangiu Publishing house, Bucharest, 2008, p. 77-86.

psychical integrity, the right to dignity, the right to respect for private life, the right to one's own image and also the non-patrimonial rights which are guaranteed by the scientific, the artistic, the literary or the technical creation. The natural person's attributes of identification (art. 59 of the new civil Code) and other similar personal non-patrimonial rights (art. 252 of the new civil Code) are distinctly protected.

As we have mentioned before, besides the civil subjective rights, the man also has certain freedoms. Some civil freedoms are legally stated, as the freedom of conscience (which it involves the freedom to adhere or not to a religious cult, the liberty of philosophical conceptions); the freedom of expression, the freedom of travel. Some other freedoms don't have a legal regulation – the freedom to marry or to stay unmarried, the freedom to choose the friends, the attirement etc.

We consider that the civil freedoms are part of the personality rights as far as the domestic law or the international conventions acknowledge them.

The civil freedoms that don't have such regulation are not genuine rights, but they have the value of general principles of law, of which force results from the custom. The matter of their juridical protection is arose when the justice has to pronounce on certain limitations that were inserted in juridical acts which were drawn up by private persons[1]. Their statement within art. 26 of the new civil Code is meant to increase their legal protection, this legal provision can serve as a legal ground of a legal action which aims to defend a civil freedom.

The new civil Code provides the following personality rights: the right to life, the right to health, to physical and psychical integrity, the right to dignity, the right to free expression, the right to respect for private life, the right to image, the right for protection the personal data and the right to respect for the deceased person's memory and also it provides the natural person's attributes of identification and the right to self-determination.

But, the enumeration made by the legislator is a declarative one because some other rights have the vocation to be characterized as personality rights, too. That is why the marginal title of art. 58 paragraph 1 of the new civil Code it was replaced with the title of „Rights of the personality" by art. 20 point 9 of the Law for the enforcement of the new civil Code (the Law number 71/2011); the content of the mentioned legal text was completed in

[1] To be seen G. Cornu, *Droit civil. Introduction.Les persones.Les biens*, 12th edition, Montchrestien Publishing house, Paris, 2005, p. 239-240.

the sense that „other similar rights that are acknowledged by law" are part of the personality rights category.

7. The classification of the personality rights that are regulated by the new civil Code. Concerning the classification of the personality rights[1], we mention that the legislator divided into four sections the chapter assigned to these rights: section 1 – Common dispositions; 2nd section – The natural person's right to life, to health and to integrity; 3rd section - The respect for the human person's private life and dignity and the 4th section – The respect ought to the person after her death.

Taking into account this classification and also the content of the respective regulations mentioned above, we consider that the personality rights can firstly be classified depending on the moment when they protect values which are indissolubly related to the natural person's humanity: during her life or after the human being's death.

The second criterion bases on the content of the regulated rights and depending on it, the personality rights divide into rights that protect the human body and its biological and psychical functions (the right to life, the right to health, the right to physical and psychical integrity) and rights that protect moral values (the right to dignity, the right to free expression, the right to private life, the right to image, the right to respect for the deceased person's memory).

We are to consider the latter criterion within the presentation of the personality rights which are regulated by the new civil Code.

A particular position is occupied by the right to self determination which is regulated by art. 60 of the new civil Code and also by the right to protection of the personal data.

The right to self determination is provided by art. 60 of the new civil Code, according to which: „The natural person has the right to self determination if she doesn't infringe the others' right and freedoms, the public order or the good manners".

The right to self determination regards any category of personality rights and it concretizes in actions which voluntary limit their exercise. Its existence arises, first of all, the matter concerning the relation which exists between the person and her body.

---

[1] For a presentation of the various classifications that were proposed in the juridical literature, regarding the personality rights, to be seen O. Ungureanu, C. Munteanu, *Dreptul la propria imagine – componentă a drepturilor personalității*, "Dreptul", number. 10/2010, p. 63-65.

The solution given by the doctrine is not unitary, because two solutions are given.

One of the opinions considers that the person has a special right of property over her own body. It was said that this right of property is different from others because it regards „an object which is attached to the person and therefore it is intransmissible for cause of death and it is imperfectly disponible"[1]. The consequence would be that „the human things (*les choses humaines*) can be appropriated without difficulty and consequently, they can be considered as goods"[2].

According to the second opinion, the existing body is considered as being part of the person, as being her biological substratum[3] and by its protection the law subject himself is protected. Thus, it cannot be discussed about rights that the person would have over her own body, regarded as an object, but it's about the personality rights, in a restricted sense, rights which include the person's right to physical integrity[4].

The new civil Code regulations belong to the aspects inspired by the last presented opinion; it acknowledges that everyone is the master of his own body and at the same time, it ensures the protection of the body even against the harmful actions that the the man is willing to commit or to accept over himself.

The extent of the right to self determination is established by reference to imperative legal provisions which regulate each possible operation, provisions which are contained by the civil Code or by the special legislation; the rights' extent is also established by resort to the case law for certain aspects, as the gravity of the injury caused to the person's integrity, the completition of the operation, the existing interests etc.[5].

On the strength of the right to self determination, the natural person can consent to engage herself into dangerous activities (the entry into army or police forces when these are in theatre of war, the practice of a dangerous trade in the industry, the practice of a dangerous sport) or even to suffer effective injuries of her integrity.

---

[1] F. Zenati-Castaing, Th. Revet, *op. cit*., p.17
[2] Idem, p. 239.
[3] G. Cornu, *op. cit*., p. 216.
[4] To be seen, Ph. Malaurie, L. Aynes, *op. cit*., p. 125-135.
[5] To be seen, G. Cornu, *op. cit.*, p.244.

From the perspective of the new civil Code provisions, the natural person could consent to the following injuries brought to her physical or psychical integrity, as the case may be: medical interventions on the genetical characters, if these are not realized for the purposes prohibited by art. 63 of the new civil Code; the examination of the genetical characters which is realized for medical purposes, for scientific or identification research purposes which is performed under the conditions provided by law (art. 65, paragraph 1 of the new civil Code); medical interventions which consist in experiences, test, samplings, treatments or other interventions for therapeutic or scientific research purposes which are realized in the cases and under the conditions that are expressly and restrictively stated by law (art. 67 of the new civil Code).

Even in the situations when such interventions over the psychical integrity are permitted, there are prohibited the acts which have as an object the conferring of a patrimonial value to the human body, to its elements or to its produces (art. 66 of the new civil Code).

But, the natural person can dispose not only of the right that refers to her physical integrity, but also she has other personality rights as the right to respect for private life (in the situation of the stars that consent to the fact that aspects of their private life should be made public) or the right to one's own image (the reproduction of the person's image in a publicity poster), the permission that a person's name may appear in the sign of a trading company etc.

The right to protection of the data with personal character is regulated by art. 77 of the new civil Code, according to which: „Any processing of the data with personal character, by automatic or non-automatic means, it can be made only in the cases and under the conditions provided by the special law".

The processing of the data with personal character can injury the right to intimate life, to family and private life and that is why this activity can only be developed in the cases and under the conditions stated by law.

The law at which the new civil Code refers is the Law number 677 on 21st November 2001 for the person's protection regarding the processing of the data with personal character and the free circulation of these data; its goal is stated within art. 1 paragraph 1 and it consists „in the guarantee and the protection of the natural person's right and fundamental freedom, especially the right to intimate life, to family and private life, regarding the processing of the data with personal character".

According to art. 3 paragraph 1, letter a), the data with personal character are „any information that refer to an identified or to an identifiable natural person; an identifiable person is that person who can be identified in a direct or in an indirect way, in a particular way by reference to an identification number or to one or to more factors that are specific to her physical, psycological, psychical, economic, cultural or social identity".

8. Rights that protect the human body and his biological and psychical functions. The rights that protect the human body and his biological and psychical functions are the following, as we have already mentioned: the right to life, the right to health and the right to physical and psychical integrity.

Probably, the legislator felt the need for evidencing the particular importance of these rights by including them as part of a special category named as „the rights which are inherent in the person" as it results from the marginal title of art. 61 of the new civil Code[1], although all the personality rights are inherent in the human being.

8.1. The right to life and the right to health. In spite of their importance, the legislator just mentions these rights and doesn't assign them any article that should frame their content. But, this content can be established depending on the following principles: the principle of the personal immunity, the principle of not conferring a patrimonial value to the human body and the principle of the human being's interest and good priority which derive from the content of the new civil Code provisions and from the mode of regulation of the conditions in which certain interventions with injurious potential on the human body can be developed.

The principle of human body's immunity is clearly provided by art. 64 paragraph 1 of the new civil Code and it consists in the prohibition of any intervention that could injure the human body's integrity and his biological or psychical functions. The exceptions to this principle regard, in essence, operations that have as a purpose the saving of life or the preservation of the subject's health which are realized in the cases and under the conditions that are restrictively provided by law.

The principle of not conferring a patrimonial value to the human body prohibits his financial evaluation and the drawing up of juridical patrimonial

[1] The text it has the following content: "(1) The person's life, health, physical and psychical integrity are equally guaranteed and protected by law.
(2) The human being's interest and good has to take priority over the unique interest of the society or of the science".

acts that have as an object the body in his entirety or his components. The justification of regulating this principle by art. 66 of the new civil Code, it consists in the fact that this body is the natural person herself, it's the biological support of her existence.

Although when they are separated from the body, his component parts as the organs, the tissues, the cells and its produces (the blood, the mother's milk, the sperm) get the character of things[1], they keep on „the imprint of their humanity"[2] and for this reason they remain under the incidence of the principle of not conferring a patrimonial value to the human body.

Thus, it appeared a third juridical category placed between persons and goods, category for which the doctrine hasn't find yet a term to nominate it[3].

The principle of human being's interest and good priority is stated within art. 61 paragraph 2 of the new civil Code, and it is regarded as related to the unique interest of the society or of the science. It gives the measure which has to be observed in all situations when the law, by express stipulation, permits derogations of the principle of the human body's immunity.

The regulation of this principle is the result of the legislator's concern to realize an equilibrium between objectives that are apparently contrary: on the one hand, the objectives regarding the increasement of the chances to life for the persons that wait for a transplant without affecting neither the sense of solidarity nor the development of the scientific research; on the other hand, it'a about not permitting that the human body's utilization ever injure the human dignity[4].

Any infringement of these principles can materialize in attempts upon the person's life, health or physical or psychical integrity.

These values can also be affected by the eugenics practices, by the interventions on the genetical characters and the examination of the genetic characters, by the medical interventions or the sampling of cells, tissues or human organs from living persons with the purpose of transplant, as they are regulated by articles 62, 63, 65, 67 and 68 of the new civil Code.

Therefore, the right to life and the natural person's right to health are indirectly protected by the regulation or by the prohibition of such activities.

---

[1]O. Ungureanu, C. Jugastru, Drept civil. Persoanele, 2nd edition, revised, Hamangiu Publishing house, Bucharest, 2007, p. 23.
[2] G. Cornu, *op. cit*., p. 219.
[3] To be seen A. Tarby, *op. cit*., p. 84.
[4] To be seen G. Cornu, *op. cit*., p. 217-218.

The protection of the genetical patrimony surpasses the individuals' interests because as the person's genetical characters are modified then he can transmit the modified character to his descendents. That is why art. 62 paragraph 1 of the new civil Code generally prohibits any activity that could injure the human race, activities that include the genetic manipulations which are realized under conditions which are different from those stipulated by law. The 2nd paragraph of the same legal text prohibits all the eugenics practices and not only those that utilize the genetic engineering means by which it tends to the person's selection organization[1].

Interpreting *per a contrario* the provisions of art. 62 of the new civil Code, it leads to the conclusion that there are legal eugenics practices if their purposes don't consist in the person's selection organization[2].

8.2. The right to physical and psychical integrity. It is stated within art. 64 paragraph 2 of the new civil Code and it is the expression of the principle of human body's immunity. The outlining of its content can be made by reference to the cases and conditions that are restrictively provided by law, conditions in which the interventions that can harm the human body or his functions are permitted. At the same time, even in these cases, the other two principles which interfere in the cases of right to life and right to health are enforceable: the principle of not conferring a patrimonial value to the human body and the principle of human being's interest and good priority. As a matter of fact, the human being protection's specific imposes a strong relation between all the means that are utilized, their separated analysis is only imposed by methodological reasons.

Only the law can regulate the cases in which the interventions with harnmful potential are permitted and they can be regarded from a double perspective: the situation in which it's possible to cause prejudices to a person's body without her assent, respectively the interventions on her own body for which the person can consent to be realized.

---

[1] Art. 62 paragraph 1 of the new civil Code has the following writing: „(1) Nobody can injure the human race.

(2) It is prohibited any eugenics practice by which it tends to the person's selection organization."

The eugenics is the discipline that studies the practical applications of the hereditary biology for the individuals' genetical ameliorating – To be seen V. Astărăstoaie, T.B. Almoş, L. Cocora*, Eugenia,* "Revista Română de Bioetică", number 1/2004, Volume 2, p. 28.

[2] To be seen G. Cornu*, op. cit.,* p. 233-234.

Within the first category there are included: the situations in which it is permitted the patient's submission to methods of prevention, of diagnosis and treatment with potential of risk, without his agreement; these situations are justified especially by the patient's impossibility to give his consent and by the urgency of the intervention.

In the same category of the injuries caused to the person's integrity without his consent, the following situations are included: the measures ordered by the judge during the settlement of a process, as the medical hospitalization (within the proceeding of imposing a judicial interdiction on smb); the making of certain sanguineous expertises (within the proceeding of solution of the action in establishment the paternity) or the obligation to submit to a biological sample for those that are suspected of driving under the influence of intoxicating drinks or drugs. The person cannot be obliged to accept the sampling, but her refusal is interpreted as a recognition of the fact which it had to be proved.

The second category of exceptions represent the natural person's right to self determination, about which we have already discussed.

The cases of exception in which the new civil Code permits the interventions with a harmful potential for the person's physical and psychical integrity are as it follows: the realization of the medical interventions; the sampling and the transplant of cells, tissues and of human organs; certain interventions upon the genetical characters; the procreation medically assisted and the examination of the genetical characters.

9. Rights that protect moral values. The moral values that have to be protected are values that have been created by the human being and they have been accepted as such by the society where he lives. For these reasons, these values were promoted to the rank of personality rights. In comparison with the observance of the physical integrity of which necessity is quite understandable for anyone, the moral values are more subtle and the persons can differently perceive them, depending on the social environment from which they come, on their professional training, on their intellectual level, on their religion and on other similar criteria.

From here it results the difficulty of selection of that values that are indispensable in order to ensure the development of each individual's personality, in a civilized and democratic society. The new civil Code states the following personality rights that belong to this category: the right to free expression; the right to dignity; the right to private life and the right to one's own image.

From the regulation of these rights, it result two essential obligations that fall on the authorities: the obligation to abstain from any action that could injury them and the obligation to create the legal framework which is necessary in order to prevent and to sanction the forbidden interferences, inclusively those coming from private persons.

Secondly, the regulation of these rights prevent the private persons from acting in a such manner that could bring injuries to other persons' rights.

None of these rights has an unlimited character as their limits are established by art. 75 of the new civil Code. At the same time, the legislator took into consideration that the person herself can utilize these rights, thus it instituted a presumption of assent in this respect, within art. 76 of the new civil Code. We'll get back on these two matters.

But, according to art. 75 paragraph 2 of the new civil Code, the exercise with bona fide of the rights and constitutional freedoms and with the observance of the pacts and conventions at which Romania is part of it doesn't represent an infringement of the rights mentioned before.

9.1. The right to free expression. One of the essential features of the democratic society is the observance of the pluralism that involves not only the political pluralism, but also the putting into circulation of ideas by any means.

The right to free expression is regulated by art. 70 of the new civil Code that clearly provides the following, within its first paragraph: „*everyone has the right to free expression*".

Before the new civil Code's adoption, art. 30 of the Romanian Constitution and art. 10 of the European Convention on Human Rights regulated the freedom of expression, thus the establishing of this right's content has to be made by reference to the respective provisions, especially to the European Court's on Human Rights case law regarding this matter. From these aspects, it result that the right to free expression involve any person's possibility to inform the public about her thoughts, opinions and her beliefs, no matter they have or haven't proper argumentations and no matter the expressed ideas are or aren't considered as acceptable by the authorities or by the majority of population. The ideas and the opinions can regard the most various domains: the social life, the politics, the economy, the arts etc.

9.2. The right to private life. It is stated by art.71 and art. 74 of the new civil Code. It has a constitutional basis, too.

Thus, the Constitution by art. 26 paragraph 1 imposes to the authorities the obligation to observe and to protect the intimate life, the family and private life, and by art. 27 it states the inviolability of one's home which is the living space in which the greatest part of the private life is consumed.

In its turn, the European Convention on Human Rights provides the following within art. 8: „*Everyone has the right to respect for his private and family life, his home and his correspondence*". CEDO interpreted these provisions and it considered that the notion of private life includes the person's right to intimate, private and personal life (which it includes the right to image), the right to private social life and the person's right to a healthy environment[1].

The dispositions af art. 71 of the new civil Code give a more restricted meaning, as the new civil Code distinctly regulates the right to image by art. 73.

The notion of private life is identified by opposition with the public one and with the public side of the professional life. It involves the family and married life, the daily life in one's home, the home itself, the state of health, the intimate and amorous or sentimental life, the friendhips, the spending of the free time, the private aspect of the professional work, the mode and the place of interment[2].

The right to private life has a corresponding obligation which rests with the authorities and with the private persons, respectively they are obliged to abstain from any interference with smb's else businesses and from any intrusions into the person's privacy.

9.3. The right to dignity. The right to dignity is a part of those personality rights which „have an object that corresponds to some generic notions of evocation which cannot be limited to a precise definition"[3]. The difficulty of working out a definition determined the Romanian legislator to abstain from trying one and thus it confined itself to institute the existence of the right to dignity within the first paragraph of art. 72 of the new civil Code. In the second paragraph it established its content (which it's formed of the person's honour and reputation) and also the legislator prohibits any possible injury that could produce without the person's consent or that wouldn't be authorized by the provisions of art. 75 of the new civil Code.

---

[1] To be seen C. Bîrsan*, op. cit*., p. 604.
[2] To be seen G. Cornu*, op. cit*., p. 246.
[3]G. Cornu*, op. cit.*, p. 254.

The bound between honour and reputation is quite difficult to establish, they could rather be considered as two facets of the right to dignity, than two distinct elements that compose this right.

About honour, it is said that it's a complex feeling, caused by the perception that each person has about her dignity and by the mode in which the other persons perceive her, concerning this aspect[1]. Therefore, the honour has not an individual character but a social one, from which it results the relation that exists between honour and reputation, relation that can be extended to synonymy: an injury caused to the reputation means an injury of the honour[2].

On the other hand, the honour is innate and the reputation is obtained, in most cases, by the person's exemplary behaviour in the private or social life.

9.4. The right to one's own image. CEDO has stated within its case law that the right to image is a component of the right to respect for private life which is regulated by art. 8 of the Convention and it has as a goal the person's indentity protection, her intimate life's protection, her pesonal relations and her sexual freedom protection[3].

As we have already stated, the Romanian legislator considers that the right to image is a component of the right to respect for private life, too (conclusion which bases on the inclusion of certain deeds that can prejudice the right to image into the category of injuries brought to private life which is regulated by art. 74 of the new civil code). From methodological reasons, the legislator distinctly regulated this right by art. 73 paragraph 1 according to which: „*Everyone has the right to his own image*".

The content of the right to image is established within the provisions of the second paragraph of art. 73 by naming the person's private life aspects which the legislator has considered to protect: the person's physical aspect and the person's voice. Thus, we notice that the legislator has stated two rights under the name of „the right to one's own image": the right to image and the right to voice.

9.5. The right to respect for the deceased person's memory. The new civil Code has assigned a special section to the norms that regulate the

[1] To be seen Ph. Malaurie, L. Aynès, *op. cit.*, p. 162.
[2] To be seen O. Ungureanu, C. Jugastru, *op. cit.*, p. 48.
[3] To be seen C. Bîrsan, *op. cit.*, p. 612. For the arguments that were brought in order to sustain the autonomous existence of the right to image, to be seen O. Ungureanu, C. Munteanu, *loc. cit.,* p. 70-71.

respect ought to the person after her death (the 4th section of chapter II from Title II). It contains 4 articles: art. 78 – „The respect ought to the deceased person"; art. 79 „The prohibition of any injury brought to the person's memory"; art. 80 – „The respecting of the deceased person's will (volition) and art. 81 – „The sampling from the deceased persons".

Although the man's juridical personality ceases up once with his death and the personality rights extinguish (they are *intuitu personae* rights and they are intransmissible), a respect is ought to him by considering what he represented during his life.

The respect ought to the person's body involves many aspects: a decent behaviour regarding his person and his funerals; the funerals' organization (art. 80 of the new civil Code); the sampling of organs, tissues and human cells for therapeutic or scientific purposes has to be made only under the conditions provided by law.

The deceased person's memory is the memory that the persons who are alive keep about her. The deceased person's protection is made by reference to the juridical norms assigned to the right to image (art. 73 of the new civil Code) and to the right to reputation (art. 72 paragraph 1) for the persons who are alive and these norms are correspondingly enforceable.

Some of the actions by which the obligation to respect the human body after the person's death it's infringed, they represent (those actions), at the same time, an injury caused to her memory (for instance, commiting one of the actions sanctioned as tomb profanation).

The respecting of the deceased person's will is regulated within art. 80 of the new civil Code and it involves two aspects: the establishing of his own funerals and the right to self determination regarding his body, after death.

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp. 28-44

SOME CONSIDERATIONS ABOUT CORRELATION BETWEEN RIGHT AND JUSTICE IN THEORY AND PHILOSOPHY OF LAW

doctor habilitat (post-doctoral degree), Professor Dumitru Baltag
Free International University of Moldova
Republic of Moldova

Abstract

The notion of "law" and "justice" are used in several ways. These double meanings must mark the material unit. The law can't be taken in it's ensemble, concerned exclusively either the object either the subjects. Independently of meanings of these terms we must contest, that they are subordinates to idea of "justice". Admit this idea, considering that "law" is the product of social forces of human will, a material phenomenon and a set of moral and social values, a dialect set of wills and freedoms.

Key words*: right, natural right, positive right, subjective right, justice, just, freedom, law, human rights, international acts.*

The notion of "right"[1] is used in several meanings. Should also be noted that this category belongs not only judicial science, but also to other branches of social science, for instance the ethics where some categories of *"right – unfair", "just – justice"* are important chapters of knowledge.

The term of "right" comes from *"directum"* which involve figurative the idea of which is according by law. This image is found in many foreign languages "*diritto"*. Derechos, Recht, right. Despite its unequivocal etymology he has several meanings. He means all the rules of conduct governing human relations in society and whose respect is provided

[1] Vrabie G., *Contribuţii la o noua definire a dreptului, în* Studii şi cercetări juridice nr..3/1985.

by public authority, speaking about the objective right. There is a tendency to identify the right target with positive law[1], all the legal rules in force at a time in a given society. This view, however, L. Barak opinion, is too narrow, because state law in a country at a time, one can not dissociate the broader phenomena and isolate any of its resources or its context. It depends on the history, environment, human, social, economic, ideological way[2].

Another sense of the term is related to what we call subjective right[3]. Legal personality is individual power, living in a society organized in the state to behave in a certain way (to have a certain behavior) according to legal rules in force, or to impose a certain behavior others to give to do or not do something about being able to call in need of state aid. The typical example is ownership: exercising the right of ownership on the house, in common language the term would be *"my house"*. The double meanings of law score unit should not matter. Right can not be taken as a whole that is concerned exclusively to its object or its subjects. Any legal situation translates into a complex of rights and obligations. The second argument is the interaction between the two meanings of law. On one hand, individual rights have their source in regulating impersonal social relations, and on the other hand, changes that occur in the objective right response on the existence or consistency of subjective rights[4].

Thus ownership of an individual exists because it enshrines the objective right. As limiting the right of ownership by objective right affect subjective right, that the owner of the property.

Therefore define the right in a consistent and permanent seems impossible. The term *"law"* is also understood to mean *"just",* the *"justice"*, while for the lawyer means *"rule of law"*. For some it is an ideal[5], for others it is a positive standard[6]. Some see in him not only a model of action, intended to establish or defend a particular state of society, so a simple social norm. Others look to a set of rules of conduct. For each right is an aspect of social phenomena like sociology or history. Others say that the right is an intellectual representation system, which arises by following his own principles, in a manner independent of social or historical phenomena.

---

[1] Vrabie G., *Teoria generală a dreptului.* Iaşi: Ştefan Procopiu, 1993 p.5.
[2] Barac L., Elemente de teoria generală a dreptului. Bucureşti: All Beck, 2001. p.8.
[3] Baltag D., *Teoria generală a dreptului*. Chişinău: Tipografia centrală, 2010 p.76.
[4] Barac L., *Elemente de teoria generală dreptului.* Bucureşti: All Beck, 2001, p.9.
[5] Craiovan I., *Finalităţile dreptului*. Bucureşti: Continent XXI., 1995. p.20-30.
[6] Kelsen H., *Theorie poure de Droit*. Paris: Dalloz, 1962.

It also argues that the right is the result of the social struggles, or that history comes not only as a state evolution and natural determinesm, arguing that the right and will not result only from human activity[1]. Heterogeneity of legal norms determine difficulties in defining the fight. We admit, however, that right is provisional social phenomenon that consists of all rules of conduct in an organized society directs social relations and whose respect is provided by public coercion[2].

We recognize this definition, believing that the right is the product of social forces of human will, a material phenomenon and a set of moral and social values, ideals and reality, a historical phenomenon and legal order, a whole dialectic of wills and documents of freedom and constraints[3].

In addition to the meanings mentioned, the concept of law is used and the wider legal system, the whole of phenomena having this character, including in it: legal consciousness, legal system, the legal and rule of law[4]. Rule of law which externalizes law and not only formal element can not be detached from the merits of, the foundations and purposes of the legal system. Therefore, any definition of law and legal study involves studying the phenomenon of rule of law, the fund and its shape. If we consider the values of society, we see that the right is what they advertise, so he has an inclusive mission he calls, determines who is every - identity, citizenship, family, etc. That is each and regulate ownership, possession, inheritance etc., but also what each - the ability to perform legal acts, civil and political rights and freedoms, duties of citizenship, etc.[5].

At the same time, the right has the power to establish and define the actions (inactions) of people with legitimate character, as well as illegal ones, contrary to the requirements of its rules. So right and freedoms set limits, restrictions that may be made to them. The role of law is to ensure and protect the freedom of others, because "freedom is the right to do what the laws allow, and if a citizen could do what they forbid, he would not be free, because the others would have the same power"[6].

---

[1] Bergel J. L. *Metoda dreptului. Teoria generală a dreptului*. Ed. a II-a, Paris: Dalloz, 1989.
[2] Barac L. *op. cit*., p.10.
[3] Baltag D. *op. cit.,* p.90-96.
[4] Baltag D. *op. cit.,* p.90-96.
[5] Boar A. *Elemente de teoria dreptului*. Arad: S.C. Multimedia SRL., 1996. p.4.
[6] Montesquieu. *L'esprit de lois*. Citat de A. Boar. În: *op. cit.,* p.6.

Relative to the meanings of *"right"* have already advanced the idea that the right can be evaluated as *"fair"* and *"unjust"*.

The term *"fair", "unjust"* belongs right morals and the evaluation as *"fair"* or *"unjust"* expresses the relationship that he is the moral, on the one hand, and on the other hand is likely to highlight one of its aims particularly important, namely, that to ensure and promote justice, righteousness and truth in society and life members.

By the valence of the right is removed from its technical construction of its formal character, essential to its development.

If we are using terms like "*fair"* and "*unjust"*, even by lawyers, we find that the meaning of these terms is also different.

Often the term "*fair"* is associated the idea of "*good", "right*" while the term "unjust" is associated the idea of "*bad", "unfair","ugly","illegal"*.

Independent of the meanings of these terms, we must acknowledge that they are subordinated to the idea of *"justice",* animated by a common element, according to which individuals, people can claim a relationship between the degree of relative equality. The common element in reality expresses a rule as principles, which manifests itself whenever the conversation between the division of profits or disadvantages, etc. Rights or obligations[1].

Therefore justice is often represented as a "*balance*", imposing its principle of treating similarly identical or similar cases, in different ways, to the different[2].

Establishing criteria that underpin a qualification event as similar or different from another case, allows us to observe and see that the term "*fair"* and "*unjust"* are carriers of different moral values from a historical period to another or even within the same historical period, from one space to another. To understand this it is sufficient to look at how slavery was viewed over time.

Internationalization of legal rules seems to reconcile differences in, there is some consensus in considering that "*unjust*" some discrimination based on race, sex, religion, etc. But we must not forget that no such agreement existed always, the framework which today we can say that "*unjust*", was once "*just*" statutory benefit plan even right.

---

[1] Barac L. *op. cit*., p.14.
[2] Boar A. *op. cit.*, p.71.

In any case, socially, note that "*just"* is analyzed by compliance with a rule, while the "*unjust*" is conformity to the rule, that command. Also notes that any individual or collective value relating to these two terms, the moment she appears in axiological system created by his time. It follows that, "*just*" and "*unjust*" are they having not only universal but also the biological roots of social relationships, like "*good*" and "*evil*"[1].

So, as we see the "*right*", "*justice"* are the most generous topics that can bead dressed by experts in various fields of social sciences law, ethics, philosophy, etc. subjects were the center of gravity of many old and new theories. A thorough analysis would involve the study of all political and legal and ethical doctrines and ideas on the separation of author location on a certain philosophical positions such that the conclusions drawn to represent a real contribution to understanding and explaining the terms "*right*" and "*justice*". As vocable "*right*", the term justice outside any context is ambiguous, even confusing, and misleading are many doubts and misunderstandings about its meaning. Is justice an equivalent of law or a distinct and superior element from right? Justice in a particular matter is complying with a law, although it is sometimes said that the law should be consistent with justice[2].

The idea of justice "*comes*" in contemporary full of old ways and not in frequently experience dramatic[3]. In older stages of thought, justice was designed as a match with a default. In the eastern world and where reigns a monotheistic and ethical conception of the universe, justice is attributed above all to express the divine proportion and harmony of their wills. In the people practice justice is to submit to the will divine, obedience or not involving a reality with other subjects. In these circumstances prayer, sacrifice, festive celebrations are considered as judicial duties with the duty of not killing and not stealing. In primitive Greek fantasy is Themis, "*counselor*" of Jupiter, who with his counsel raises various causes discord and war. The marriage of Jupiter and Themis, Dike arises, goddess judgments (sister of "*truth*"), which tends to reconcile and resolve conflicts.

And in practical terms, the concept of *"justice"* is uncertain and variable and in any case needs to clarify its application in practice, the law

---

[1] Barac L. *Răspunderea şi sancţiunea juridică*. Bucureşti: Lumina Lex, 1997. p.12-14.
[2] Giorgio del Vecchio. *Lecţii de filosofie juridică*. Bucureşti: Euronova, 1983. p.33.
[3] Craiovan I. *op. cit.*, p.112.

just having the vision to transform and set it on land application of immediate benefit but the virtues of justice guideline value.

"The law is intended to provide legal order in a given society, the goal *is* "*justice*", ie rules about fair and objective rational individual legal relations," says Mircea will Djuvara[1].

This purpose is not an accidental choice of secondary importance because, for a rule of substantive law that aspires to govern human societies it is necessary to conform to a certain ideal of Justice. Thus it will be neither respectable nor respected if she rejects too much this ideal. As such, this ideal of justice is an inherent presence, structural, in relation to rule of law defined as a general rule and abstract, with its people living in society, whose observance is ensured by social constraint and whose content inside is an or derideal in the sense of justice, according to the situations that meet the needs, human relations, needs vary by time and place"[2].

Was noted that long periods of life of individuals and peoples, the two terms "*right*" and "*justice*", appeared reduced to a single and was considered fair everything is set. In this regard, in Socrates *'Crito'*, derives the obligation to obey the laws (even when they are harsh or unfair) of the natural and quasicontracual link that unites citizen of a country[3].

On this idea, Giorgio del Vecchio noted that "this subject has never been developed so sublime simplicity"[4]. People are receptive, passionate about the existence of justice in their hearts will never accept a divorce between what is right and what is legal[5]. Justice not face with judiciary. Ideal nature of justice can make clear and justice-as antithesis. It is possible that, given the legal experience conflict with the absolute requirement of justice that consciousness can not achieve elsewhere than in himself. Hence, it follows the classic distinction between the right in the narrow sense (just positive or legal) and just absolute or ideal, which is a natural right, so here follows the possibility of unjust laws (as unjust)[6].

Roubier Paul says that unjust laws are laws that hurt the feeling of justice. Moralists and theologians have developed a theory of legitimate

---

[1] Djuvara M. *Teoria generală a dreptului.* Bucureşti: Soces & Co SA, 1930. p.430.
[2] Roubier P. *Theorie generale du Droit*. Paris: Sirey, 1946. p.184.
[3] Craoivan I. *Finalităţile dreptului.* Continent XXI. Bucureşti, 1995, p.92.
[4] Apud, Craiovan I. *op. cit.* p.92.
[5] *Ibidem.*
[6] Baltag D. *Idealul social de justiţie.* În: Materialele conferinţei internaţionale ştiinţifico-practice: "Edificarea statului de drept". 26-27 septembrie 2003. Chişinău, 2003 p.109-115.

resistance to such laws: first there is a natural passive resistance which the subject is limited to disobey the law, then a defensive resistance against which the subject is defending against measures taken by authorities. Finally appears and active resistance by the subject alone or with others will move to attack to get the law repealed or resignation of the Government[1].

The notion of justice and change meaning over time uploading it as shown Michel Villey referring to French doctrine, the resonances in November[2]. Analyzing the ideas contained in her fifth book of "*Aristotle's Ethics*", Michel Villey mau look out the evidence in the literature revealed little, namely the meaning of terms used by him to the designation of facts, ethical and legal phenomena. Effort undertaken is determined by the desire accurate understanding of the concept as that great philosopher had on justice and law, as between them. It is "*to dicaion*" and "*dicaiosyne*". If the first virtue of justice signifies a certain virtue, that of giving everyone what is his (private justice) second means compliance with the rules of moral conduct, the sum of all virtues (general justice). To see what is the difference between law and morality and what relationships they were in Aristotle's views should not be started from the notion of justice understood broadly, the general court, the court understood that, in the narrow sense, as specific justice, justice is proportion, a report, a tie. Justice in this building, is a ratio between what you get what you give, is a proportion between the two works. Purpose, the purpose of this kind of behavior is not more than you own your side and no less (*ta auton ekein*)[3], but achieving this goal is the competence of individuals but of public figures, the legislature. Such private justice is assigned to each role that is his. Suum cuique tribute, the Romans would say. Next we try to give an interpretation proportion between law and justice that is based in particular justice specific concept.

Premise that justice is possible in the sense that we give here the term - to give each what is his, is a crucial point to understand the true sense of what is justice we are talking about. If justice is to give each what is his, to give every one his right (*jus suum cuique tribute*), it is clear that justice will be exercised only where issues have things that are theirs. Justice does not grant her the things that come from the fact that things are already as

---

[1] Roubier P. *Theorie generale du Droit.* Paris: Dolloz, 1946, p.184.
[2] Villey M. Philosophie du droit. Definitions es fins du droit. 2-ena ed:Dallaz, Paris, 1978 p.57.
[3] *Ibidem.* p. 57.

signed. In it self, the act is attributed to a topic which was not assigned – in any manner in any respect is not legal act (the act would not give everyone what belongs to him, but to give one thing is still not his). This act may be an act of good governance, an act of generosity, an act of good management, but not an act of justice. Justice has the opportunity to be exercised only after something has been assigned one, ie, when someone can say in a certain way or in a particular issue, that that is his. So noted, and rightly so, that justice is a second act. It always depends on the primary act: who, attributing things, create the right *"his"*. The sale and purchase, under which a subject someone selling an as set a price is not an act of justice, as any act of purchase is not an act of justice. The two acts are free decisions and no one of them is to give someone what he deserves, or what is his. Once the contract was made, each party is entitled, about what was the contract, is an act of justice, once the contract, the seller sold buyer to give work to give the price. In a certain way under a certain aspect, the finalized contract price and good question belongs to the buyer. To give price to the seller and thing to the buyer are acts to give each what is his.

To understand better the concept of justice, we must always bear in mind the following fundamental principle: justice under the law. There can be no judicial act where there is no way on something, where work is, by virtue of a title, something due, or right.

For us, we can say that justice is the virtue which is to meet and respect the right and virtue which is not create.

Point that we take is fundamental to understand what is justice in this case is just or unjust law. It seems that justice would be prior law so that justice would be a previous or higher criterion by which we highlight the positive law. Moreover, as the virtue of justice that would arise just right. To speak as just or unjust would make sense only in this case. For we must say about this idea so ingrained that if it is acceptable in the current environment, it can not be sustained as a scientifically rigorous criteria. Today we talk ourselves just social order and morality in conjunction with public order etc.

Right that you understand the law, or you just do not conceive that it is rooted in the virtue of justice, and that neither pre nor his superior. The virtue of justice includes the right in this regard, it is always to some extent right back. Any act of justice requires a stable as the previous, so it is a second act. Primary act, which establishes the right is not an act of virtue, but an act of power. This act of power can be adjusted, without doubt, the

virtues, in practice the virtue of prudence, but we say, wisdom, prudence should govern, but these virtues are absent (an act of sale, for example, may be imprudent) without being affected by the validity of the act of power. Setting the right is in itself an act of power, not an act of virtue. Right once established, justice acts, giving each his right.

Then, as a right to speak just or unjust? Obviously, just or unjust law problem arises only in relation to positive law. Able to raise such a problem is that positive law for the purposes of its establishment is within a pre-existing prior right and a right which we call natural law since antiquity. Then obviously positive law can give or deny someone what is his is just or unjust. According to our new, what we call court orders, the requirement of justice and rule of justice is nothing but natural law and the principles of justice are called different principles and precepts own this right. What is the reality of positive law is not justice, but natural law. If you understand that outside of positive law there is no real right subsisting or would not base a question in the proper sense as unjust and severe.

Pre-existence of law is, again, distinctive criterion of justice. For example, if the employees and the employers are placed at the same table to negotiate salaries of the fruit that the company should go to workers is basically a matter of policy work. However, the actual distribution of the fruits resulting from the agreements, agreed wages is an act of justice, the distribution is paid, the distribution agreement already established when the negotiation is actually born.

In this example, we might could see that the distribution of our negotiated is only a matter of policy work, but also one of justice. Salary paid may be just or unjust. Moreover, the key issue of fair wages to the wages were born and are often unjust, although accepted by employee labor contracts. Therefore, a matter of justice can be inserted into a negotiation on wages. Similarly, it can happen that a system of how assignments are distributed things are unjust, such distribution of property in certain countries.

If a positive history and distribution and the award is fair, because he is such a prior right to distribution, if a positive and award distribution is unjust, mean that it is inconsistent with natural rights. Justice, in turn, if, above all, not moralizing individual aims, then it has lost the rationale of human balance and interpersonal relation. It is true that moral precepts have an angle of perfectibility and that foreign law is inferior to the moral law,

but the right to make the effort to recognize that what he lacks is the belief in human perfectibility.

Just and unjust definitions, says Lydia Barak belong to morals, and evaluate on of law expresses the relationship in which the morals, on the one hand and the other promotes justice, righteousness and truth in society and life members. Regardless of the meanings of these terms, we must acknowledge that they are subordinate to the idea of justice, animated by a common element, according tow which people can claim their relationship a degree of relative equality[1]. The common element in reality expresses a rule of principle value is manifested in the division of profits or disadvantages, rights and obligations, etc.

Based on John Rawls's idea that "justice is the first virtue of social institu-teons, just as is true for systems of thought"[2], some manual says that "Justice is the constant will to give each what he deserves"[3]. In political theory, justice refers to distributive justice and social justice. Based on assumptions developed two conceptions of social justice: concept based on merit and reward ideas and design ideas based on need and equality. Conclusive idea of these books is that "people do not advocate any of these way, but lean towards one of the two, without fully embracing minimalism, on the one hand, or status as good general condition, the the other[4].

But there is a real injustice if he was not an employee what belongs where capital and labor distribution was made? Salary or wages paid legal will be unjust if positive before the distribution is, in one aspect and to some extent a natural distribution: only if a natural right that the salary to cover certain personal and family needs, we can say, that a salary is unfair if they cover. In this case is not talking about justice and injustice in the proper sense or reference to the two necessarily represent the reference to natural law.

To understand under what aspect of justice protects natural rights must understand correctly the meaning of each of the terms it contains the formula that define justice: to give each what is his.

---

[1] Barac L. *Răspunderea şi sancţiunea juridică.* Lumina Lex. Bucreşti, 1997, p.14.
[2] Rawls John. *op. cit.,* p.34.
[3] *Общая теория права.* Курс лекций. Под ред. В. К. Бабаева. Н. Новгород, 1993.
[4] *Ibidem.*

A. To give. The analysis should include two fundamental things: first, that means *"yes"*? And if so is an act or a rule?

a) "*Giving"* is a generic sense in the formula given. May be the equivalent of a hand, or to comply or return, and the sense of transfer. In short, means any act or omission whereby something passes or stays the effective power that legitimately corresponds to such power, that is, by virtue of legal title (contract law, custom, nature, etc.). It is therefore a generic word that covers many types of actions, each is necessary for everything to be effective in the real power of its holder, as contained in the title.

b) The second question is *"giving"* is an act or a rule? Amounts as sometimes talking about justice granting them the precepts content including: time of justice, the requirement of justice, duty, justice etc. Thus, it seems that *"yes"* would be made rather "*must be given"* as a demand for justice, a duty norm.

Perhaps the most poignant words that look for the formula to give each what is his coming to H. Kelsen, who described it as *"a vain tautology"*. According to the Viennese lawyer, justice as a virtue, but a time, so the formula would be a form of justice imperative, it would be a general statement of any rule of justice and would be to prescribe to give each what is "his"[1]. A true statement of the formula of justice such as to give each "*what is*" its his and how this would mean that someone is due to its right (ie you have to be given), the true formula justice were down to the "everyone must be given which must be *"given"*, and this obviously is a tautology. But it is equally clear that H. Kelsen tautology reach it suggests he change the formula, and a virtue because it confuses change with time. Formula does not say and does not mean you have to give, but *"give"* simple, ie it does not designate an imperative, but an act. And rightly: since it refers to a virtue and does not indicate at all that would act the virtues, and no law or rule that depends on virtue. Every virtue is a subject of power available, not the norm (Sollen - to be) but a fact, quality (sein - to be). Therefore, justice is a provision of the will, not the norm, but as a fact. Textbooks for what? For documents, specifically to the act of giving. What virtues are defined by their acts, *"giving each what is his"* means an act, an action (to give) and not a precept or a duty (to give). The theme of justice

[1] Kelsen H. *Theorie paore de Droit*. Dalloz, 1962 p.79.

must clearly distinguish three things: virtue, precept, and the thing that belongs to (work right, ius or right). The virtue of justice is a common provision of the will, the law or precept is the norm, and something is right or fair (due to work). "We need to give" justice is not about who is a provision of the subject, but the work just to *"his"* to the extent that is due.

Right or fair and justice is another cause. Human rights, fundamental, are decisive for a living, they created and the only evidence of a right and a universal justice. We are facing a particular case of what is generally the moral relationship between virtue and law or precept. Virtues are provided to meet the law, which is due. We say that the virtues of *"binding"* and talk about the debt of justice, temperance, force etc. Not to say that the virtues are rules or precepts. Every virtue is a habitus or available and nothing else, but it is a requirement to fulfill the law, natural or positive. So morality is under center, as some claim, but the law, even if we understand the fundamental law demands from human nature. Virtue is subordinated debt, not vice versa. Duty of justice, the requirement of justice, rule of justice are expressions which means a duty, a requirement or a law whose fulfillment is an act of virtue to justice, that marks a law or a law of natural or positive home with character legal. Justice under the debt arises from what is *"his"*, which is given or the subject of virtue is a duty owed something; virtue of justice makes this something due (or as I said jus preexisted virtue of justice).

Then get back to the question above, how can we speak about a positive law *"fair"* or *"unjust"*? If the right preexisted justice as a right to say positively that it is *"fair"* or *"unjust"*? Talk about justice or injustice in relation to a pre-existing law, because such a predication refers to giving or not giving everyone what is *"his"* (his right), so positive right to be *"fair"* or *"unjust"* in relation to a right there before his natural right. Justice of positive law is in relation to natural law, in addition to this relationship, there is, itself, a matter of justice. Inadequacy of positive law and social ethical values or social ideals or things of the same gender will be in any case a matter of law wrong, immoral, and there is no real right and above the positive law itself, not too *"unjust"* in the strict sense. Here the major issue in legal pozitismului: denial of natural law involves removing the unjust law problem, because in this case we hypothesize unjust laws, believing that justice is available to enforce the law and positive law exists only in the event there is no other positivist justice beyond compliance with law and positive law whatever performance it would be fair. So we can not

talk right wrong, which is contrary to common and general humanity. That sense of justice remains in our mind "as a directive of thought", it helps to apply in each case a legal assessment recognizes and M. Djuvara. "If we conceive it, whatever its content, we could not specifically say that in such case is a case right or wrong"[1]. If positivism speaks of justice, it amends the definition of justice. It no longer means giving each what is his, the man leaves a void that is his, out of what positive law grants, such attacks is the innermost element of the human being that is the fact that the person the person is being who has power over itself, that being that can at least say "I am my own master". At least, today any person can be someone in a legal relationship. These statements, so natural, not true, but for all times and places (remember the institution of slavery, and still subsystem in some countries).

2. Each

a) Unlike what the word means *"to give"* espresso *"everyone"* is extremely accurate. Justice is not to give or assign something or some things Mankind, Nation and People, she refers to "*Women's rights" "or"* marginalized "*or" Child "*. This court sees modern abstractions or large groups as social structures under names as above, is not justice we are talking about here, modest Justice lawyers. There is an art of law but of politics.

We say *"everyone"* because justice for every person and all persons or legal entities that have a title on something, either positive law or natural law. Justice gives *"his"* each holder of a right, every man, woman, every child, each public or private. This is not a virtue of abstractions or groups, but a virtue unique and specific social relations. Justice concerns the people take individually and not as a group, it gives each what is his. Therefore art law applies, ultimately, the case is singular and art to discern fairly between concrete persons.

b) To say that everyone is given the right or justice also means that virtue knows no discrimination or sense of people. It entitles each holder or whatever it. Justice the right holder, independent of any other circumstance, it gives what is its owner, because belonging to a particular social group, ignoring the right of the other social groups, nor give or refuse it according to their condition, condition or circumstance.

---

[1] Djuvara M. *op. cit.,* p. 52.

It follows that the first injustice is discrimination.

c) It says *"each what is his",* is to establish the principle of nondiscrimination. Discrimination when he gives each his right depends on non-objective conditions or circumstances relating to the right in question, in other words, when the treatment of not only a subject for objective of the exercise of any right or title to. If the ownership of a right is based on being a human person, there is discrimination when it denied rights under the pretext that one person is a different condition: rich or poor, black or white, male or female, ethnic or other etc. If the right is based on knowledge, there is discrimination or acceptance of people when someone prefers not to his knowledge, but because he has a certain orientate-on or family reasons or other reasons, or, conversely, becomes an object for these reasons. Non-discrimination principle does not mean "to give everyone the same" formula for this is not justice, but "to give each what is his." Justice treats everyone equally, meaning that gives equally to all their right, but it does not necessarily all the same things or same, if not all holders of such work. Justice under the law. There are things that belong equally to all. Generally natural rights of man, because they are founded on the fact that all men are equal, these things are due to all equally. There are other things instead, which are distributed differently and are therefore not due to all equally. Justice gives each of his rights, but it does not assign these rights: the distribution is part nature and part of human society. Growing sensitivity to human problems, moral and civic values to Education for rights and fundamental freedoms of dignity and tolerance etc., Are listed among the aims of legal education process in Moldova, stated in the draft Education Code.

What we usually aims of education in general, is the most abstract, higher, the general definitions, which are guiding principles for the following levels (intermediate and operational). As an a side, especially in the formulation of teaching objectives of legal sciences, cognitive objectives, of character and emotional believe that we must put more emphasis on knowledge, understanding and enhance the spirit of justice, considering solutions and cost-view of their legality, also manifest a sense of solidarity with those who achieved justice, a sense of responsibility of future lawmen, growing spirit of justice, etc. "The right to learn about human rights", analysis of actual cases and discussion of solutions for the violation of human rights are as important, if we want these rights to be protected.

3. *"His"*. The term *"his"* is a translation of *"jus suum"* the Roman definition of justice. Cicero, for example, already said that justice is "*suum cuique tribute*". *"His"* equals so with "*his right"* and it expresses the idea is to give each thing that it is: work which is due it deserves. His is one thing.

a) First, we must ask "what type of work". Here are broad terms. Things can mean real or perceived negative things, such as a punishment for crime, be it material or immaterial things, for example, good name, or a task can be a person, for example, child, human activity (labor, management, etc.) may be an animal or a herd of animals, or something in the strict sense. Terms include all elements of which man can say mine, yours, his, whenever the subject or content may be human relationships in other words, relations of alterityand intersubjectivity and so we speak right, talking about them.

b) The feature that gives the relationship of otherness and inter subjectivity can be high lighted with the term *"external things"*. His, in terms of justice, can only be something foreign or external. Exteriority means that it is something that is somewhat beside the point or another, is able to be the object of human relationships. This is fundamental justice, because justice act is based on the fact that the ownership, possession or use or bineficierea can cross one thing or the power of another person, other than that which it is. Justice can only act in the midst of human relations and therefore the subject of *"his"* must have notice of exteriority.

Outside, it must be clear does not mean that it is something that can be perceived through the senses themselves. Just that as an outward manifestation, subject to human relations and therefore can be perceived by others –directly or indirectly, mediated or unmediated. For example, when talking about the right to religious freedom, is clearly not talking about the act of faith as it itself may be the object of learning for others. But the media, this may have interfered, and the person perceived religious manifestations may be subject to coercion. Under specific cases, religion is exhibited active or passive, active in its manifestations, passive because any coercion. Religious belief may be subject to the extent that justice is outside, even if it is itself an intellectual, who as such pate be brought to the senses. ”Actuellement, le droit est laicise; il tend neanenoims toujours a realiser la justice”[1].

[1] Voirin R. *Droit civil.* Paris, 1974. p,39.

It was secularized? If so, why the author says that nevertheless tend constantttly to achieve justice? Source pressure on individuals to comply with the rule, if morality and religion is just individual consciousness, his inner forum. The individual is more or less pressed by his conscience that should (in a negative or positive, not lying or cheating, to be honest, forgiving, etc.). This does not mean that there is and external pressure, from the community he lives, but also exercises the role accepted and endorsed by the individual only.

Even if the expression *"his"* refers to the first idea of property, this is not the meaning that is the formula of justice.

Mean by his everything is a right of subject, what is owed. In accordance with the manner, extent and type of law about it. *"His"* is what is atriubuit a subject that property, and his is also what is attributed to the usufruct, the object rented which bears the sphere of power or freedom, etc. It follows that the same thing may be his in relation to different persons, according to different types of holders. Thus, for example, a home owner belongs, in terms of use. So his is any thing that a person holds as a type of law. In conclusion, we note the following. Achieving mission lawyer fighting for justice involves combining the imperative of rationality, morality and spiritual force intransigent attitude constraint, all under the sign of humanity. Because, as Professor appreciate E. Sperantia, besides scientific training, keen intelligence, integrity and impartiality to the law applying to have a great love of people, a warm enthusiasm for justice and a clear awareness of the role it is between people. "If people love is accompanied by vivid sense of their responsibility and that of justice, never clemency will not slip into indul-gent weakness encouraging transgressions. If feelings of responsibility and strict justice is retouched and put up a great love of people and a subtle understanding of the human soul never judge will not hit with too much harshness where possible correction and healing will never leave to submit a valid dressed evil. Lawyer does not work with inanimate matter as mason or mechanic but has to do with troubles all suffering and all passions, aspirations and the countless miseries of human life[1]. However, expressing her vocation, E. Speranția completed his course in 1946 to introduce the philosophy of law, emphasizing a strong high purpose of law and justice: "Justice comes from outside, from above, is the

[1] Speranția E. *Introducere în filosofia dreptului.* Cluj: Tipografia „Cartea Românească, 1946. p.467.

same kind and origin as averb that created the world. Love is the elemental force of justice. For those in place balance the shop, most speaking emblem of Justice would have a heart, winged in flight sky"[1].

In conclusion, we note the following. Achieving mission lawyer fighting for justice involves combining the imperative of rationality, morality and spiritual force intransigent attitude constraint.

Bibliography

- Vrabie G., *Contribuţii la o noua definire a dreptului, în* Studii şi cercetări juridice nr..3/1985.
- Vrabie G., *Teoria generală a dreptului.* Iaşi: Ştefan Procopiu, 1993
- Barac L., Elemente de teoria generală a dreptului. Bucureşti: All Beck, 2001
- Baltag D., *Teoria generală a dreptului*. Chişinău: Tipografia centrală, 2010 p.76.
- Craiovan I., *Finalităţile dreptului.* Bucureşti: Continent XXI., 1995. p.20-30.
- Kelsen H., *Theorie poure de Droit*. Paris: Dalloz, 1962.
- Bergel J. L. *Metoda dreptului*. *Teoria generală a dreptului*. Ed. a II-a, Paris: Dalloz, 1989.
- Boar A. *Elemente de teoria dreptului*. Arad: S.C. Multimedia SRL., 1996
- Barac L. *Răspunderea şi sancţiunea juridică*. Bucureşti: Lumina Lex, 1997
- Giorgio del Vecchio. *Lecţii de filosofie juridică*. Bucureşti: Euronova, 1983. p.33.
- Djuvara M. *Teoria generală a dreptului.* Bucureşti: Soces & Co SA, 1930. p.430.
- Roubier P. *Theorie generale du Droit*. Paris: Sirey, 1946. p.184.
- Craoivan I. *Finalităţile dreptului.* Continent XXI. Bucureşti, 1995, p.92.
- 14.Baltag D. *Idealul social de justiţie.* În: Materialele conferinţei internaţionale ştiinţifico-practice: ”Edificarea statului de drept”. 26-27 septembrie 2003. Chişinău, 2003 p.109-115.

[1] Ibidem.

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp. 45-53

CRIME INVESTIGATION MANAGEMENT

Ph.D. Habilitated Professor Mihail Gheorghiță
Free International University of Moldova
Republic of Moldova

Abstract

The article focuses on the interest shown by forensic researchers on identifying and fundamenting problemes regarding the scientific organization of investigators' activities of research and inquieries and on the details of the matter. Also, the personality of the criminal is taken into account, hence the analysis of the investigator who needs to be a professional as well as a psychologist.

In the end, conclusions reveal that only impecable criminal investigation may lead to a fast and effective solution to a criminal cause.

Key words: *investigation, investigator, criminal, crime, system*

Forensic scientists have begun to actively analyse the problem of organizing crime investigation in the 1920s. Their works on the matter have played a positive key role not only in fundamenting theoretical forensic science, but also in the actual solving of problems regarding the organization of the investigation of some categories of crimes[1].

Starting with the 70s, forensic scientists have shown their deep renewed interest towards fundamenting problems regarding the scientifical organization of the investigators' work[2].

Their reccomendations in this field have certainly played a very important role in the improvement of work conditions and ensuring technical facilities for those charged with crime investigation. However, the problems shown - organizing crime investigation and scientifical organization of the investigators' work – are not identical, although a series of authors do not consider them different, while others see investigation organizing as a sort of planning. For instance, V. Gromov, while generally defining „planning" shows that „it reffers to a preliminary organization of the investigation, ment to ensure fast and effective discovery of crimes"[3].

In our opinion, up to present, the problems of organizing crime investigations have not yet been plausibly reflected in forensic literature, and no one has been preoccupied with their profound fundamentation. Considering the lack of an unique, unequivocal approach of the essence of this system of human activity by forensic scientistists, it is interesting to observe the components and the tasks related to organizing crime investigation, including crimes commited by organized criminal groups.

From the points of view expressed in the specialized literature, we consider it to be closer to the truth – the one of professor A. Larin. He states that „organizing investigation represents a selection and an arrangement of forces, instruments and means of the investigator, it represents creating and using optimum conditions in order to reach the judicial goals"[4]. Apart from those mentioned above, another shorter definition of A. Larin is called for – organizing investigation as an activity of an investigator or of a grup of investigators regarding a concrete crime, as an interaction between the investigator and the operative investigation teams, as an attraction of society to investigate, as organizing the interaction between the investigator and the colaborators of revision and inspecting services[5]. According to prof. V. Konovalova, on the other hand, included in the organizing of crime investigation are only the elaboration of the different versions of investigation and the planning of the judicial inquiry. Some authors include the elaboration of different versions of judicial inquiry, the planning of the judicial inquiry, the primary actions of criminal pursuit and the operative measures of investigation – in the actual content of organizing the judicial inquiry[6].

Prof. M. Iakunin, for instance, proposes a series of composing elements of the organizing of state crimes investigation: the rational distribution of obligations in order to realize the judicial inquiry, ensuring the coordination of people and organs participating in the investigation and their actions, efficient visibility and control over the work being done, vast using of means and methods which contribute to rendering more efficient the work of some of the partipants[7].

We believe that, in order to develop an organized activity according to standards and requirements, the organ of criminal pursuit must establish, each step of the way, the tasks he should achieve which, in fact, determine the contents of the plan that he sets up for each criminal cause[8]. It is necessary to firstly determine the general tasks of the criminal investigation, the main problems that need to be elucidated.

The theses exposed above show that scientists understand and explain in different manners the concept of „organizing criminal inquiry". Furthermore, some confuse organizing and planning. The final thesis exposed above is in our opinion a mere element of the organization.

The term organization has more that one significance, of course. From a forensic point of view, according to us, it reffers to an activity of the officer charged with the criminal pursuit (the public prosecutor), an activity aimed at establishing all the exact circumstances of the criminal deed, accumulating evidence on the matter, counteracting and investigating the crime. This actually means organizing the work conducted, setting it in order, accumulating information on the criminal case, disposing forces and means in a pattern, as well as realizing the actual process of establishing the true objective of the criminal file in cause. It appears to be a correct opinion the one regarding the fact that the stated theses must reffer to the object of forensic tactics. Unfortunately, however, no forensics textbook contains the theory of organizing crime investigation. Hence the question on how do lawschool graduates manage?

It is well-known that the process of investigating any crime is organized by the officer charged with the criminal pursuit or public prosecutor based on primary information and materials contained in the operative file, according to the Code of criminal procedure, scientific theses and forensic reccomendations. This is the way that ensures a certain logical coherence of the thinking processes and actions, aplying the forms which provide the optimum solution in an organized plan.

The activity of the officer charged with the criminal pursuit or of the public prosecutor implies conceiving a rational system of organizational decisions, of criminal pursuit actions and operative measures of investigation aiming at fulfilling the tasks of criminal legislation, justice and internal state security - as efficiently as possible. These decisions and actions of the organ of criminal pursuit or prosecutor have both a procedural and a non-procedural (tactical) character.

Their unity consists in the fact that both procedural decisions and actions, as well as non-procedural, are oriented towards accomplishing the tasks of the criminal pursuit of the criminal and towards solving other problems standing in the way of judicial organs. The differences are based on the fact that procedural decisions and actions, as well as non-procedural, have different grounds and are expressed in different forms. Thus, while the first are based on concrete norms of criminal and criminal procedure

legislation – which are reflected in the procedural documents of the file, those in the second category being based on different reccomendations of the theory and practice of law organs, on instructions, ethical norms and the own experience of investigators.

In the documents of criminal files are usually only reflected the results of the procedural decisions and actions of the officer charged with the criminal pursuit/prosecutor, while the other data obtained from the operative investigation activities are recorded in current materials, the files of operative accounts.

The procedural decisions and actions comprised in organizing criminal causes' investigations are the following: beginning the criminal cause following the establishment of the crime; taking the necessary counteracting measures towards the suspects, blamed or confined persons; carrying out special actions of criminal pursuit (initial, ulterior or non-postponable), oriented towards obtaining evidence; identifying and interrogating witnesses, victims, suspects or blamed persons; initiating criminal proceedings with regard to the persons in cause, verifying obtained evidence etc.

The non-procedural decisions and actions, which are also part of organizing crime investigation, are: obtaining, accumulating and appreciating information on the crime; elaborating versions of judicial inquiry and operative investigation; planning the investigation or the measures of operative investigation; creating interaction and coordination; analyzing resulting materials and controling the developing activity.

Organizing crime investigation must be understood as the rational activity of the criminal pursuit organ or prosecutor, which includes a complexity of decisions and actions oriented towards the identification of illegal deeds, the personality of the author, the establishment of his guiltiness and of other circumstances relevant to the correct solving of the criminal cause[9].

The specific characteristic of the emergence of criminal causes is what determines the organizing system of all investigating actions of the respective cause. The consecutivity, orientation, volume and content of the criminal pursuit and operative investigation actions in the initial phase of judicial enquiry are determined by the specifics of the situations being examined. In the present context, they might be formulated as follows: are the criminals identified or not; have or have not been done the operative actions of investigating the established crime before initializing criminal

proceedings; the crime is or is not linked to victims, extended damage, application of dangerous methods of carrying it out, weapons, technical means etc.

In our opinion, organizing crime investigation mostly depends on the circumstances from the moment of initiating criminal proceeding and may have one of the following versions:

- organizing the judicial enquiry of the criminal cause started in connection to the confinement of the criminals in the moment of the crime;
- organizing the investigation of the criminal cause started on the grounds of materials resulting from the operative investigation;
- organizing the judicial inquiry of the criminal cause started on the grounds of separated material in other files;
- organizing the investigation of the criminal cause started by establishing the existence of the criminal deed, with unknown author.

The first three situations are characterized by the fact that the suspected or blamed persons are known from the very beginning of the criminal cause. Usually, they are also taken into custody or arrested. In such situations, ever since the start of the criminal inquiry there are possibilities for organizing and carrying out criminal pursuit actions and concrete operative measures of investigation oriented towards identifying, confirming and prelevating additional evidence on the respective crime allegedly committed by the persons suspected, and in some cases by their direct participation. Operative and criminal pursuit actions are recorded and are carried out in relation with the persons concretly related to the investigated crime.

We are of the opinion that the first tasks of organizing the investigation in the three situations above are the following: correct definition of the complexity of criminal pursuit actions aimed at identifying, confirming and prelevating crime evidence; convenient application of counteracting measures that would keep criminals from avoiding the judicial enquiry and judgement, while not affecting the stability of the truth; verifying by procedural and other types of means the existent evidence; acquiring additional data on the crime; carrying out a series of operative and research actions in order to identify and take into custody all participant criminals in the crime (crimes); establishing the criminal relations among

the suspects as well as storage and selling places for goods resulted from the criminal activities etc.

All actions may be realized in a series of proceedings, operations or tactical combinations being elaborated by forensic science and oriented towards reaching the tactical goal in a concrete situation of criminal pursuit. The investigation of established crimes may be carried out by an officer charged with the criminal pursuit (public prosecutor) or a group of such investigators. In the last situation mentioned above, this group is made up by the leader of the organ of criminal pursuit who, along the way, may, if necessary, complete or modify the investigation group. In the case of a group of agents of criminal pursuit (prosecutors) ment to investigate one or more crimes, its leader names the person responsible for the team. This person conducts the activity of the investigating group, having only few administrative functions towards the group.

The very nature of the procedures, operations and tactical combinations, in the primary phase of crime investigation, implies a high level of organizing and special measures. A distinct form of such an organization is represented by the groups of officers charged with the criminal pursuit (prosecutors) and operative agents who usually participate in the investigation of heavy crimes or public importance crimes. The essential principles in carrying out this form of organization of crime investigation are:

- the leader role in the investigation group of a criminal pursuit organ or prosecutor;
- the access of group members to information obtained from operative actions in the phase of preparing operations or tactical combinations;
- the decisions of the group leader regarding time, place and type of operation or tactical combination;
- the relative establishment of the investigation group;
- sufficient technical and material ensurance of the group's activity;
- forensic ensurance regarding the vast participation of forensic or other types of specialists in carrying out operations or tactical combinations aimed firstly at completing the tasks of discovering the committed crime.

It is undoubtful the fact that our proposal regarding the acces of group members at the materials of operative investigation activities might be contested in the first place by criminal procedure specialists. Thus, it is necessary to take into account that no complicated or heavy crime may be

operatively discovered without a series of operative measures of investigation, including information from operative interceptions. Such an interaction may only affect the investigation in a positive manner. Moreover, the operative ensurance of criminal cause investigation may be mentioned at this point.

The investigation of such criminal causes is carried out from the primar phase in the direction of establishing and confirming through procedural means the crime's components represented by the actions of a concrete person, whose characteristics have been found out before being caught in the act as a result of operative activities of investigation.

Organizing the judicial inquiry of criminal causes begun on the grounds of discovering a crime, when the criminals are not yet known, presents a series of specifities and difficult aspects. Firstly, because of the fact that the volume of initial data on the crime is usually reduced in these cases and the list of possible criminal pursuit actions and operative measure is not a large one. Secondly, apart from the initial incomplete information on the criminals' identity, there are also very important the results of the crime scene investigation, the witnesses' and victims' interrogations. It is absolutely necessary that crime scene examination be carried out at the optimum time and in qualitative manner. Any gap may negatively influence the results of the research. For as skillful as the criminal may be, as practice has proven it, he always leaves his marks on some elements such as crime objects, materials and so on. This is why it is important that these prints be found and fixated in a qualified manner from a procedural point of view, following which they shall be correctly tactically used in order to find and uncover the criminals.

By studying the experience of criminal pursuit organs, we are able to distinguish the characteristic elements contained in the organizing activities and realisation of the crimes' investigation. According to us, these are:

- obtaining, accumulating and evaluating initial data on the crime;
- carrying out initial or non-postponable crime pursuit actions and operative measures of investigation;
- elaborating forensic versions and planning crime investigation;
- realizing interaction with other subdivisions of the law organs, including from other states, aimed at fulfilling the tasks of criminal justice, as well as maintaining public order;
- analyzing and controling the activities carried out in the concrete cause[1]0.

The elements enumerated above do not manifest on their own, isolatedly, in reality. It is obvious that the solidity, sequence, volume and content of criminal pursuit actions and the operative investigation measures in the case of any criminal cause are determined firstly considering to what extent the information evaluated by the criminal pursuit officer is complete, or that information coming from the persons having participated in the crime or being suspected to have participated. This means that organizing the criminal investigation shall always start by studying what exactly happened in reality. Only after will the forensic versions be elaborated, the workplan of the criminal pursuit organ/operative agent designed, the corresponding investigation conditions achieved, the coordination and interaction with representatives of other subdivisions of law organs, departments or institutions established. One of the conditions of discovering and efficiently investigating any crime is the mandatory analysis and generalisation of the obtained materials, the actual control over the research activity. Without these and without planning (verbaly or in writing) the investigation, even the simplest of the crimes may be left undiscovered or solved with great difficulty and delay.

Qualified investigation of crimes always implies not only the identification, fixation and succesful prelevation of evidence, but also an effective analysis and their correct use in order to obtain the necessary additional data on the cause and – on these grounds – also implies control over the activities carried out (exact determination of the research direction, volume and state of data in every phase), adopting well-founded decisions regarding on the continuation of the investigation etc.

Organizing all crimes' investigations has as a goal the fulfilment of the following tasks:

- prompt counteracting of the crime and the localization of possible consequences;
- making qualified decisions in the optimum time regarding the criminal pursuit of concrete persons;
- correct determination of the complexity of necessary criminal pursuit actions as well as operative measures of investigation in the created situation;
- obtaining efficient results of the above mentioned actions;
- ensuring the accomplishment of justice, maintaining law order and internal state security;

- accomplishing the necessary actions of prevention regarding the discovered crime.

In our opinion, the tasks above are not ment to minimize the role and importance of tasks of other institutions and state organs although they do not include them, but should exist and be examined separately.

Thus, the scientific organization of crime investigation uses as strategy the setting in motion and ensuring of a system of actions and decisions of the criminal pursuit organ (prosecutor) aiming to establish the illegal deeds, the criminal's identity, his guiltiness as well as other circumstances important to the objective solving of the criminal cause. This activity is based on criminal procedure law norms, specific normative acts, as well as on the personal experience of the criminal pursuit organ or prosecutor and always takes place relatively to the concrete criminal pursuit situation.

Only an impeccable organization of investigating criminal causes may lead to the achievement of great success with minimum time, effort and means.

Bibliographical sources:

- Якимов И.Н. Криминалистика. М., 1925; Громов В.И. Методика расследования преступлений. М., 1930;
- Якунин М. Основы планирования и организации расследования государственных преступлений. Москва, 1975; Соя-Серко Л.А. К вопросу о научной организации труда следователя / Вопросы борьбы с преступностью, 1968, №25;
- Громов В.И. Методика расследования преступлений. – М., 1930;
- Ларин А.М. Расследование по уголовному делу: планирование, организация, Москва, 1970, с.59;
- Голунский С.А., Шавер Б.М. Криминалистика / Методика расследования отдельных видов преступлений. – Москва, 1939;
- Коновалова В.Е. Организация расследования хищений государственного и общественного имущества. Харьков, 1984, с.3;
- Якунин М.И. Основы планирования и организации расследования государственных преступлений. Москва, 1975, с.72;
- Gh. Alecu, Forensics. Ed. Ex Ponto, Constanţa, 2008, p. 277;
- Activity including goal, means, process and its results. (See: Encyclopedic Dictionary, Moscow, 1983, p.381);
- M. Gheorghiţă, General theses of forensic tactics, Chişinău, 2004.

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp. 54-58

MEDICAL-LEGAL INVESTIGATION OF CRIMINAL CASES – THEORETICAL ASPECTS

Senior lecturer Ph.D. Catherine Baltaga
Moldova State University
Republic of Moldova

Abstract.
The rapid progress of science and technology, especially in the last decades, favored an unprecedented development of expertise, currently encountered in almost all areas of human activity. The necessity is imposed by the desire of presenting conclusive evidence before the judicial bodies, international commercial arbitration bodies and economic operators, to ensure the adoption of fair decisions. The complexity and special character of the problems that have to be settled by the judicial bodies oblige them consult the opinion of specialists in different fields and explain the great importance attributed to means of evidence in stating the reality of the facts. Among them, the expertise represents that form of application of special knowledge by which, based on methodic researches using scientific methods, the expert presents the scientifically grounded conclusions on the facts which need special knowledge to be elucidated.

Keywords: *special medical knowledge, medico – legal expertise, medico – legal report, medico – legal specialist, procedural actions.*

Among all forms of application of special knowledge plays a central role forensic examination. Need for them arises in cases where other forms of involvement of specialists in criminal proceedings are insufficient. In this case, expertise is one of the unique possibilities of obtaining information valuable evidence capable of establishing the truth in criminal cases. It considerably broadens the knowledge of the criminal investigation officer, allowing him to apply the whole arsenal of possibilities existing research knowledge. According to statistics, expertise currently apply to almost

every other criminal case, and a forensic examination takes, in terms of quantity, number one among other types of expertise[1].

In all their expertise represents that form of application specific knowledge that, based on metho-dical research using scientific methods, the expert shall inform the body that represented, reasoned submissions on scientific facts are necessary to elucidate their knowledge special[2].

Explanatory dictionaries par excellence, treating expertise as a personal and critical work, including not only the result of examination of the facts in terms of accuracy formal and material and expert opinion on the causes and effects about the object of his research.

Is a term exceeding the action of control and that of verification, because embraces the idea of expressing the views of experts on the fact or facts on which to carry out surveys[3].

The term forensic in criminal proceedings, as distinct form is used later than the more factual finding of whether the offense. For the first time this term appears in canon law as "peritorum medicorum judicium" where rules were prescribed by the physician conducting the independent review of deaths as a result of crime (18, X, of homicide., Vol 5, 12). Based on these actions, the "*Carolina*" expertise was called "a complex research conducted by the court with approved persons"[4]. Sometimes expertise is also referred to other terms such as "proof by expert reports", "trial by expert" or "expert reports".

Since by audit and other data can be found than those in the case file, it may be that it can fulfill a dual function:

- Discovery and highlight important data and facts of the case or to subject qualitative and quantitative measurement of samples;

- Exposure of the present case reasoned scientific conclusions derived objectives of expertise.

---

[1] E. Baltaga. *Procedural aspects of criminal-legal expertize*. The international conferince „European union's history, culture and citizenship: The European Union – Establishment and Reforms – 3nd Edition" România. Piteşti. 15-16 mai, 2010. p. 109-115.

[2] А. Р. Шляхов. *Актуальные проблемы теории и практики судебной экспертизы в свете ускорения научно-технического прогресса.* Общетеоретические. правовые и организационные основы судебной экспертизы: Сб. науч. тр. М.: ВНИИСЭ, 1987. с. 28–34.

[3] *Каролина.* Уголовно-судебное уложение Карла V. Перевод С. Я. Булатова. Алма-Ата: Наука, 1967. p.27.

[4] E. Mihuleac. *Expertiza judiciară.* Bucureşti: Ed. Ştiinţifică, 1971. p. 76.

This dual function allows you to specify and its basic characteristics, of which two are to be retained:

- Expertise is available to scientifically express an opinion and sometimes to perform a physical operation which the court can not perform;

- Can not have that expertise is to shift the burden to fund litigation or trial judge, expert with only the task of giving a simple opinion on the facts submitted to or need to find[1].

Role, the weight and prestige of forensic expertise in judicial probation increases from year to year and it has certain features:

First, is called to determine the materiality of crime based on the application specific knowledge in science, technology, art, trade and other areas. This means that the problems solved by judicial experts can not cover the sides of the legal elements of the offense, as the prosecution and judges them selves competent in law;

Secondly, the examination and the conditions under which to carry out surveys, circumstances determined by the expert are reflected in a report. Criminal procedure law establishes the main components of the report. It can not be replaced by the minutes of listening to experts or other document. It should be clearly written, include a detailed analysis without omitting any necessary clarifying circumstances of the case[2].

Criminal Procedure Code of Moldova contains most regulations on expertise, which is performed in cases "in which to ascertain the circumstances that may have evidentiary significance for the criminal case required special knowledge ..." (Article 142 para. (1) CPP RM).

In addition to these regulations, in terms of expertise and the institutional framework for such activities there are some special provisions. For example, Moldova's Law 1086 of 2000 on sudicia expertise, technical, scientific and forensic document is the first explicit reference to the legal and forensic expertise.

Despite the diversity of approaches chosen by several authors, principled differences in defining the essence of expertise there. Only difference is the different number of specific signs, assigned judicial expertise. Basically defined in the literature, as scientific-practical work carried out:

---

[1] N. Văduvă, L. Văduvă. *Expertizele, constatările tehnico-ştiinţifice şi medico-legale mijloace de probă în procesul penal.* Craiova: Terathopius, 1997. p.141.

[2] *Legea Republicii Moldova Nr. 122 Codul de procedură penală a R.Moldova din 14.03.2003*. În: Monitorul Oficial 07.06.2003, Nr. 104-110.

a) the disposal of bodies or persons authorized in connection with criminal proceedings need for the special knowledge;

b) the procedural form;

c) by topic particular expert called;

d) consisting of objects presented research to see certain circumstances that are important for the determination of a case;

e) subject to certain legal safeguards able to provide quality research, the authenticity of its results and interests of participants process;

f) which ends with a presentation by the expert conclusion of expertise (or the refusal of submission) - is an important legal institution, over time and enjoys the attention of many specialists in the field theorists[1].

Thus, specific forensic investigation is to establish the truth of justice, based on effects to the question. Miss adequatio principle Intellectus undertake to use legal methods to specific work epistemology, based on the following paradigm[2]:

- Obtain objective evidence resulting in criterio grame scientific truth;

- Evaluation and affirmation of truth requires the judicial con science testing opinions by the risk of error, to the arguments of doubt, the evidence of witnesses, cross the double-checking;

- Expert must work as a method to avoid errors need to develop a reliable legal truth;

- The logic of scientific research requires to be made only statements that can be scientifically proven;

- Conclusive proof and relevance. In this regard, scientific tests have no value exante, but only after verification - ex post.

- Solving various problems presented by the prosecution or trial work requiring the application of specific methodology in providing these criteria in order to ensure and increase the efficiency of medical justice.

Thus, we conclude that expertise is that form of medical application of special knowle-dge that, based on methodical research using scientific methods, the expert shall inform the body that represented, reasoned submissions on scientific facts whose elucidation is special skills required

---

[1] Э. С. Гордон. *Судебно-медицинская экспертиза: проблемы и решения*. М.: «Удмуртия», 1990. p. 7; Ю. Т. Шуматов. *Использование специалиста на предварительном следствии*. Дисс. ... канд. юрид. наук. М., 1996. p.53; Рыжаков А.П. Следственные действия. М.: Приор, 2001. p104.

[2] V. Beliş. *Medicina legală în practica medico-judiciară.* Bucureşti: Juridica, 2003. p.195.

and can be defined as a scientific-practical activity of medical application of special knowledge, the card of the criminal, civil or administrative, research carried out in order: objects, people, phenomena and processes and data to establish the circumstances that may have evidentiary significance for the cause investigated.

Bibliography

- E. Baltaga. *Procedural aspects of criminal-legal expertize*. The international conferince „European union's history, culture and citizenship: The European Union – Establishment and Reforms – 3nd Edition" România. Piteşti. 15-16 mai, 2010.
- А. Р. Шляхов. *Актуальные проблемы теории и практики судебной экспертизы в свете ускорения научно-технического прогресса*. Общетеоретические. правовые и организационные основы судебной экспертизы: Сб. науч. тр. М.: ВНИИСЭ, 1987
- *Каролина.* Уголовно-судебное уложение Карла V. Перевод С. Я. Булатова. Алма-Ата: Наука, 1967
- E. Mihuleac. *Expertiza judiciară.* Bucureşti: Ed. Ştiinţifică,
- N. Văduvă, L. Văduvă. *Expertizele, constatările tehnico-ştiinţifice şi medico-legale mijloace de probă în procesul penal.* Craiova: Terathopius, 1997.
- Э. С. Гордон. *Судебно-медицинская экспертиза: проблемы и решения*. М.: «Удмуртия», 1990. p. 7; Ю.
- Т. Шуматов. *Использование специалиста на предварительном следствии*. Дисс. ... канд. юрид. наук. М., 1996.;
- Рыжаков А.П. Следственные действия. М.: Приор, 2001.
- V. Beliş. *Medicina legală în practica medico-judiciară*. Bucureşti: Juridica, 2003. p.195.

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp. 59-64

THE PRINCIPLES OF TAKING LEGAL ACTION ACCORDING TO THE NEW CODE OF CIVIL PROCEDURE

Senior Lecturer Ph.D. Andreea Tabacu
Asisstant Ph.D. Ramona Duminică
University of Pitesti

Abstract

The means of taking legal action are meant to ensure that principles of civil process are met, especially the right to defence and to determine that a proper solution is found by the judges in lower circuit courts.

The New Code of Civil Procedure maintains the previous classification of means of legal action, but it expressly sanctions the principles of exercising the right to take legal action, the legality, uniqueness, the order of procedures, in order to highlight the intention of the legislator to establish the system of taking legal action on modern but predictable bases.

The way these principles are regulated both ensure and guarantee the right to a fair trial, without the possibility for different case law interpretations, as in the code from 1865.

Keywords: *principles, ways of taking legal action, the uniqueness of ways of legal action, legality of ways of legal action, the order of procedure.*

1. INTRODUCTION

The system of remedies at law was conceived[1], in order to ensure the identity between the judicial ruling and the justice so necessary and desired by the litigant parties. The role these means is to prevent any errors in the ruling due to want of diligence on the part of the litigants, when presenting the real

[1] I. Leş, *Tratat de drept procesual civil*, Ed. C.H. Beck, Bucureşti, 2010, pp. 681-683.

situation before the court or due to a misinterpretation of the law or impropriety on the side of the civil judges.[1]

As such, the remedies at law are meant to ensure the fulfilment of the principles of the civil suit, especially with regards to the right to a legal defence and to lead to a proper solution given by the lower court judges. The higher courts do not always give a more appropriate solution than the lower courts. However, it is thought that higher courts can offer greater guarantees in delivering justice due to the way in which the trial is organised in higher courts and because of the requirements for the judges: certain experience and qualifications, passing an exam to demonstrate their academic knowledge.

Concerning the national law of the signatory states of the European Convention of Human Rights, the remedies at law are acknowledged and sanctioned by article 13 and 6 from this act.[2] The higher courts verify the legality of lower courts decisions, but also that of rulings given by bodies with or without jurisdictional authority, due to the fact that article 21 from the Constitution ensures free access to justice. As such, the distinction between the notions of judiciary control and procedural control is important, because the remedies at law regulated by the Code of Civil Procedure covers judiciary control.

Judiciary control includes the possibility of higher courts to verify the legality and soundness of the rulings given by the lower courts and if necessary to vacate or modify those they consider illegal or unfounded. The specialised literature explains the notion of judiciary control as being partly law and partly the obligation of the courts to verify the legality and soundness of lower court rulings.[3] Judiciary control designates the possibility of the courts to verify the legality and soundness of certain documents with or without a jurisdictional nature, which were issued by authorities outside the legal system.

2. THE CLASSIFICATION OF REMEDIES AT LAW

Considering positive law, we must distinguish between the remedies at law regulated by the Code of Civil Procedure and the special means of appeal, stipulated in other normative acts, also, between ordinary and extraordinary means of appeal, between the acts of reform and those of retraction and between means that can be conveyed and those that cannot.

---

[1] V.M. Ciobanu, *Tratat teoretic şi practic de procedură civilă*, vol.II, Ed. Naţional, Bucureşti, 1997, p. 321.

[2] Golder vs. the United Kingdom, 1975, cited in the ruling of the Constitutional Court of Romania – 522/11.10.2005, published in the Romanian Official Monitor, issue 993 from 09.11.2005.

[3] V.M. Ciobanu, *Tratat teoretic şi practic de procedură civilă*, vol.II, Ed. Naţional, Bucureşti, 1997, p. 323.

The remedies at law stipulated in the code represent the common law in this case in relation with other special, exceptional stipulations. Other regulations sanction the means of appeal which can be used only against certain decisions, either made by certain jurisdictional bodies, or pertaining to the special procedure of the courts. We include in this category the following motions: the annulment of a payment order and the annulment of the arbitrary decision etc. The Code of Civil Procedure classifies the remedies at law into two categories, ordinary and extraordinary. The fist category includes those remedies that can be used by the interested party without any need to meet certain strict reasons stipulated by law. The appeal is among these measures. The extraordinary remedies can be exercised by the interested party only in cases and circumstances expressly regulated in procedural norms. They include the recourse, the annulment of the contestation, the review.

The relation between the ordinary and extraordinary means of appeal consists in the fact that so long as an ordinary remedy is still available, an extraordinary one cannot be used. They are classified by the authority, which is competent to resolve them. Thus we have reformative remedies at law, whereby judiciary control is exercised and which are resolved by higher courts, and remedies of rescission, which are addressed to the courts that gave the respective ruling and whose purpose is to have the ruling rescinded and replaced by another. The first category contains the appeal and the recourse, while the second includes the contestation by annulment and the revision. The remedies are also classified into ones that can be conveyed and others that cannot be conveyed. Depending on these, the case is determined on its own merits or not. The appeal is a form of conveyed remedy, which is regulated by the code as is the revision, under certain aspects. The recourse or the contestation by annulment does not involve a new judgment on its own merits. These extraordinary means of appeal are a special procedure alone which sees that the legal requirements are met, but indirectly these means lead to the retrial on its own merits.

3. PRINCIPLES OF REMEDIES AT LAW

3.1. The Principle of Legality

After enumerating the different means of appeal in the Romanian legal system, the New Code of Civil Procedure expressly stipulates that the ruling is subordinate to the remedies stipulated by law, within the terms and conditions established by law, indifferent of the mentions in its content.

Simply put, the remedy at law with all its qualities is permitted by law, notwithstanding the mentions in the contested ruling, in consequence to certain

texts which are susceptible to several interpretations or even to error. Thus, the law stipulates that an inexact mention in the ruling produces no effect, whereby it is shown that the contesting party has an open avenue of attack against it, even though the law does not stipulate it.

Although the contesting party uses, either by respecting the mentions in the ruling, or by disobeying the stipulations of the law, another avenue of attack (the legal one), it will resolve the matter because the higher court is obliged to apply the law and not to negotiate a remedy unmentioned by the norms in force. Moreover, the higher court may not reject the inadmissible remedy, save for when it is no longer possible pursuant to the law. It is precisely due to its application of the principle of legality that the New Code of Civil Procedure regulates the obligation of the court that rejects remedy used by the interested party which it consider inadmissible, to communicate the decision to all parties that are involved in the suit for which the ruling was contested. This communication is official and is meant to allow the contesting party to use the remedy stipulated by law, since the selected remedy has not led to a solution, through its dismissal, for the analysis of contested aspects.

3.2. The Uniqueness of the Remedy

A remedy may be used only once to contest a ruling. The New Code of Civil Procedure requires that the law stipulate the same term for any cause existing by the time the remedy is decided on, if the terms are different for the execution of the remedies within the given deadline each (the sentence whereby the execution of the administrative act is delivered – 5 days since the communication but also its annulment – 15 days since the communication). When the same ruling solves accessory motions as well, then the decision is subjected fully to the remedy stipulated by law for the main request, by virtue of *the accesoriun sequitur principalem* rule, the term of appeal or depending on the case the recourse to common law, even though special laws state so. If however this ruling had solved several main or incidental requests, among which some had been appealed, while others to recourse, then the ruling is subjected to ordinary remedies like the appeal. When the ruling that resolves several of the main or incidental requests is given on appeal, the ruling is subjected to recourse. If the ruling concerning the main or incidental request is not subjected to an appeal or recourse, the solution for the other requests is subjected to the lawful remedies.

The purpose of the legislator was to ensure that the interested parties have the possibility to use the remedy as stipulated by law, in every case. If this is not possible, the contesting party is allowed a supplementary remedy for

which it is not stipulated (the main request – the ruling open to an appeal; the counterclaim which is dropped is susceptible to recourse).

3.3. The Order of the Remedies

Before the extraordinary remedies are used there must be an appeal, if the law allows this measure for the contestation of the ruling. Contrariwise, the recourse is inadmissible.

The principle was acknowledged and beforehand its clear formulation in the text is welcome in order to avoid any contradiction, although in the code there is no clear regulation. The reason for the norm is ensured by the fact that the appeal is the common remedy. It can be conveyed and is unconditioned by certain reasons, thus any criticism of the ruling may be done this way.

Concerning the principle of the availability of the contesting party during the civil suit, the Code allows that the parties involved use directly the appeal or the recourse, within the given deadline, either by an authentic motion or a verbal declaration presented before the court whose sentence is contested or consigned by a report. The recourse may be used before the court that was competent to preside over the recourse against the appeal ruling but not before the court of appeal.

Concerning the main quality of this convention between the parties, the Code limits the reasons for the recourse to those that involve the violation or misapplication of the laws and subsequent procedural deficiencies covering the parties, which are thus separated from the stipulations of the procedure normally applied. After the appeal, the extraordinary remedies may be used at the same time. The Code permits for the recourse and revision to be used once, however the law of application of the Code, which was published on the Site of the Ministry of Justice, shows that the extraordinary remedies may be exercised at the same time. The recourse takes priority.

4. CONCLUSIONS

The means of appeal are regulated in a much more organised way, structured in accordance with a corresponding unitary system based on two degrees of jurisdiction. In this system, the appeal is the ordinary remedy, which can be conveyed from one party to another, while extraordinary remedies may be exercised only when certain conditions are expressly stipulated by law.

The principle of legality of remedies and the solutions offered by the code, in case of errors pertaining to the selection of the remedy which can be used to contest the ruling in the trial on its own merits, exist to resolve a series

of different interpretations, given by the courts in the application of the Code of Civil Procedure of 1865.

Also, the uniqueness of means of appeal and the order of their exercise set the base for the normal system of remedies, thus making up for the lacks in the 1965 code, with certain benefits meant for the subjects of the law.

Bibliography:

- Ciobanu, V.M., *Tratat teoretic şi practic de procedură civilă*, vol.II, Ed. Naţional, Bucureşti, 1997.
- Leş, I., *Tratat de drept procesual civil*, Ed. C.H. Beck, Bucureşti, 2010.
- Golder vs. the United Kingdom, 1975, cited in the ruling of the Constitutional Court of Romania – 522/11.10.2005, published in the Romanian Official Monitor, issue 993 from 09.11.2005.
- The New Code of Civil Procedure.

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp. 65-68

THE REFLECTION OF THE FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION STATED BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE ROMANIAN LEGISLATION

Senior Lecturer Ph.D. Ion Ristea
University of Pitesti, Romania

Abstract:

Freedom of thought, conscience and religion is a fundamental right. It comprises the right to beliefs, the right to change his belief or the right to not share a belief.

Romania respects and guarantees this fundament freedom for every person on its territory, according to the national Constitution and international treaties to which Romania is part. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Key words: *freedom of thought, freedom of conscience, freedom of religion, belief, European Convention on Human Rights, Romanian Constitution*

The basic preoccupation of the Member States of the Council of Europe in the process of reformation is to place their criminal legislation to the level of the European Convention on Human Rights, the provisions of the Convention becoming European standards for all national legislations.

The European Convention, signed in Rome on 4 November 1950, and entering into force on 3 September 1953 (ratified by the Romanian Parliament by Law 30/1994) is the most important document drafted by the Council of Europe (which was founded in 1949 and gradually enlarged after 1980) for the protection and development of human rights and fundamental freedoms.

The humanistic principles stated by the Convention shall create a judicial framework proper for the development of human personality and its protection against any abuse from the authorities and has a decisive influence on the legislation of the European states, Member States of the Council of Europe.

Romania accepted as a full member in the Council of Europe on 4 October 1993 has laid efforts to modify its legislation (civil, administrative and criminal) in relation to these humanistic principles and in accordance with the actual stage of the development of social relationships.

Starting with the Constitution (in force since December 1991 and revised in 2003), which stated many of the European Convention's principles and from that moment all important normative acts were inspired from the European regulations. Also, in the criminal doctrine numerous studies were dedicated to the European Convention[1].

A special attention is paid for the protection of the freedom of thought, conscience and religion.

1. According to Art 9 of the Convention, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance (Para 1); freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others" (Para 2).

2. These regulations were refined and embodied in the practice of the European Court.

Thus, in the case *Manoussakis and others v Greece*, the Court stated that renting by the defendants of a hall that it would be used for meetings of Jehovah's witnesses is not illicit in the light of the Convention. The fact that the Greek authorities consider that this cult must have an authorization for function based on Law No 1363/1998 and even creating administrative difficulties for obtaining this authorization, is an encroachment for the defendant's rights to freely manifest his religious beliefs. Such interference overlooks Art 9 of the Convention. The

[1] G.Antoniu, „Implicații asupra legii penale române a Convenției Europene a Drepturilor Omului" in Romanian Law Studies Review, Volume 4(57), 1992, No. 1, p.5–13; G. Antoniu „Articolul 5 din Convenția Europeană a Drepturilor Omului" in Romanian Law Studies Review, Volume 5(38), 1993, No. 2, p. 167–184; G. Antoniu „Articolul 6 din Convenția Europeană a Drepturilor Omului. Implicații asupra legislației penale române" in Romanian Law Studies Review, Volume 5(38), 1993, No. 3, p.257–270. Ovidiu Predescu „Convenția Europeană a Drepturilor Omului. Implicațiile ei asupra dreptului penal român", Lumina Lex Publishing-house, Bucharest, 1998, p20 and next.

European Court states that in the meaning of the Convention the freedom of religion excludes any kind of involvement of the state in the legitimacy of religious beliefs or of the means of expression if the public order and morals are not harmed. In these conditions, in the case brought before the Court, Art 9 of the Convention was harmed[1].

In the case *Larisiss and others v Greece*, the European Court stated that the alleged acts of proselytism to spread their religious ideas and to convert the listeners to the Pentecostal Church, were in the limits of Art 9 of the Convention. Thus, the measures adopted by the Greek authorities were inconsistent and violate the provisions of Art 9[2].

3. In the Romanian legislation there are provisions in accordance with the Convention's exigencies.

Thus, the Romanian Constitution states in Art 29 Para 1 freedom of thought, opinion, and religious beliefs shall not be restricted in any form whatsoever. No one shall be compelled to embrace an opinion or religion contrary to his own convictions; freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect (Para 2); all religions shall be free and organized in accordance with their own statutes, under the terms laid down by law (Para 3); any forms, means, acts or actions of religious enmity shall be prohibited in the relationships among the cults (Para 4); religious cults shall be autonomous from the State and shall enjoy support from it, including the facilitation of religious assistance in the army, in hospitals, prisons, homes and orphanages (Para 5); parents or legal tutors have the right to ensure, in accordance with their own convictions, the education of the minor children whose responsibility devolves on them (Para 6).

The Romanian Penal Code incriminates a series of serious offences which may harm the freedom of conscience. Thus, according to Art 318, the act of preventing or disturbing the freedom to exercise any religious cult that is organised and is functioning according to the law (Para 1); also the act of forcing a person, by coercion, to partake in the religious service of any cult or to accomplish a religious act linked to the exercise of a cult (Para 2) shall be punished. Also, the penal law incriminates in Art 247 the act, committed by a public servant, of restricting the use or exercise of the rights of any citizen or of creating for a citizen situations of inferiority based on nationality, race, sex or religion.

4. All legal provisions above mentioned form an appropriate judicial framework for solving cases similar to those brought before the European Court.

The Romanian Law 489/2006 on the freedom of religion and the general status of denominations[3], abolishing Decree No 177/1948 on the general status of

[1] Romanian Penal Law Review, IV, 1997, No. 2, p.151-152
[2] Romanian Penal Law Review, V, 1998, No. 3, p.153-154
[3] Published in the Official Gazette, Part I, No 11 of 8 January 2007

denominations, with its subsequent modifications and completions, is the base of all religious cults. The new regulation is in accordance with the Romanian reality, regarding religious life, and with the European exigencies, with the international conventions, agreements and treaties to which Romania is part.

Regarding the cult of "Jehovah's witnesses" we must note that the Romanian modern regulation is in accordance with the spirit stated by Art 9 of the Convention, in the meaning that this religious cult acts freely, as a legal person of public utility, being stated in the list of cults recognized in our country (Annex of the Law 489/2006), according to Art 49 of the above mentioned regulation. The recognition as a "religious cult" is received based on a Government Decision, on the proposal of the Ministry of Culture and National Patrimony.

Bibliography

- G.Antoniu, „Implicații asupra legii penale române a Convenției Europene a Drepturilor Omului" , in Romanian Law Studies Review, Volume 4(57), 1992, No. 1
- G. Antoniu, „Articolul 6 din Convenția Europeană a Drepturilor Omului. Implicații asupra legislației penale române" , in Romanian Law Studies Review, Volume 5(38), 1993, No. 3
- Ovidiu Predescu, „Convenția Europeană a Drepturilor Omului. Implicațiile ei asupra dreptului penal român", Lumina Lex Publishing-house, Bucharest, 1998

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp. 69-76

THE PRINCIPLE OF HUMANITY AND ITS THEORETICAL ASPECTS SEEN THROUGH THE PRISM OF THE NEW LEGAL REALITIES

Ph.D. Candidate Ruslan Munteanu,
Institute of History, State and Law,
Republic of Moldova

Abstract

The fundamental question to witch our society gives answers or should give answers and arguments for the answers, is sometimes called the question of justice. Morality has majesty. Despite ourselves, and yet to ourselves, it stands over the rest of our existence, in particular over our self-interest in its various forms. To my mind it is the Principle of Humanity above all that has that majesty. The Principle of Humanity is not the only conceivable formulation of the morality in question, and it requires enlargement in several ways. But surely it is the proper and true response to the question of well-being. It is, to my mind, the best formulation of the greatest of moralities. That is not so controversial a conclusion as some may too quickly suppose. There remains the other large question, that of tactics and institutions, to which we have latterly approached a bit more closely. There is more room for dispute here.

Key- words*: principle of humanity, new legal realities, human right.*

Introduction

According to Kant, the humanity must be treated as an inwardly goal. This principle of humanity is viewed by Kant's readers as being convincing, because these identify themselves with the current ideals, contemporary with the human rights and the human dignity. More than that, those specialists that studied Kant's theory concluded that the principle of humanity was the central principle of its ethics. Therefore this principle must be viewed as a fundamental principle of morality. From another point of view the principle of humanity must be understood as a necessity of

creating an efficient policy whose final goal is to reach the submission of the human rights. In the principle of humanity vision all human beings who suffer must be helped, wherever they are, even if this thing is difficult to be achieved. The principle of humanity means that humankind shall be treated humanely in all circumstances by saving lives and alleviating suffering, while ensuring respect for the individual. It is the fundamental principle of humanitarian response.

The priority and absoluteness of rights are very often the subject matter of ethical debates[1]. On the one hand, humanity is considered as a certain moral ideal that is established on the respect and pursuit of human dignity. This is achieved through moral principles and particular moral norms that define ways of pursuing humanity in the individual and social life of moral communities. I do not concern humanity as the unattainable and abstract moral ideal that is too far from the moral practice of agents. I mean that humanity as a moral ideal is the expression of actual demands and interests of individuals and humankind together. Human beings have hope for their rational being and surviving just through the fulfilling of humanity, its principles and respect for human dignity. There are also other issues (for example, environmental) that are external conditions for the preservation of human beings as well as life. On the other hand, I accept the principles of humanity as the moral guides for the attainment of a moral ideal.

By the principle of humanity I mean the principles what are accepted on the level of common sense morality. For example, respect for older people as well as respect for all people who deserve it. Furthermore, this is fairness and justice in the relations to others, tolerance for them, mutually benefitting cooperation and so on. We can express these principles of humanity in philosophy and ethics, for instance as the Golden Rule (in its positive or negative form) or Kant's categorical imperative.[2]

First to talk about the principle of humanity was Confucius. He explained that humanity “is to love the people” because “one could not love only his parents, brothers, sisters and sons” but ought to love the masses extensively.[3] Here the "masses" did not signify specially certain kind of

[1] A. Gewirth . *Are There Any Absolute Rights?* In: Philosophical Quarterly, Vol. 31, No. 122 (Jan., 1981),Clarendon Press, Chicago, 1981, p. 1-16.
[2] http://www.bu.edu/wcp/Papers/Huma/HumaGluc.htm, Humanity and Moral Rights
[3] Huazhong Chen. *Confucius Educating Humanity*. Nanking, China, 1998, p. 34.

people. Its basic meaning is like what Buddha said of saving all the living creatures and Christ said of loving all the people including your enemy. This humanity principle was carried forward continuously by his disciples. One of his disciples Zixia said, "All people on the earth are brothers, why should a gentleman worry about shortage of brothers?" Mencius later related this loving -heart spirit as «respect my own elders and extend this respect to the other's elders, love my own youngsters and extend this love to the other's youngsters." During the past thousands of years, this universal love spirit has permeated into the cultural tradition of the nation, become life-maxims known to everybody.

Humanity and human dignity are the essence of moral goodness. [1] They are the supreme values that are essential to fulfillment by the moral agent's actions. These values are expressed through the principle of positive social consequences (PSC). This is defined by the claim that PSC has to respond to the pursuing and attainment of humanity and human dignity.

The performing of humanity and human dignity in the moral agent's actions is thus the fulfillment of the innocent person's right for the dignified life. Ethical idea of moral goodness is expressed primarily through human dignity and the principles of humanity that are more reliable. Moral right includes the idea of the moral value that will be pursued. Human dignity and humanity are expressed through the principle of PSC which is also restricted by them. Moral rights more properly express human dignity. They are informal indication of moral values, while legal rights are institutional statement of some moral rights. We can point out that moral right is only a framework or form for the fulfilling of moral values because the ends are not moral rights but moral values of human life. Therefore, humanity and human dignity through moral rights are general expressions for the protection or performing of fundamental moral values of the individuals as well as humankind. Some authors have concluded that in the principle of humanity can be reasonably included the following principles:

PRINCIPLE 1:

All humans are sacred, no matter what their culture, race religion, capacities or in-capacities, or weaknesses or strengths may be. Each of us needs help to become all that we might be.

PRINCIPLE 2:

---

[1] J. Rawls. *A Theory of Justice*. Cambridge, Belknap Press, 1971, p. 67.

Our world and our individual lives are in the process of evolving. It is a question of loving all the essential values of the past and reflecting on how they are to be lived in the new. These values include openness, love, wholeness, unity, peace, the human potential for healing and redemption, and, most important, the necessity of forgiveness.

PRINCIPLE 3:

Maturity comes through working with others, through dialogue, and through a sense of belonging and a searching together.

PRINCIPLE 4:

Human beings need to be encouraged to make choices, and to become responsible for their own lives and for the lives of others.

PRINCIPLE 5:

In order to make such choices, we need to reflect and to seek truth and meaning. To be human means to remain connected to our humanness and to reality, to choose to move toward connectedness. To be human is to accept ourselves just as we are, with our own history, and to accept others as they are.

Are rights absolute? Alan Gewirth says "yes". Thomas Nagel, in accordance with rights affirms that rights have a priority forever. First of all, I shall deal with issues concerning priority of rights. According to Nagel, rights are universal protection of the individual against the abuse or sacrifice that benefits worthy or unworthy interests. He asserts that the idea of right expresses the position of individual in the moral system. Therefore, priority of rights means the important fact that the individual is understood not only as the object of protection and an endeavor in its benefit, but also as an inviolable and independent one. The principal of Humanity is the articulation of the need for justice, tolerance, mutual respect, and human dignity in all of our activity.[1] Speaking of humanity allows us to express the idea that all individuals are part of the scope of morality and justice. To protect this principles to ensure that people receive some degree of decent, humane treatment. To violate the most basic human rights, on the other hand, is to deny individuals their fundamental moral entitlements. It is, in a sense, to treat them as if they are less than human and undeserving of respect and dignity. Examples are acts typically deemed "crimes against humanity," including genocide, torture, slavery, rape, enforced sterilization

[1] http://users.polisci.wisc.edu/kinsella/martens%20clause.pdf, Principles of Humanity and Dictates of Public Conscience

or medical experimentation, and deliberate starvation. Because these policies are sometimes implemented by governments, limiting the unrestrained power of the state is an important part of international law. Underlying laws that prohibit the various "crimes against humanity" is the principle of nondiscrimination and the notion that certain basic rights apply universally.

A very attractive theory regarding the principle of humanity was formulated by Kant. It's a purely philosophic point of view but in the meantime it has a great significance in the context of our paper. His formulation states that we should never act in such a way that we treat Humanity, whether in ourselves or in others, as a means only but always as an end in itself.[1] This is often seen as introducing the idea of "respect" for persons, for whatever it is that is essential to our Humanity. Kant was clearly right that this and the other formulations bring the CI (closer to intuition) than the Universal Law formula. Intuitively, there seems something wrong with treating human beings as mere instruments with no value beyond this. But this very intuitiveness can also invite misunderstandings.

First, the Humanity formula does not rule out using people as means to our ends. Clearly this would be an absurd demand, since we do this all the time. Indeed, it is hard to imagine any life that is recognizably human without the use of others in pursuit of our goals. The food we eat, the clothes we wear, the chairs we sit on and the computers we type at are gotten only by way of talents and abilities that have been developed through the exercise of the wills of many people. What the Humanity formula rules out is engaging in this pervasive use of Humanity in such a way that we treat it as a *mere* means to our ends.

Second, it is not human beings *per se* but the 'Humanity' in human beings that we must treat as an end in itself. Our 'Humanity' is that collection of features that make us distinctively human, and these include capacities to engage in self-directed rational behavior and to adopt and pursue our own ends, and any other capacities necessarily connected with these. Finally, Kant's theory requires "respect" for the Humanity in persons. Proper regard for something with absolute value or worth requires respect for it. But this can invite misunderstandings. One way in which we respect persons, termed "appraisal respect" by Stephen Darwall (1977), is clearly

[1] http://plato.stanford.edu/entries/kant-moral/#HumFor, The Humanity formula

not consistent with the Humanity formula: I may respect you as a rebounder but not a scorer, or as a researcher but not as a teacher. When I respect you in this way, I am positively appraising you in light of some achievement or virtue you possess relative to some standard of success. If this were the sort of respect Kant is counseling, then clearly it may vary from person to person and is surely not what treating something as an end-in-itself requires. For instance, it does not seem to prevent me from regarding rationality as an achievement and respecting one person as a rational agent in this sense, but not another. And Kant is not telling us to ignore differences, to pretend that we are blind to them on mindless egalitarian grounds.

However, a distinct way in which we respect persons, referred to as "recognition respect" by Darwall, better captures Kant's position: I may respect you because you are a student, a Dean, a doctor or a mother. In such cases, cases of respecting you because of whom or what you are, I am giving the proper regard to a certain fact about you, your being a Dean for instance. This sort of respect, unlike appraisal respect, is not a matter of degree based on your having measured up to some standard of assessment. Respect for the Humanity in persons is more like Darwall's recognition respect. We are to respect human beings simply because they are persons and this requires a certain sort of regard. We are not called on to respect them insofar as they have met some standard of evaluation appropriate to persons.

We can say that his view constitutes sound ground for the being of moral communities in the present. Human society founded through respect to human rights is the assumption for the further development of that community as well as all human society. The extension of respect to the individual human rights does also mean the moral development of human society. However, it is implausible to understand the measure of individual sovereignty over itself life. We can dissent about this issue. I think that fundamental criterion for decision about rational proportion of the individual sovereignty over personal life is that the fulfilling of its rights must not violate or essentially restrict rights of other persons. We can explain it through the satisfaction of sexual needs, because the need to satisfy these needs by one person must not lead towards the restriction or violation of human rights of other people. There is inevitable to accept the difference between lawful and moral distinguishing of rights, as well as their violations. However, the lawful definition of rights is usually offered

as the sole criterion for the judgment of the individual's actions. This is generally presented and identified namely in common sense morality.

The formulation we have of the Principle of Humanity is not the only one, and not identical with a formulation that has seen the light of day in the past. We need not suppose we have its eternal and canonical form - or a form as agreeable to all other supporters of it as it is to those of philosophical habits. Enlightened economists, no doubt, would couch it differently, and political theorists differently again. If the subject of the inquiry we are now ending were the left rather than the Right, the principle would get a lot more attention. We would look into various questions raised by it and various recommendations of it, and relate it to the various generalities about equality looked at earlier. We would also consider its great capability of withstanding objections - such as the objection about liberty - which are also withstood by the principle of equality of results.

Humanity is a principle and a responsibility which we can and must lay upon others. Like the parable of the talents, we should not be overly protective of the great principle we have been given by burying it in our own institutions and mandates but instead make interest on it by investing it fiercely in the affairs and in the consciences of others. Post-modem humanitarianism must play the prophet alongside the priest. We must constantly challenge those engaged in inhumanity with the principle of humanity. We must actively affirm that it is not only organized humanitarianism which needs to embody and implement the humanitarian principle. As a universal principle, humanity must be upheld by all actors in and around today's society.

The 21st century promises to be a time of scientific and technological growth at a level never before experienced in human history. This growth will either trigger chaos, disruption, war, starvation and disease or will introduce a period of humanistic cooperation, development, progress, and peace. What emerges will depend upon which values are embraced, taught, encouraged, and legislated. The value choices, which must be deliberately chosen and not left to chance, must be secular, global, and familial. The accepted values must be embraced, taught, encouraged, and supported internationally, nationally, locally, and personally. What is proposed here represents some of the value choices, the ethical building blocks, that will enable a world of peace and harmony to come into existence - a world in which human diversity is respected and tolerated and, at the same time, a world in which each individual will be enabled and encouraged to maximize

his or her potential, without discrimination and in an atmosphere of freedom.[1]

What is required to bring about this idealized world is a democratic, pluralistic society which recognizes the principle of Humanity as the fundamental condition of our existence, a world in which human dignity and natural rights of everyone on this planet shall be respected and protected, a world in which the life of every man and woman and child shall be recognized of inestimable value. To achieve and make real this concept of a world of peace for the 21st century the principle of Humanity provides the basic essentials. The values of this concept, of this supreme principle must be of the people, for the people, and by the people. They must embrace common moral decencies such as altruism, integrity, freedom, justice, honesty, truthfulness, responsibility, compassion, and must reflect the normative standards human beings discover and develop through their existence.

Long ago, a friend of mine said "there are already seven billion people on this planet, but, how unfortunately there aren't so many HUMANS among them". Only now I realize the true meaning of those words, only now I can really say that Humanity is what makes us human, only this principle – the highest of all, is the judge of our life and destiny.

Bibliography:

- A. Gewirth . *Are There Any Absolute Rights?* In: Philosophical Quarterly, Vol. 31, No. 122 (Jan., 1981), Clarendon Press, Chicago, 1981
- Huazhong Chen. *Confucius Educating Humanity*. Nanking, China, 1998
- J. Rawls. *A Theory of Justice*. Cambridge, Belknap Press, 1971

- http://www.humanismtoday.org/vol12/larue.html,
- http://plato.stanford.edu/entries/kant-moral/#HumFor,
- http://users.polisci.wisc.edu/kinsella/martens%20clause.pdf,
- http://www.bu.edu/wcp/Papers/Huma/HumaGluc.htm

[1] http://www.humanismtoday.org/vol12/larue.html, Human values for the 21st century

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp.77-83

SHORT CONSIDERATIONS ON THE RELATION BETWEEN THE LAW AND THE CUSTOM IN THE CURRENT NATIONAL LAW

Assistant Ph.D.Ramona Duminică
Senior Lecturer Ph.D. Andreea Tabacu
University of Piteşti, Romania

Abstract

The law and the custom have long been studied for their role of sources of law, and remain so to this day. Throughout their evolution they have permanently provided doctrinaires with causes for reflection. Truly, in modern law the role of norms based on customs is greatly diminished in comparison to the previous periods. This is due to the fact that the custom which is made up of simple, basic rules has become too out of touch with the requirements of modern society. However, it has not completely disappeared, since it remains a source of juridical norms in certain sections of the law. With respects to its legal force, the custom occupies mainly a subsidiary position in the hierarchy of sources of Romanian law, since the law is characterized by stability which the vague, changing and uncertain custom cannot have.

Keywords: *custom, law, formal sources, the relation between law and custom.*

1. A BRIEF PRESENTATION OF THE CUSTOM AS A FORMAL SOURCE OF NATIONAL LAW

The custom is a rule of law which is not established by the will of the state but by a continuous practice of this rule by those interested. It is the law established by habit[1]. Generally, the concept of custom has both a broad sense as well as a narrow one. Thus, *lato sensu* the custom designates the group of legal norms created by society, without the legislator's

[1] Pierre Pactet, *Institutions politiques. Droit constitutionnel*, ed. 13, Masson, 1994, p. 34.

involvement. Therefore, it contains both custom and jurisprudence. *Stricto sensu*, the custom represents a constant and uniform social practice, which is consciously considered as necessary by a social group.[1]

From a historical point of view, the custom has had a primordial role in the development of the law, as its oldest source. The first juridical norms were nothing more than customs converted into laws with guaranteed public power. For example, *Jus Valachium* also known as *lex terrae*, *consuetudo terrae*, meaning the law of the country or the law of the land constituted one of the sources of inspiration for the Pravilniceasca Condica – The Code of Byzantine Customary Law (1780), Codul Calimachi – the Code of Calimachi (1817) or the Legiuirea Caragea – Caradja's Law (1818).

Thus, the custom is not just the first formal method to establish order of cohabitation and of collaboration within the community, but also the source of subsequent formalities – the law developed and adopted by a competent body vested with that authority. The law borrows such qualities as generality, impersonality, abstraction, obligation and sanction from the custom, thus giving them a higher level of formality, to which its specific qualities are added[2].

According to the classic theory of sources of law, a custom must meet the following two conditions to acquire a juridical quality: an objective and material condition, referring to a long and uncontestable practice, and a subjective, psychological quality which consists in conviction that a rule thus developed has a mandatory quality, sanctioned by the state[3]. Not all the customs created on a social level have become sources of law. The process of turning a custom from the general system of social norms into a formal source of law may take on the form of: either the state acknowledges a custom and includes it in an official law, or the custom is invoked by a party before a court of justice, which by enforcing it validates it as a law.

The role of the custom has been different from one age to another. It has been generally noticed that its importance decreased in modern times. If the supporters of this sociological conception have considered that the custom is the most suitable source of law, which expresses the social dynamics. The school of positivism has exceedingly reduced this role, by

---

[1] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului*, Ed. C.H. Beck, Bucureşti, 2008, p. 123.
[2] Gheorghe C. Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, Ed. All Beck, Bucureşti, 2004, p. 204.
[3] N. Popa, *Teoria generală a dreptului*, Ed. All Beck, Bucureşti, 2002, p. 199.

placing the law at the centre of the sources. This concept has prevailed and it was supported by practice.[1]

Thus, in the current legal system, the role of customs has been greatly diminished in comparison to its role during previous times. Given that they are more suitable as the basis of certain simple rules, customs have lost in importance because they are too rudimentary for contemporary requirements. However, the custom has completely disappeared from contemporary law, as a source of legal norms. Even though its importance is secondary, we can still find it in certain branches of the law and it represents a source of community law[2], in certain exceptional cases.

If in the current private law, the custom only applies as a point of reference in public law it has a wider applicability, as a procedure. For example, in constitutional law, the legal custom is present in the form of parliamentary, republican, monarchical practices or administrative-territorial traditions etc. In public international law, the custom is equal to the treaty as a source of law. It is defined as a general practice relatively long-lasting and recurring among nations and which is accepted as law by some states. The custom is however excluded from criminal law, since it sanctions the principle of legal penalties and incrimination, which make it impossible to use in this case.

Also, given the imperative quality of procedural norms, the necessity for precise conditions of due procedure during a trial and the importance of the organisation of the justice system as a public service, the custom is not accepted among the ranks of sources of civil procedural law[3].

Last but not least, the custom that contains a rule, which is contrary to public order and moral habits or repeals a law already in force (*consuetudo abrogatoria* and *desuetudo*) is not acknowledged, in principle. Nowadays, customs apply mostly in the interpretation of the will of the parties and of the law[4].

---

[1] René David, Camille Jauffret-Spinosi, *Les grands systèmes de droit contemporains*, Dalloz, Paris, 1992, p. 101.
[2] C. Voicu, *Teoria generală a dreptului*, Ed. Universul Juridic, Bucureşti, 2006, p. 149.
[3] A. Tabacu, *Drept procesual civil*, Ediția a VI-a, Ed. Universul Juridic, Bucureşti, 2011, p. 20.
[4] N. Popa, "Considerații generale privind conceptul de izvor al dreptului", în *Culegere de studii juridice*, Ed. Sitech, Craiova, 2009, p. 356.

2. THE CONCEPT OF LEGAL NORM AS A SOURCE OF LAW

As a source of law, the legal norm was for the Romans an agreement between the magistrate and the people, which was accomplished when the latter (*iubet*) accepted the proposals for regulations made by the former (*rogat*). In his work "The Institutions of Justinian", Gaius defined the law as "*quod populus romanus iubet atque constituit*". In Romania, written laws began to be called "lege" with the advent of the written legal codes of the XVII century[1]. They were considered the most important sources of the written law of the time: "Cartea Românească de învățătură" and "Îndreptarea Legii".

In its everyday meaning, the law represents any compulsory rule and it contains practically any source of legal authority (in this case, the custom or the judicial precedent become law if they are compulsory). The normative act is a law developed by Parliament (above all, the Constitution) however it does not limit itself to this one act. Thus, there is a system of normative acts made up of laws, decrees, rulings, government ordinances, regulations and ministerial orders and decisions made by local administrative bodies.

At present, the law is the principal source of legal authority. This privileged position is justified by both historical causes but most of all by reasons pertaining to the content and form of this source in relation to all the others and by the need to ensure juridical stability. As such, the law presents the following distinctive qualities: it is always normative, general and mandatory; it primarily regulates a certain field and it is issued by a legitimate body, constructed in accordance with a specific technique and procedure, in order to exercise a legal function.

3. THE RELATION BETWEEN LAW AND CUSTOM IN CURRENT ROMANIAN LAW

The relation between law and custom is outlined differently in modern times, depending on the option of each system of law. For example, in German law doctrinaires consider the custom as being equal to the law in its legal power. Hence, it can supplement the law (*praeter legem* custom), to complete it (*secundum legem* custom) and even break from it (*contra legem*

[1] Florin Negoiță, *Introducere în istoria dreptului*, TCM Print SRL, Bucureşti, 2005, p. 72.

custom). Actually, this thesis remains purely theoretic and abstract. No author can invoke a single real example of a law repealed through custom.[1]

In Romanian law, the custom mainly has a subsidiary, subordinate role due to its legal authority and relation to the law.

The law offers a certain security which the custom cannot, because it is more diffuse, changing and uncertain. The publication of the law ensures that it is known. However, it can always be repealed, from one day to the other. Thus, the written sources of law are in principle the factors of security and stability of the legal authority, but may lead to sudden breaks in the established order.[2]

On the other side, it is ascertained that the custom presents the essential advantage of being the expression of the direct will of the people. It is flexible and easily adaptable in comparison to the law. However, the custom is generally imprecise in relation to the law, because it is a cause of juridical insecurity. The law is general, centralizing while the custom is specific, because it varies depending of the circumstances, the professional particularities, the social medium, which could be a threat for the political unity of a state. In other words, the custom is not that flexible as it first seemed and may form an impediment for the development of the law.[3]

It is possible that once a new law appears (a code of law, for example), the legislator may dispose of certain customs, ignore its validity or expressly repeal them (the Romanian Civil Code of 1864, for example, repealed a great deal of previous customs). However, it is clear that the legislator cannot prevent the appearance of new customs.

In the current Romanian legal system, especially in private law, the most common custom is the *secundum legemi* one. Thus, the custom applies by virtue of the law, in cases where the law calls for it. In this situation there is no contradiction between law and custom. Also, we find references in Romanian law, for example in article 603, in article 613, article 1263 paragraph 2 and so on, from the Civil Code in force. Moreover, article 1 paragraph 3 from the Civil Code clearly sanctions the subsidiary characteristic of the custom, by showing that the regulations of the law, the customs apply to the extent that the law expressly warrants it. The code uses

---

[1] Michel Fromont, Alfred Riege, *Introduction de Droit*, Allemand, Tome I., Editura Cujas, Paris, 1977, p. 199.

[2] L. Barac, *Elemente de teoria dreptului*, ediția 2, Ed. C.H. Beck, Bucuresti, 2001, p. 212.

[3] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului*, *op. cit*., p. 124.

the concept of habit whereby we understand the custom and the professional tradition, as stated in the final paragraph of article 1.

Also, the custom may have juridical value, although the law does not clearly make reference to it. Thus, the *praeter legem* custom is applied in the absence of the law. In such a situation there is no conflict between law and custom, since the law is inexistent. This thesis was criticised by starting with the classic constitutional law argument: the Parliament is the sole representative of the people's sovereignty. This argument cannot be approved because firstly, legislative sovereignty is subordinate to the sovereignty of the people, while the custom is the direct expression of the people; secondly, on an institutional level Parliament is no longer the only law-making body; lastly, even the legislator clearly stipulates in article 1 paragraph 2 from the Civil Code that in cases where the law does not regulate, customs apply, and in their absence, legal stipulations concerning similar situations apply. If there are no such dispositions, then the general principles of the law apply. Thus, the *praeter legem* custom completes the inevitable lacks in the legislative system. As we have shown, the deficiencies were recognized by the legislators themselves.

The *contra legem* custom represents the case, in which a custom contradicts an existing law, thus posing the delicate problem of the obligatory force of the custom in relation to the law: could a custom apply when it is contrary to law? The answer is found in two situations: when the law is auxiliary and when the law is mandatory. In the first situation, the custom may prevail, if there is proof that the parties have had the intention to depart from stipulations of the law and to conform to the custom[1]. In the second case, Romanian law does not acknowledge the value as a source of law of a custom which comes into conflict with public order and good morals, nor a custom which contradicts the law. In this sense, there are the stipulations of article 1 paragraph 4 from the Civil Code which states that only the customs in conformity with public order and good morals are acknowledged as sources of law.

4. CONCLUSIONS

The law as a source of juridical authority maintains its central role in the Romanian legal system to the detriment of the custom, since the latter is

[1] Rémy Cabrillac, *Introduction générale au droit*, Ed 2, Dalloz, Paris, 1997, p. 133 and so on.

subsidiary to it. This means that it can only be *praeter legem* or *secundum legem*. It is unable to contradict the law (*contra legem*), save the case in which it contains non-compulsory simple rules. However, we must not forget that "laws have always been precarious, if their foundation is not based on customs; the customs represent the only resistant and durable force of a people"[1].

Bibliography:

- Barac, L., *Elemente de teoria dreptului*, ediția 2, Ed. C.H. Beck, Bucuresti, 2001.
- Cabrillac, Rémy, *Introduction générale au droit*, Ed 2, Dalloz, Paris, 1997.
- Dănişor, Dan Claudiu, Dogaru, Ion, Dănişor, Gheorghe, *Teoria generală a dreptului*, Ed. C.H. Beck, Bucureşti, 2008.
- David, René, Jauffret-Spinosi, Camille, *Les grands systèmes de droit contemporains*, ed 10, Dalloz, Paris, 1992.
- De Tocqueville, Alexis, *Despre democrație în America*, Volumul I, traducere Magdalena Boiangiu şi Beatrice Staicu, Ed. Humanitas, Bucureşti, 1995.
- Fromont, Michel, Riege, Alfred, *Introduction de Droit*, Allemand, Tome I., Editura Cujas, Paris, 1977.
- Mihai, Gheorghe C., *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, Ed. All Beck, Bucureşti, 2004.
- Negoiță, Florin, *Introducere în istoria dreptului*, TCM Print SRL, Bucureşti, 2005.
- Pactet, Pierre, *Institutions politiques. Droit constitutionnel*, ed. 13, Masson, 1994.
- Popa, N., *Considerații generale privind conceptul de izvor al dreptului*, în *Culegere de studii juridice*, Ed. Sitech, Craiova, 2009.
- Tabacu, A., *Drept procesual civil*, Ediția a VI-a, Ed. Universul Juridic, Bucureşti, 2011.
- Voicu, C., *Teoria generală a dreptului*, Ed. Universul Juridic, Bucureşti, 2006.

[1] Alexis de Tocqueville, *Despre democrație în America*, Volumul I, traducere Magdalena Boiangiu şi Beatrice Staicu, Ed. Humanitas, Bucureşti, 1995, pp. 366-367.

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp. 84-88

CAUSES FOR DISCIPLINARY IRRESPONSIBILITY

Assistant Ph. D. Candidate Andra Puran
Lecturer Ph.D Carmina Aleca,
University of Pitesti, Romania

Abstract

T*he only ground of disciplinary responsibility is represented by disciplinary deviation. Art.274 paragraph 2 of the Labour Code shows that "disciplinary deviation is an action in relation with work and which consists of an action or inaction done with guilt by the employee, through whom he/she broke the legal norms, internal regulation, individual work contract or collective work contract, legal orders and dispositions of the superior managers".*

As in the case of infractions, there are causes which lead to the removal of disciplinary responsibility for the employee, causes provided from penal law.

Keywords*: disciplinary deviation, employee, disciplinary irresponsibility, disciplinary inquiry.*

Introduction

To be in the presence of disciplinary deviation, it must be that the action committed by the employee sums up its building elements. If these elements are not met, the employee's disciplinary responsibility cannot be addressed.

But there are also situations in which, although these are joined elements, the employee's actions are not considered deviations, resulting in the fact that he/she cannot be held responsible.

Provided from penal law[1], the causes which exonerate of disciplinary responsibility are the following:
- self defence;

[1] Art.44-51 of the Penal Code

- state of necessity;
- physical coercion and moral coercion;
- fortuitous case and major force;
- irresponsibility;
- minority offender;
- error of fact;
- executing the service order which was emitted legally.

According to Art.44 of the Penal Code "it is not an infraction the action provided by penal law, done in self defence.
It is in self defence the one who does the respective action in order to remove a material, direct, immediate and unjust attack against him/her, another or against the common interest.
It is also in self defence the one who because of the disturbance or fear of overstepping the limits of a proportional defence in report to the gravity and circumstances in which the attack occurred".

The causes of penal irresponsibility are found also in the matter of disciplinary responsibility but only in the measure in which it corresponds to the juridical reports of the work right, so self defence is very rarely met in the matter of disciplinary deviation.

The Penal Code provides in Art.45 that "it does not constitute as infraction the fact provided by penal law, done in a state of necessity.
It is in a state of necessity the one who does the action in order to save from an immediate danger and who could not be removed otherwise, the life, the body integrity or health of another person or one of its important possessions or another one's possession or a common interest.
It is not in a state of necessity the person who in the moment of committing the action realised that he/she would suffer grater consequences than the ones which could occur if the danger were not removed".

Against self defence, the state of necessity is a cause of disciplinary responsibility which can be met more often in work relations.
Although is a state of irresponsibility, the penal legislation regulates a situation of exception in which the state of necessity is not considered an exoneration of responsibility, situation which applies also in the case of disciplinary responsibility.
So, if the employee is aware, in the moment of committing the action that he/she would suffer grater consequences than the ones which could occur if the danger were not removed, he/she would be held guilty, being considered that he had done a disciplinary deviation.

By analogy to the regulation of Art.46 of the Penal Code, *mutatis mutandis*, we can say that there is not a disciplinary deviation the action provided by legal norms, internal regulation, individual or collective work contract which applies, the orders and legal dispositions of the superior managers or of another person who provides new tasks for the employee, done because of moral coercion, exercised through threat with a grave danger to the person in question or to another and who could not be removed in another manner.

As regards to the fortuitous case and major force, in the doctrine there are divided opinions. So, some authors consider that between the two notions exists an identity as both are causes which cannot be imposed to the offender and which produce the same effect, which is the exoneration of responsibility.

In another opinion, the fortuitous case and major force are distinct notions. This is explained by the fact that sometimes both the Civil Code and the commercial one enumerates both notions alternatively, one after the other.

The lato-sensu concept of fortuitous case, be it of internal or external nature towards the rightful subject, can include major force, as the latter, being always of external nature, cannot be conceived and lato-sensu as including the fortuitous case[1].

Although the Penal Code refers to the fortuitous case also as a cause of irresponsibility, the Labour Code refers only, and expressly, in certain articles(for example Art.4 paragraph3 letter d; Art.48, Art50 letter f, Art.105 paragraph1 letter c, Art120 paragraph 2, Art.121 paragraph 2, Art.151 paragraph 2, Art.254 paragraph 2) to major force, without giving it a definition.

As regards to irresponsibility, irresponsibility cause provided by the Penal Code in Art.48, this is the mental state of a person who cannot control his/her actions and cannot conceive his/her actions, because of mental disorders or other situations, like sleepwalking.

In the case of work relations there cannot be the question of existing a state of mental disorder when making an individual work contract, because this is a general incapacity which leads to the impossibility of making such an act.

[1] See Ion Traian Stefanescu, Tratat theoretic si practice de drept al muncii, Pub. Universul Juridic, Bucharest, 2010, page 792

But there is the possibility that during the individual work contract such a state would emerge.

The state of irresponsibility must exist in the moment of committing the action. If the offender alternates the moments of irresponsibility with those of lucidity, than he will account only for those committed in a lucid state.

This state is also called mental immunity.

Article 49 of the Penal Code provides that "it does not constitute as infraction the action provided by penal law, if the offender, in the moment of committing the action, was, because of circumstances independent from his/her will, in a state of complete drunkenness produced by alcohol or other substances".

According to these regulations the state of drunkenness exonerates of responsibility only if the offender was in this state involuntarily, without his/her consent, and the drunkenness is complete (for example an employee of a liquor factory who gets drunk off the vapours of alcohol resulted from the explosion of a boiler).

As in the case of irresponsibility, minority is a cause of incapacity to cloze an individual work contract. Here we refer to minors under the age of 16 (or 15 as provided in Art13 paragraph 2 of the Labour Code).

According to the Penal Code, minors under the age of 14 are not criminally responsible. Anyway these minors cannot be employed, resulting that in work reports the minority provided by the Penal Code as a cause of penal irresponsibility, cannot function.

The Penal Code provides in Art.51 that "it does not constitute as infraction the action provided by penal law, when the offender, in the moment of committing the action, does not know the existence of a state, situation or circumstance of which the penal character of the action depends on".

These regulations refer to the error in fact, as cause of irresponsibility.

By analogy, we can say that if the employee was not aware of the existence of a state, situation or circumstance of which the deviation character of the action depends on, in the moment of committing the action, he/she will be exonerated of responsibility.

Knowing or not knowing sufficiently the sources which gave birth to obligations in the responsibility of the employee will not constitute error of fact, thus exonerating the employee of responsibility.

In the juridical literature[1] is appreciated that "in principle, the employee is not forced to appreciate by him/herself, the opportunity of a given order; the responsibility in such a case, operates in the task of the one who, culpably, gave the order, by hypothesis, inopportune.

In spite of all these, those employees who have the work obligation to verify the opportunity of certain expenses or operations answer disciplinary also in the hypothesis in which they execute an order of obvious inopportunity".

If, on the contrary, the employee executes a work order of obvious inappropriate nature, this order does not exonerate the employee of disciplinary responsibility.

In the doctrine[2] it is considered that infirmity, non existent in penal legislation, but provided as exemption cause in the Government Ordinance no.2/2001 regarding the juridical regime of contraventions, approved with modifications and additions through Law no.180/2002, can be withheld, in a disciplinary matter, as irresponsibility cause from the employee's part.

"If the filed of the contravention is graver than the field of discipline, is logical and possible that the infirmity to operate and as a cause of disciplinary irresponsibility".

Conclusion

The only ground of disciplinary responsibility is represented by disciplinary deviation. But there are causes which exonerate of disciplinary responsibility. These causes are: self defence; state of necessity; physical coercion and moral coercion; fortuitous case and major force; irresponsibility; minority offender; error of fact; executing the service order which was emitted legally.

References

- Ion Traian Stefanescu, Tratat theoretic si practice de drept al muncii, Pub. Universul Juridic, Bucharest 2010
- Ion Traian Stefanescu, Infirmitatea - cauza de raspundere disciplinara, in "Dreptul", no.12/2002

[1] Ion Traian Stefanescu, Tratat theoretic si practice de drept al muncii, Pub. Universul Juridic, Bucharest 2010, page 709;

[2] Ion Traian Stefanescu, Infirmitatea - cauza de raspundere disciplinara, in "Dreptul", no.12/2002, page 76 – 84.

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp. 89-93

REGIONAL DEVELOPMENT, REGIONALISM AND REGIONALIZATION IN ROMANIA

Ph.D. Candidate Florentina-Janina Mitoi
University of Craiova, Romania

Abstract.

Amid deepening of globalization states are considered, on the one hand, too small to cope with emerging global issues, which lead to the creation of supranational organizations and on the other hand, they are considered too large to solve effectively all problems of citizens. In this context involved regionalization and regionalism which describes two interrelated movements in the region. Regionalization often seeks to reduce regional economic imbalances and harmonious development of the entire national territory while regionalism corresponds to a local deep desire to be responsible for resolving problems that affect them directly. Regional needs are responded to by a state policy which in turn has repercussions on regional sentiment and involve reactions of the region.

Keywords: *state, territorial, local, regionalism, regionalization.*

Regional development was defined[1] as the process of improvement human life by increasing GDP/capita, poverty reduction and intensifying individual economic opportunities. Regional development requires, also, conserve natural resources, better education, better health and nutrition, a cleaner environment and a rich cultural life.

Between regional development policy and concepts of regionalism and regionalization are very closely linked. Regional development should increase the quality life, but it involves human communities organized administrative units in the state and the specificity of each. Thus, regionalization aims to reduce regional economic imbalances and

[1] Corneliu Dincă, Alexandra Dincă, *Organizational structure of regional development in the European Union*, Sitech Publishing House, Craiova, 2006, page 1.

harmonious development of the territory held in administrative units while regionalism corresponds to a local deep desire to be responsible for resolving problems that affect them directly[1].

1. Administrative division factor in regional development.

Administrative division of a state is a key factor in the functioning of state institutions and policies promoting development.

Administrative division in Romania is provided for both the Constitution and other laws. Article 3 (3) of the Constitution[2] establishes an exhaustive list of forms of spatial Romania administratively as: common, city and county. Article 18 of Law no. 215/2001[3] establishes, as well as common forms of territorial organization, city and county. Where to deduce that the only way possible administrative-territorial arrangement in Romania are set by the constituent and the only constitutional way to introduce new forms of organization of the territory consists of a revision of the Constitution.

Romania is in the process of regionalization whose foundations were laid in the "Green Paper for regional development in Romania", prepared under the aegis of the EU delegation in our country.

One of the objectives U.E. is to promote balanced economic and social progress and sustainable economic and social cohesion by strengthening member countries. An important role in this process is given regions, seen as areas closer to citizens.

2. Developing regions.

In Romania were established in 1998, 8 regions[4], to be implemented regional development policy. These were created with the idea of economic development of disadvantaged areas. They have not administrative independence, as in most European countries. The eight development regions work alongside the 41 county structures. Currently, to run European funds there are eight regional development agencies.Councils were created in 1998 for regional development of South-East, South, Southwest, West,

---

[1] Ioan Alexandru, *Public Administration*, third edition revised and enlarged, Lumina Lex Publshing House, Bucharest, 2002, page 607.

[2] Article 3. 3 of the Constitution: *"... territory is organized administratively into communes, towns and counties. according to law Some towns are declared municipalities* ";

[3] Article 18, (1) *Towns, cities and counties are administrative units for the exercise of local autonomy that is organized and functions of local government authorities*.

[4] Law no. 315/2004 on regional development in Romania, published in Official Gazette no. 577 of June 29, 2004;

North-West, Central, Eastern and Northern region and Bucharest. These development regions were established under the EU recommendation that the county is a party considered too low while the state covers too large. It would be appropriate, the establishment of a new administrative level, region. However regions in Romania are not far from what will be the regions of the other European countries. The 8 regions of Romania have no administration in status and have no legislative or executive body board as required by the Political Declaration on regionalism, adopted in 1996 by the Assembly of European Regions. According to this statement, the basic structure of the region is composed of a representative assembly (a mini-parliament) and an executive body (a miniexecutive body).

Development regions in Romania are not administrative units not having legal personality, the result of an agreement between the county and local. Their function is to allocate funds from the European Union, regional development, research and interpret and regional statistics.

Creating an administrative region as an intermediary in Romania is an issue that raises many issues. Whenever talking about reform for this purpose is an ethnic problem. Hungarian leaders proposed legislation, the reorganization of the developing regions by moving the eight development regions to 16 regions was criticized, in terms of legal content on the grounds that aims to create regions along ethnic lines. However, the real stake of regionalization is not satisfying a desire ethnic, but rather the creation of strong regions economically and administratively efficient, have the capacity to absorb financial resources that are important to the necessary strength to reduce disparities and ability to provide quality services[1] through a policy of conservation and sustainable regional development.

Regionalization of the Community Charter[2], adopted at Maastricht, the region mean that territory which, in geographical, entity or group similar clear areas where there is continuity and whose population has some common features and wish to retain specific identity through development, to stimulate progress culturally, socially and economically, in a word to promote regionalism.

[1] Cosmin Dina, *Hungarian regionalization problem transcends Romania*, article published on the website www.adevarul.ro on 01/06/2011, accessed on 10.11.2011;
[2] Regionalization of the Community Charter, adopted by Parliament in 1988.

3. Requirements to improve the administrative organization of the Romanian territory.

The current administrative-territorial organization of Romania faces many difficulties. First, failed to optimize decision making, local autonomy is not fully assumed by local authorities. Local budgets are dependent on state budget resources while the local budgets revenues do not exceed 25% of local resources. Secondly, people are drawn into the decision making process which contradicts the principle of transparency in administration. Attracting citizens to work making the decision means that most of the administrative work, powers return with priority public authorities located closest to it.

Administration reform is not possible without a separation of administrative responsibilities at the political level, which depends ultimately on the will of government. It aims to promote an administration based on career performance professionalism and experience, or a government subservient to political interests?[1] Political factors directly influence management reforms at both the prescription and the plan of its execution by public policies approved.

Modernizing government must comply with guidelines given by the European Union, as noted in most European countries that have agreed to implement as an administrative-territorial regions, benefiting the wider skills. It is true that the administration is a complex phenomenon and involves a variety of ways of implementing the plan practical work, distinguished from one state to another, from one historical period to another. However, action must be long and thoroughly prepared, aiming to ensure, first of all economic conditions, political, social, leading to optimal timing of its implementation in practice. Preparation of action, as timing was put into practice is the responsibility of state authorities and must be based on objective, scientific, to give it credibility, support and stability in the future[2].

Preparatory actions must take place from the bottom up, democratic principles and with all transparency, to be widely and properly publicized,

[1] Mircea Preda, Anna-Sofia David, Maria Filip, *Administrative organization of the Romanian territory,* Lumima Lex Publishing House, Bucharest, 2000, page 527;
[2] Idem, page 528.

analyzed and discussed in all their positive and negative effects, involving citizens, for them to discern and decide knowingly.

Bibliography

- Alexandru, Ioan, Public Administration, Third edition revised and enlarged, Lumina Lex Publishing House, Bucharest, 2002;
- Dina, Cosmin, Romanian regionalization transcends Hungarian problem. Article published on website www.adevarul.ro on 01/06/2011, accessed on 17.04.2012;
- Dincă, Corneliu, Dincă, Alexandra, Organizational structure of regional development in the European Union, Ed Sitech, Craiova, 2006;
- Law no. 315 of 28 June 2004 on regional development in Romania, published in the Official Gazette, Part I, no. 577 of 29/06/2004
- Preda, Mircea, David, Ana-Sofia, Filip, Maria, Administrative organization of the Romanian territory, Lex Lumima Publishing, Bucharest, 2000;

***

"This work was partially funded by contract POSDRU/88/1.5/S/49516, strategic project ID 49516 (2009), co-financed by European Social Fund - Invest in People, the Human Resources Development Operational Programme 2007-2013."

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp.94-97

THE REQUIREMENT FOR LEGAL LIABILITY IN THE EUROPEAN LAW CONTEXT

Mariana-Daniela Sperilă (Crăciunescu) [1]
University of Craiova, Romania

Abstract

Legal Liability is a juridical phenomenon that has gained momentum in recent years, a decisive influence in this respect is held by European law that develops before our eyes. Starting from the importance that the legal responsibility has at the level of legal life, it appears that its durability depends to a large extent on its general purpose, namely ensuring the legality and the rule of law. Is not imperative that this goal to be achieved, it is sufficient for it only to exist and based on it to set a strategy, a set of tools and processes to achieve the desired result. Legal responsibility is even more necessary the current context of the European law, as the the latter is the result of a dynamic and continuous development process.

Keywords*: legal responsibility, European law, desideratum, legality, rule of law.*

1. ENSURING THE LEGALITY AND RULE OF THE LAW AS A GOAL OF LEGAL RESPONSIBILITY

Given that the foundation of legal responsibility is the lawful conduct of the individual, it follows that its purpose can not be other than ensuring the legality and the rule of law. Legality is a fundamental duty of constitutional nature, which concerns both natural and legal persons and the organization and conduct of state activity. Therefore, the citizen free to conduct any activity, except those prohibited by law and state authority can perform only those duties stipulated by law as attribution. It follows that the

[1] This work was partially supported by the stategic grant POSDRU/88/1.5/S/49516, Project ID 49516 (2009), co-financed by European Social Fund – Investing in People, within the Sectoral Operational Programme Human Resources Development 2007-2013

legality is, on one hand, an imperative arising from the law and, on the other hand, a fact resulting from obeiding the law. As a consequence, we can speak of promoting or ensuring the legality, but we can not talk about obeiding legality, as legality means precisely law obeiding in general. So , legality means a general state of concordance between the various human activities and the system of rules and laws existing at a given time in society. Legality correlates, inevitably, with the rule of law, the latter being a component of social order that establishes the framework for achieving juridical norms.

Rule of law is seen as "a condition that establishes as a result of strict obedience to the law for all citizens and state institutions and is guaranteed by law"[1]. In the absence of order it appears the disorder, "deviation from regularity"[2], and to avoid this it is necessary that individual always act with responsibility, that is, to make fair elections and always in full knowledge that this choice.

Problem of order in general and the legal order in particular is an inexhaustible theme that is still generating controversies. The society in order to survive, needs stability and security, ensuring that the individual activities will take place normally and that their rights will be respected. However, this order can not be achieved unless it is based on a higher ideal, of moral nature, to impregnate the institutions of society. And this is the idea of justice[3].

"In order for the positive right to create a true legal order it must be efficient. Efficiency is absolutely necessary for the transformation of the moral order into juridical order"[4]. The legal order, in its accepted meaning at the level of doctrine[5], involves an ordering of human behavior through legal norms and the legal responsibility is critical in this respect. Legality implies some discipline from the subject of law, his lawful conduct is the result of fair and conscious decisions and in other words responsible

---

[1] www.rubinian.com/dictionar

[2] Mihai, Gh., Motică, R., "Teoria generală a dreptului", Editura All, Bucureşti, România, 2001, p. 237

[3] Vălimărescu, Al., „Tratat de enciclopedia dreptului", Editura Lumina Lex, Bucureşti, România, 1999, p.68-69

[4] Dănişor, D.C., Dogaru, I., Dănişor, Gh., „Teoria generală a dreptului", Editura C.H.Beck, Bucureşti, România, 206, p. 467

[5] Mihai, Gh., „Fundamentele dreptului. Argumentare şi interpretare în drept", Editura Lumina Lex, Bucureşti, România, 1999, p.96; Craiovan, I., „Itinerar metodic în studiul dreptului", Editura Ministerului de Interne, Bucureşti, România, 1993, p. 119

decisions. Only in this way with the awareness of the duty to respect the positive law, the individual participates in creating and maintaining the state of legality and legal order.

The novelty that the individual lives today is that after Romania joined the European Union, the domestic legal system is added a different legal system, the EU one, which integrates into the legal system of Member States and which imposes on national jurisdictional bodies. As a consequence, the behavior of the subject of law must adapt this legal system and legal liability concerns the attitude of the individual towards both of them, because now we can no longer talk about one without having to invoke the other. In fact, we are assisting "an integration of the Romanian legal system in the Community legal order, which becomes a complement and at the same time, a measure of national law"[1].

2. THE INFLUENCE OF LEGAL RESPONSIBILITY ON THE BEHAVIOR OF THE INDIVIDUALS

The phenomenon of legal responsibility apears during the transition of the legal norms through the filter of consciousness, and for that transition to be possible, is necessary for the legal rules to have that quality to aim human relationships, knowing that a rule is even more interesting to humans as it aims them more. Therefore the laws of physics or chemistry are forgotten by the common man as soon as he completes the courses of the educational process conducted in schools, while only the specialists use and research them further. But the common human, general subject of the law, does not remain interested in something that has no connection with him, does not obliges nor benefit him directly, he is very receptive to those laws targeting his conduct, that establish rules and guiding principles in his daily activity.

The way a human expresses in society is inseparably linked to the presence of legal norms and legal responsibility. Juridical rules, by their nature imperative, set the result that the individual must obtain by his behavior and the legal responsibility makes this result to be effectively achieved.

But even Rousseau, who praises the law directly, saying that "only to the law people owe justice and liberty", recognizes that, to have the

[1] Rusu, I. E., Gornig, G., „Dreptul Uniunii Europene”, Ediția a III a, Editura C.H.Beck, Bucureşti, 2009, p.1

positive desired effect, of ensuring the rule of law, laws should be more than just laws, they have to echo the people's consciousness, leading to compliance of individuals without threatening with sanctions. "These are the most important laws ,that is laws that are not written on marble or bronze but in the hearts of citizens, laws that [...] keep people in line with its ordinances and imperceptibly replace the power of authorities with the power the habit "[1].

The lawful conduct, of compliance of the individual to the system of rules of society to which he belongs, represent the optimal interaction of people, while being the ideal way of solving various social problems that may occur. This is an important step in human evolution, cultivation of the legal rules at the level of consciousness having positive effects on individual behavior in general, whether it relates to legal or social life.

"The increase of consciousness is a particular aspect of increasing the value of the individual"[2]. It is undeniable that while human life corresponds to more to the legal standards, self-respect gradually increases and with it grows the care for each other materialized in actions full of legal and social responsibility. It does not matter in this context, to which rules the individual grants greater importance, if the national or community rules are those that regulate behaviors and create attitudes. What matters here is the final result, namely grinding his conscience in order to comply to the system of rules affecting him.

According to art. 148. (2) of the Romanian Constitution, following Romania's EU accession, the Union's constituent treaties and other mandatory community regulations prevail over contrary provisions of the national law. It follows that a thorough knowledge of rules and principles of community law is not only useful but imperative for adopting a behavior of compliance with this legal order that builds before our eyes.

Community law creates an independent legal system that establishes rights and obligations, not only for member states but also for individuals and businesses. Following the transfer of sovereignty from the member states to the Community, the latter may adopt legally binding acts for the society, acts according to which the individual is forced to shape his behavior.

---

[1] Rousseau, J.J., Contractul social, Cartea a II a, cap. 12, Editura Mondero, Bucureşti, România 2007, p.161

[2] Fauconnet, P., "La Responsabilité. Étude sociologique", France, p.338

LEGAL AND ADMINISTRATIVE STUDIES, www.rsja.upit.ro.
ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (12), Year XII, 2013, pp.98-102

LEGAL STATUS OF NON-RETROACTIVITY PRINCIPLE OF LAW IN EUROPEAN UNION[1]

Ph.D Candidate Alexandra Florescu
University of Craiova, Romania

Abstract

The position of the retroactivity principle in the normative hierarchy, including the European or the European-inspired systems, is different as a rule, when reffering weather to criminal law, or civil law. Most systems of criminal law prohibite constitutionally, the retroactivity of penal laws, while civil law retroactivity remains a valuable legislative principle. Applying the European Convention of Human Rights does not change the location in the hierarchy of the normative, than in criminal matters, for systems that have not implemented it, though recognizes an over- legislative value to he Convention, while art. 7 of the Convention prohibits only the retroactive criminal laws, and not the civil laws. It seems, therefore, that the rule in most of the European or European-inspired systems, is the constitutionalization of the retroactivity principle in criminal law or at most, usually suppressing terms in general, in other areas still applying the practice of retroactive legal rules, even if not unlimited, as the principle remains legislative. However, some law systems adopt different solutions.

Keywords: principle, criminal law, non retroactive law, European Law, European system.

Keywords: *European Union, non-retroactivity, principle of law*

[1] This work was partially supported by the strategic grant POSDRU/CPP107/DMI 1.5/S/78421, Proiect strategic ID78421(2010), co-financed by the European Social Found –Investing in People, within the Sectorial Operational Programme Human Resources Development 2007-2013.

European Union is a special entity that plays an important role on the world stage. The matter of non-retroactivity principle of law in the normative hierarchy of European or European-inspired rule is different ,as it is criminal law or civil law. Most systems prohibite constitutionally the retroactivity of criminal laws, while civil law retroactivity remains a valuable legislative principle. Applying the European Convention on Human Rights does not change the geographical location in the hierarchy of normative principle than in criminal matters for systems that did not constitutionalize it, but recognize to the Convention an over-legislative value, as art. 7 of the Convention prohibits only retroactive criminal laws, not the civil ones.

Thus, in French law, the principle of non-retroactivity of criminal law is provided by Article 8 of the Bill of Rights of 1789, with a constitutional value, while retroactivity law is generally provided only by article 2 of C.civ.fr., the only linking enforcement bodies, as a principle of interpretation, and not a civil law training. The legislator can therefore deviate from it[1]. In Canadian law " the general system is the legislative sovereignty one," so, in principle, retroactive law is allowed, "but he grafted some regimes of exception, the most important of which is created by Charter in 1982 for criminal laws and certain non-criminal repressive laws "1[2]. **A**rticle 11 of the Charter stipulates that "'any defendant is entitled as not guilty by reason of an act or omission which, when it occurred, did not constitute an offense under the law of Canada or international law, and did not have any criminal aspect according to the general principles of law recognized by all nations".

Unlike French law, "this provision applies only to crime, not punishment so that the defendant is not entitled to back a law that would repeal it, withdrawing it an aggravating factor or adding an item more favorable (...). Repealing the text tha creates the crimes has no effect on already committed crimes or the prosecution of these crimes. "But the legislator might make a retroactive application of criminal law more

[1]Th.Renoux, în Annuaire International de Justice Constitutionnelle, 1990,p.357-373.
[2] P.Garant, Annuaire International de Justice Constitutionnelle,1990, p.343 .

favorable. Constitutionalization of the principle of retroactivity of criminal law in Canada is therefore only partial[1].

Belgium Constitution makes no reference to the principle of retroactivity law. This is, at stipulated, only legislative, both in civil (Civil Code Article 2.) and criminal matters (Article 2 Criminal Code.). If you could speak of the principle supralegalitate due to direct applicability of Article 7 of the Belgian law the European Convention on Human Rights even a constitutionalisation of, even if somewhat mediated by the derivation to the provisions of Article 7 of Constitution and Article 8 on the legality legality inmfractiunilor punishment, although the Arbitral Court ruled in their base in this respect, in civil matters, retroactivity principle application remains only, not forming a legal order.

Austria also confines the general principle of the law, requiring as a limit of retroactivity the principle of equality and even the expectations of citizens in the continuity of the legal system, which can be understood as a kind of constitutionalisation, but strongly limited. In terms of criminal law, they are not retroactive, but not in the constitutional text, but in the Article 7 of the European Convention of Human Rights, which in Austria represents a constitutional value[2].

The text of the Convention is somehow restrictive, because, besides prohibition of retroactive laws in setting crime, it contents to issue a prohibition in order to impose more severe punishment than the one applicable at the time of the crime, without prescribing the less severe penalty. So, the implementation of the Convention leads to the adoption of non-retroactivity rule of the less stringent law[3].. Greece, in turn, establishes the principle of retroactivity in the constitutional level in penal laws and somehow in matters of tax laws, but in others it remains a legislative matter. The new constitutions seem to go on the same line[4].

---

[1] D.C.Danisor,Ion Dogaru, Ghe.Danisor, Teoria generala a dreptului , Editura C.H.Beck, Bucuresti 2006 pag. 339

[2] D.C.Danisor,Ion Dogaru, Ghe.Danisor, Teoria generala a dreptului , Editura C.H.Beck, Bucuresti 2006 pag. 339

[3] F.Deperee, Annaire International de Justice Constitutionnelle, 1990,p.335.

[4] C.Spiliotopoulos, Annuaire International de Justice Constitutinnelle, 1990 p. 375-381.

For example, the Bulgarian Constitution prohibits retroactive criminal law (Article 5), but generally constitutionalize the principle and the Russian Federation Constitution, in Article 54, prohibits retroactive criminal laws and those "determining or aggravating the liability of a person", but not a general principle of neretroactivity. It seems, therefore, that the rule in most of European or European-inspired systems, is the constitutionalization of the retroactivity principle in criminal law or of repressive rules at most in general terms , in other areas remains possible the practice of retroactive law, even if not unlimited, for the principle remains of legislative nature.

Still, some systems adopt different solutions. Thus, the German system, the issue of retroactivity arises differently, but somehow at the same level , as refering to criminal law and other branches of law. In criminal law, retroactive laws are constitutionally prohibited by article 103. Although not expressly provided as a constitutional principle in other areas of law, the principle of retroactivity is derived from the respect for legitimated power, resulting in turn from the rule of law, therefore with constitutional value. Constitutional judge makes the application, both in legislative terms and administrative matters, or even changes of the jurisprudence. However, the situation is different from Roman law, in which this jurisprudential constitutionalization, specifically provided under other stipulated constitutional principles making cases, and although effective to censor some retroactive laws, does not turn into a constitutional principle with mandatory general application [1].

In The United States the matter of non-retroactivity gets some unique connotations. Although the rule does not require clear constitutional level but in criminal matters, prohibiting the adoption of “ex post facto” laws or bill of attainder << >> (article 1 paragraph sec.9 . 3 for the federal government and art. a sec.10 paragraf 1 for the Federated States), can be inferred from other non-criminal matters and principles, especially the “the due process” clause << >>, which made the Supreme Court decide, on the one hand, that the legislator can not avoid the problem of retroactivity law simply by including in the text a provision to make it expressly retroactive.

It is mandatory that the retroactive law must be supported by a legitimate legislative motivation and that retroactivity be justified by

[1] M.Fromont, Annuaire International de Justice Constitutionnelle, 1990 p.321-325.

reasonable means and, on the other hand, judicial decisions (source of law in the American system) to be required non-retroactivity rule in non-criminal matter. Although not as drastic as the Romanian system, simply prohibiting retrospective laws in all areas, except in matters of criminal or more favorable contraventional laws where retroactivity is constitutional, the American system, however establishes more clearly than most European systems, the possibility of adopting retroactive laws.

A system which establishes retroactivity as a general constitutional principle is the norvegian1 system[1]. Thus art.97 of the Norway Constitution provides that "no law may have a retroactive effect. " The formulation is even more trenchant than the Romanian Constitution, which at least, expressly sets the exception of the more favorable criminal or contraventional law. However, the interpretation of constitutional provisions so trenchant in Norway is not as strong as the text itself.

Thus, the prevailing interpretation of this constitutional provision, seems to make sense of a general principle of equity rather than the sense of rules built, in authentic positive law.

It seems, therefore, that the rule managed to impose outside the criminal law, where it works for the purposes of the development of European law in general, more of a recommendation to the legislator, nevertheless as a general principle of interpretation.

Bibliography:

- Th.Renoux, în Annuaire International de Justice Constitutionnelle, 1990
- P.Garant, Annuaire International de Justice Constitutionnelle,1990.
- D.C.Danisor, I. Dogaru, Ghe.Danisor, Teoria generala a dreptului, Editura C.H.Beck, Bucuresti 2006
- F.Deperee, Annaire International de Justice Constitutionnelle, 1990
- C.Spiliotopoulos, Annuaire International de Justice Constitutinnelle, 1990
- M.Fromont, Annuaire International de Justice Constitutionnelle, 1990

[1] E. Smith, 1999, p. 483-496.