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DEMOCRATIC HERITAGE OF EUROPEAN COUNTRIES AND DEMOCRACY IN THE INTEGRATED EUROPEAN UNION

Andrzej SZMYT[1]

Abstract:

Democracy in Europe has a long tradition dating back to ancient Greece and Rome. It has its roots in the Middle Ages as well. Theoretical basis of democracy were established by such great thinkers as Marsilius of Padua, J.J. Rousseau, E. J. Sieyes or J. St. Mill. Representative democracy has been traditionally perceived in opposition to direct democracy, however, the political systems of modern states have far outweighed the balance in favor of representative (indirect) democracy, which is mainly determined by the territorial extent of a country, the size of the political community (the people) and the complexity of the matter of governance. The solutions included in the Polish Constitution of 1997 can serve as an example of the democratic standards of modern European countries. At the supranational level the Treaty on the European Union in its preamble explicitly refers to the inspiration of the European inheritance, which also include democracy, and confirms the affection to the principle of democracy. Article 2 of the Treaty enumerates the values on which the European Union is founded, including democracy as a common value to the Member States. However, a problem commonly referred to as "democratic deficit" can be recently noticed both at the European level and the level of Member States. The "democratic deficits" are counteracted in three ways - by strengthening the role of the European Parliament, by strengthening the role of national parliaments and through the instruments of participatory democracy.

Key words: *direct democracy, representative democracy, representative mandate, european union, democratic deficit*

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INTRODUCTION

Democracy in Europe has its roots in ancient Greece, including the etymology of the notion - from the Greek *demos* (people) and *kratos* (power, strength), meaning the "rule of the people". Athens democracy, which was understood as the direct exercising of supreme power by all free citizens of the state-city gathered at people's assemblies, became the symbol of ancient democracy. The people could decide in all areas (legislative, executive, judicial and the selection of officials). The assemblies in ancient Rome were much more limited. Medieval forms of direct democracy were old Germanic *tings* and corresponding Slavic *rallies*. They gave the beginning to the institution of the popular assemblies in Switzerland (*Landesgemeinde)*, which are still practiced in two Swiss cantons (Glarus, Appenzell Innerrhoden).

Another trend of democracy in medieval Europe was linked to the constitutional systems of urban republics, mostly Italian and German, as well as to the model of an assembly that evolved from the royal councils and feudal meetings (elective, judicial, legislative) and were based on the class representation. Polish Sejm (since 1493), as well as Hungarian parliament, expressed the noble democracy, but in many countries of Western Europe the townspeople (often the clergy, sometimes even the peasantry) also had a strong representation. Prior to the Polish Sejm the representative bodies in other countries were established - the Spanish Cortes, the English parliament, the French Estates General and the Swedish Riksdag. However, the representatives of particular classes, did not exercise power on behalf of the sovereign, mainly acting as the opposition to the monarch's power, especially if it was absolute.

Already in the Middle Ages Marsilius of Padua gave the first bases for the sovereignty of the people principle as the primary source of power, without prejudging whether people should exercise their power directly or it could have an indirect nature. The main changes were brought by the Enlightenment and the French Revolution. J. J. Rousseau conquered the minds with the concept of the social contract and the need to express the will of the people by the people themselves, giving the primacy to direct democracy. At the other extreme was the concept of E.

J. Sieyes who claimed that people were only empowered to elect their representatives periodically. The doctrine of representation was developed by J. St. Mill. This trend gave substantial foundations of the parliamentary democracy which flourished in the nineteenth century.

The instruments of direct democracy obtained their primary legal basis in the period of the French Revolution, though a real breakthrough was the Swiss experience in the nineteenth century. Direct democracy was significantly expressed in the Constitution of Weimar Republic and legal acts modeled on it. After World War II the new constitutions of democratic countries relatively frequently alluded to the Weimar Constitution. Quite recent example is provided by the constitutions of Central and Eastern European countries adopted in the time of political transformation after 1989. The legal solutions concerning direct democracy that was implemented in this region during the political regime after World War II had marginal and partly facade character. Nowadays, the institutions of referendum and popular initiative (especially citizens' legislative initiative) have much more significant importance. The popular veto, plebiscite, the institution of recall (the right to appeal an officer who was elected for the function, for example in Poland the mayor of the city can be recalled at the local level) and the already mentioned popular assemblies in the communities of small territorial units (the Swiss ones are most recognized) are much less often applied.

THE CONTENT OF THE PAPER

The practical experience of the political systems of modern states, however, have far outweighed the balance in favor of the priority of representative (indirect) democracy, which is mainly determined by the territorial extent of a country, the size of the political community (the people) and the complexity of the matter of governance. Social and technical transformations of modern day do not determine the overall changes significantly, although they may favor the renaissance of the direct democracy institutions to some extent.

Representative democracy has been traditionally perceived in opposition to direct democracy, though their complementarity in the development of the principle of the sovereignty of the people is often pointed out today. The recent doctrine also uses the concept of participatory democracy, combining direct democracy with the concept of semi-direct democracy. The latter one serves as the strip of demarcation between the two classical typologies. Its forms activate people, but without the participation in the final decision, which is undertaken by state authorities (usually representative). The right to petition or the institution of the public hearing can be pointed out as the examples of participatory democracy institutions.

Within the area of the development of representative democracy the determination of such issues as: the way in which the representatives should be elected, the nature of their mandate and the position of the national parliament among other state organs have become important. The creation of the parliament by popular elections (electoral law), based on the principles of universality (with a progressive reduction of censuses), equality, directness (sometimes partly indirectly), secrecy and majority (or proportionality) concerning the distribution of seats among the political forces have become a common standard. Sometimes the principle of free elections and their periodicity are also emphasized.

Historically, the concept of free mandate which means that a representative (deputy) represents all the people (nation), not just the voters of his district, a deputy is not bounded by any instructions of the voters and their groups (the instructions are legally unacceptable also from political parties) and cannot be recalled before the end of the term of office has prevailed. The earlier concept of imperative mandate (associated, subsidiary) passed to the history. In the period of noble Poland this type of mandate was characterized by instructions which were given to deputies who had to swear to accomplish them. In the People's Republic of Poland, as well as other countries of the same political block, the imperative mandate was reflected in the constitutional provisions on the liability of deputies before voters and the possibility of their direct dismissal. However, the normative foundations of a free mandate have merged with the political role of parties, including the

important role of the club (fractional) discipline which is binding for deputies. This contradiction of practice can be only solved by the legal fiction. Nowadays, the attribute of the representative body is generally granted only to the parliament. It affects parliament's legal position, especially the scope of its competences - mainly legislative (the role of the statute).

The solutions included in the Polish Constitution of 1997 can serve as an example of the democratic standards of modern European countries. The Republic of Poland is defined as a democratic state ruled by law (Article 2), in which the supreme power belongs to the Nation who exercises it through their representatives or directly (Article 4). A citizen has the right to participate in a referendum and the right to vote for the President of the Republic, deputies, senators and representatives to organs of local government (Article 62). Everyone can submit petitions, proposals and complaints (Article 63). Legislative power is exercised by the Sejm and the Senate (Article 10 and Article 95), and elections to the Sejm are universal, equal, direct and proportional and shall be conducted by secret ballot (Article 96). Deputies are representatives of the Nation and they shall not be bound by any instructions of the electorate (Article 104). Groups of at least 100 thousand citizens having the right to vote in elections to the Sejm have the right of legislative initiative (art. 118). In matters of particular importance to the State a nationwide referendum may be held (Article 125). The Constitution also expressly provides for a ratification referendum (Article 90), a referendum on the amendment of the Constitution (Article 235) and a local referendum (Article 170).

The electoral social technique of legitimizing power of the people is perceived as narrow (slightly formal) understanding of democracy, but is also accompanied by a broader understanding of democracy (material, axiological) as inextricably linked to additional standards of the liberalism doctrine (constitutionalism, separation of powers, the rule of law, political pluralism, the protection of rights and freedoms of an individual, the protection of minorities). These standards are realized by the Constitution of 1997. Many of them have also normative anchoring in international law and are protected by international organizations,

successively strengthening the democracy. This trend is also visible in European integration law.

The issue of democracy in the European Union must repeatedly manifest itself in a different way than in the intrastate relations, mainly due to the nature of the entity such as the European Union. The Treaty on the European Union in its preamble explicitly refers to the inspiration of the European inheritance, which also include democracy, and confirms the affection to the principle of democracy. This axiology is also confirmed by Article 2 of the Treaty, which enumerates the values on which the European Union is founded, including democracy as a common value to the Member States.

The title II of the Treaty (Articles 9 - 12) as a whole contains provisions on democratic principles. In all its activities, the Union shall respect the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies (Article 9). In accordance to Article 10 of the Treaty the basis for the functioning of the Union shall be founded on representative democracy. Citizens are directly represented at the Union level in the European Parliament and the Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments. Heads of State or Government and the governments are democratically accountable before their national parliaments or their citizens. Every citizen has the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely to the citizens as possible. Political parties at the European level contribute to forming European political awareness and to expressing the will of citizens of the Union. In accordance with Article 11 of the Treaty, by appropriate means the institutions provide citizens and representative associations with the opportunity to speak their mind and publicly exchange the views in all areas of the Union actions. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society, and the European Commission shall carry out broad consultations with parties concerned in order to ensure consistency and transparency of the Union. Citizens of the Union in the amount not less than one million coming from a significant number of Member States

may undertake the initiative of inviting the European Commission to submit, within the framework of its powers, any appropriate proposal if in citizens' opinion the application of the Treaties requires an act of European Union law.

The provisions of Article 12 of the Treaty perceive the national parliaments of the Member States as contributing actively to the good functioning of the Union: a) by obtaining information and the copies of European draft legislation from the institutions of the Union, b) by ensuring the principle of subsidiarity, c) by taking part in the appraising and monitoring mechanisms of the implementation of specific policies of the Union and indicated organizations, d) by taking part in the revision procedures of the Treaties, e) by being notified of applications for accession to the Union, f) by taking part in the inter-parliamentary cooperation between national parliaments and the European Parliament. Two separate Protocols annexed to the Treaty are relevant in that context – Protocol on the Role of National Parliaments in the European Union and Protocol on the Application of the Principles of Subsidiarity and Proportionality. The domestic rules are also relevant - in Poland the Act of 2010 (the previous one was of 2004) about the Cooperation of the Council of Ministers with the Sejm and the Senate in Matters Related to the Membership of the Republic of Poland in the European Union and the relevant provisions of parliamentary Standing Orders and government regulations.

Among the provisions concerning the institutions (Title III of the Treaty) Article 14 relates to the European Parliament. It shall (together with the Council) fulfill legislative and budgetary functions. It also serves the function of political control and the consultation function as laid down in the Treaties and elects the President of the Commission. The European Parliament shall consist of representatives of European Union citizens, in a number not exceeding 750 (not including the Chairman). The representation of citizens shall be proportional in the range of 6 to 96 seats per Member State. Members of the Parliament are elected directly for a five-year term in universal elections in free and secret ballot. Treaty provisions are supplemented by national provisions - in Poland by the Act of 2004 on the Elections to the European Parliament and by the

provisions of the Electoral Code of 2011. Article 330 of the Code states that Members of the European Parliament are "representatives of the people of the European Union", are not bound by any instructions and cannot be dismissed. Therefore, the European society (people, nations) cannot be treated as the single European Sovereign. It should be also remembered that the primary law of the European Union is not constituted by a particular European organ generally representing European citizens. The authorities of the European Union (including the European Parliament) cannot determine the content of primary law, because all the changes are decided by Member States, which are the "masters of the Treaties".

CONCLUSION

In the background of the above mentioned regulations some problems can be noticed, which are commonly referred to as "democratic deficit", although there has been a steady trend to reduce this deficiency. This deficit is seen both at the European level and - linked functionally - the level of Member States. The political body of the highest positions, although somewhat of the external nature, remains the European Council, composed of the Heads of State or Government of the Member States. The solid organ of the European Union, which is the European Parliament, has still strongly limited position. The accepted model of institutional balance in the system of the European Union authorities, which is to some extend the equivalent of a model of the separation of powers in constitutional regimes, very modestly equips the European Parliament with the competences, especially in the sphere of legislation. The basic legislative powers belong to the European Union executive bodies - the Council and the Commission, although the budget is adopted by the Parliament. The decision making process in the European Union takes place primarily at the governmental level. Since the European Union Council is composed of the representatives of the governments of Member States, also at the national level the decisions concerning the views presented by these representatives at the European level are mainly undertaken by governments. This in turn limits the role of national

parliaments. Importantly, the accession of a state to the European Union involves the transfer of many areas covered by the legislative competences of the national parliament to the European level. It is estimated that it is even about the 2/3 of legislative matters, which means the visible marginalization of the national parliament in the sphere of its legislative functions. The above considerations give a picture of reversing the roles in the existing relations - important from the point of view of democracy – deparlamentarization. The parliament's function to implement the European Union law is not an equivalent here.

It should be also noted that the Council and the Commission do not have the democratic legitimacy from universal and direct elections, and they are not responsible before the citizens. At the same time, the citizens of Member States have limited impact on European Union affairs through their national governments. Therefore, the European Union does not provide the structure which would ensure citizens with enough participation in the government (neither by a supranational institution, nor a national institution) or an appropriate electoral mechanism, which would allow citizens to remove persons responsible for negatively rated European Union decisions from their office. The problem is sometimes perceived as a restriction of the sovereignty of the people guaranteed by the constitutions of Member States, since the participation of citizens in undertaking the decisions concerning their own state is limited. The transfer of certain matters to the European level causes that they cannot exercise a direct control.

The "democratic deficits" are counteracted in three ways - by strengthening the role of the European Parliament, by strengthening the role of national parliaments (in terms of the forms of their participation in decision-making processes before the authorities of the European Union, the forms of cooperation of the members of the European Parliament with national parliaments, as well as the forms of influence and control over the activities of their governments in the European Union institutions) and through the instruments of participatory democracy (especially public consultations and the European Citizens' Initiative). The normative status presented above is the result of these actions.

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CAPACITY OF THE PARTIES IN THE LEASE AGREEMENT

Andreea TABACU [1]

Abstract:

The capacity of the person in a lease agreement is a very important legal subject, due to the frequency of this agreement in the legal daily life.

In order to analyze the validity of the agreement, the conditions of form aim also the civil capacities, the different qualities of the parties being provided by the law, warning the parties to avoid the nullity of the agreement

Key words: Civil capacity, lease agreement, lesser, lessee, nullity

INTRODUCTION

The capacity of use in the lease agreement regards the persons who can have this quality in the contract, the situation of the owner of the right of usufruct, of superficies, legal seized debtor, seizure-administrator are presented.

For the lessee the civil law does not state special provisions, being possible to be any person who fulfils the necessary capacity requirements.

Also it is presented the state's or the administrative-territorial units' public property and the dwellings with special regime.

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1. Capacity of use

In the lease agreement of the common law the parties, the lessor and lessee, can be any natural or legal persons, not being specified any restrictions in relation to their capacity of use.

Any limitation of the person's capacity of use must be expressly stated by the law[2], the total enclosure being equivalent with not recognizing the person as subject of law, which is unacceptable[3].

In order to be a lessor or lessee in the common law of the lease agreement is essential for the person to own an asset, to have the possibility to use it for him, and another person to accept to pay a price in exchange for that right to use.

Thus, **lesser may be**: the owner of the right of usufruct, of superficies[4] the lessee from another contract, all of them has the recognized legal possibility to use that good, *in perpetuu* or temporary.

Regarding the *depository*, the hypothesis of the lesser cannot be imagined in relation with the nature of the depositary's right[5] who must keep and return the asset at the end of the contract (Art 2013 of the New Civil Code[6]).

Cannot be a lesser the *user or owner of the right of occupation*, thus the strictly personal feature of these rights limiting the possibilities of their owner. Thus, Art 752 of the NCC expressly states that "the right

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[2] Art 29 Para 1 of the NCC, former Art 6 Para 1 of the Decree No 31/1954

[3] Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil român, Subiectele dreptului civil* (Bucharest: Sansa Press, 1994), 262; Ovidiu Ungureanu, *Drept civil. Persoanele*, (Bucharest: Rosetti, 2003), 63-64; Eugen Chelaru, *Drept civil. Persoanele*, (ALL BECK Pub-house, Bucharest, 2003), 74; Eugen Chelaru, *Drept civil. Persoanele* (3rd Edition, Bucharest: CH BECK, 2012), 13.

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[5] V. Jean Neret, *Le sous contrat* (Bibliotheque de droit privé, t. 163, LGDJ, 1979), paragraf 245.

[6] Art 2013 Para 1 of the NCC – the deposit is the agreement by which the depositary receives from the deponent a movable asset, with the obligation to preserve it for a certain period of time and to return it in nature.

of use or occupation cannot be transferred, and the asset which is the object of these rights cannot be rented or leased". Therefore, the solution identified in the application of Art 572 Para 2 of the previous Civil Code, according to which the habitant may rent the unused part of the house, being beyond his needs of inhabiting it[7] is not allowed anymore, on the contrary being prohibited by law.

By a reference norm (Art 1784), the Civil Code states in terms of lease the same incapacities for concluding the contract as well as in the case of the sale. Art 1654-1655 of the NCC are applicable, adequately for the lease, and by analogy Art 1653 of the NCC is also applicable.

The phrasing "adequately" refers to the incapacity to buy, in the meaning of acquiring the right arising from the contract, namely to the incapacity to sell under the conditions of Art 1655 of the NCC, namely to the ability to transmit the use of his own goods to these persons by the lease agreement.

Thus are limited in their capacity of use, by concluding the lease, as lessees, directly or by intermediary, or by public auction: a) authorized agents, for the assets commissioned to be leased, unless measures to avoid a conflict of interest are taken (Art 1304 Para 1 of the NCC); b) parents, legal guardian, trustee, provisional administrator for the assets of the persons represented by them; c) civil servants, syndic judges, insolvency practitioners, bailiffs, as well as other persons who may influence the conditions of the lease intermediated by them or the conditions referring to the assets administered by them or which administration they supervise.

Regarding the incapacity to have litigious rights aiming the lease agreement, Art 1653 of the NCC states that the judges, prosecutors, clerks, bailiffs, lawyers, notaries public, legal counselors or insolvency practitioners cannot buy, directly or by intermediaries, the litigious rights

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[7] Ion. P. Filipescu, *Drept civil, Dreptul de proprietate şi alte drepturi reale* (Bucharest: Actami, 1994), 251; Ovidiu Ungureanu, *Drepturile reale. Curs practic* (Bucharest: Rosetti, 2001), 131; Liviu Pop, *Dreptul de proprietate şi dezmembrămintele sale* (reviewed and update edition, Bucharest: Lumina Lex, 2001), 198.

that are under the competence of the court in whose jurisdiction they operate, even if the litigation concerns the right of property for the asset which is about to be the object of the lease.

Regarding the incapacity to transmit the use of his own assets by lease, the code states that the authorized agents, parents, legal guardians, trustees, provisional administrator, civil servants, syndic judges, insolvency practitioners, bailiffs or other persons who may influence the conditions for concluding the agreement cannot conclude the agreement regarding their own assets, for a price consisting in a sum of money originating from the sale or exploitation of the asset or patrimony administered by him or whose administration he is supervising.

The **legal seized debtor** shall be able to conclude a valid lease agreement for the legal seized asset, but its opposability shall be determined by the rules stated by Art 777 of the new civil procedure code for moveable assets and by Art 827 of the new civil procedure code for immoveable assets.

Thus, for the first case, the lease of the asset adjudicated is still valid or ceases according to the law, but the adjudicator is not forced to respect the lease agreement or another legal document when the agreed price is less than a third of the market price or lower than the one resulted from previous leases or legal documents (Art 777 Para 1 of the new Civil Procedure Code).

In the area of immoveable assets, any lease or rent, performed by the debtor or third-party purchaser after the date when the legal seizure is marked in the Real Estate Registrar is not opposable to the creditor or to the adjudicator, while the rents or leases previous to the notation are opposable under the law, both to the creditors, as well as to the adjudicator, but the latter one is not compelled to respect the lease when the agreed price is less than a third of the market price or lower than the one resulted from previous leases (Art 827 Para 1 of the new Civil Procedure Code).

The **seizure-administrator**, appointed in the legal seizure procedure, acts as an administrator in charge of managing another

person's assets[8], his attributions resulting from the provisions of the Civil Code regarding the simple management of another person's assets. Art 795 of the new Civil Procedure Code states that the person in charge with the simple administration must perform all necessary actions to preserve the assets, as well as to conclude all useful documents for these to be used according to their usual destination. Thus, the administrator must collect the fruits of the assets, cash in the administered debts, releasing the corresponding valid receipts, must exercise the rights attached to the moveable assets which are in his administration, as well as the right to vote, conversion and redemption rights, to invest the sums of money under his administration, according to the law, and with the authorization of the beneficiary or of the court, he shall be able to alienate for good and valuable consideration the individually determined asset placed under administration or to entail it with a security interest, when this is necessary for the preservation of the asset's value (Art 796-799 of the NCC).

For the legal seizure procedure of the fruits uncollected and of the rooted crops, the seizure-administrator has the obligation to preserve, collect, store the fruits or crops, and for the special cases stated by art 798 Para 5 of the new Civil Procedure Code[9], with the approval of the bailiff, he shall be able to sale the assets by agreement on the current price.

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[8] Unlike the person in charge with the simple administration, the person empowered with the full administration is compelled to preserve and profitably exploit the assets, to increase the patrimony or to perform the dedication of the patrimony, to the extent to which it is in the interest of the beneficiary (Art 800 of the NCC). In this purpose, the administrator may alienate, for good and valuable consideration, the assets, to encumber them with a real right or to change their destination, as well as to perform any other necessary or useful acts, including any form of investments (Art 801 of the NCC).

[9] The bailiff shall be able to approve the sale to be concluded by the seizure administrator, even by good bargain, at the current price, without any influence from the storage, when: 1. The fruits or crops are subjected to destruction, degradation, alteration or depreciation and the sale must be concluded with emergency; 2. The storage is impossible or results in disproportioned expenses in relation with the value of the fruits or crops.

For the legal seizure of the general revenues of immoveable assets, the new Civil Procedure Code states that the seizure-administrator may take measures for the preservation and maintenance of the immoveable asset, to seed or grow orchards or vineyards and to collect the rents and leases or other incomes of the immoveable asset, to pay the local taxes, to claim the mortgage interests, insurance and, generally, any other successive maturity benefits in relation to that immoveable asset. He may terminate the existent lease agreements, according to the contractual clauses, to seek the eviction of the lessees with the approval of the court of enforcement and to seize, in the name of the owner, the moveable assets found in the premises (Art 802 Para 3 of the new Civil Procedure Code)[10]. On the other hand, the seizure administrator may conclude leasing agreements for a period of maximum 2 years (Art 802 Para 5 of the new Civil Procedure Code).

Also is not excluded the lease of a person's asset, its holder considered being a good faith owner being able to conclude a lease agreement with a third party, despite the unenforceability of this legal document towards the real owner[11]. The legal document concluded with a mala fide holder has the same effect, important for the conclusion of the agreement being the possibility, at least temporary, of the holder to purchase for the lessee the use of the asset[12]

The unenforceability of the lease towards the real owner cannot be invoked if when the agreement is concluded the lessee owned a title justifying the use of the asset, which subsequently was canceled or terminated[13] the lessee being of good faith. Thus, Art 1819 of the NCC states that even if the suppression of the right allowing the lessee to

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[10] Savelly Zilberstein, Viorel Mihai Ciobanu, *Tratat de executare silită* (Bucharest: Lumina Lex, 2001), 418;

[11] Alain Bénabent, *Droit civil, Les contrats spéciaux civils et commerciaux* (5th Edition, Montchrestien, E.J.A., 2001; 31 rue Falguière, 75741 Paris Cedex 15), 221;

[12] R.A. Cunningham, „The Law of Property" (11.7) 3rd Ed., 2000 in Parella, R.E., *Survey of New York law: real property* (51 Syracuse Law Review 703, 2001), paragraful 11.7.

[13] Ioan Deleanu, *Părţile şi Terţii. Relativitatea şi opozabilitatea efectelor juridice* (Bucharest: Rosetti, 2002), 63;

ensure the use of the leased asset determines the rightful cancelation of the lease agreement, the lease continues to generate effects even after the suppression of the lessor's title during the period stated by the parties, up to maximum 1 year since the suppression of the lessor's title, if the lessee was of good faith when the lease ended.

Under the previous regulation, in relation to the moment when the lease ends is applied the theory of the apparent lessor[14] perceived by the third parties as owner, based on a common and invincible error on the quality of ownership of the lessor.

De lege lata, the Civil Code offers effects for the lease agreements for maximum 1 year after the termination of the lessor's title if the lessee was of good faith.

The lessee

For *the lessee* the civil law does not state special provisions, being possible to be any person who fulfils the necessary capacity requirements. It cannot be a lessee the person who simultaneously is an owner, gathering all the attributes of this real right in one person, because – "*neque pignus, neque depositum, neque precarium, neque locatio rei suae consistere potest*". Though, if the property is dismantled, the use of the asset being transmitted to the beneficial owner, he shall be able to lease to the owner his asset, because during the usufruct he is the only one who can use that asset.

An aspect determined by the particularity of leasing residential areas is given by the fact that the lessee can bring several persons into the residence, representing his family. These persons are usually stated by the agreement (Art 1832-1834 of the NCC), namely: the spouse, descendants or ascendants, as well as any other persons having the same residence as the owner who were enlisted in the lease agreement.

Therefore, the holder is the person who signs the agreement, fulfilling the requirements for validity, probation and opposability, but in reality, the beneficiaries of the agreement are more, the lessees, namely the persons forming the holder's family, or who from various reasons are

[14]Patricia Zajac, *Le bail accidentel de la chose d'autrui* (J.C.P., Edition N, 1995), 641;

enlisted in the lease agreement, thus justifying a minimal relation with the holder.

Public property

Law No 213/1998 states that the state's or the administrative-territorial units' public property can be leased, with the approval of the Government, of the county council, of the General Council of Bucharest or of the local council, by a decision, depending on how it forms part of the public domain of the state or of the administrative-territorial units.

The agreement is concluded as lessor, either by the owner of the right of property or by the owner of the right to administer the asset, according to Art 868 Para 2 of the NCC.

The lessee may be any natural or legal, Romanian or foreign person according to Art 14 Para 2 of the law.

Dwellings with special regime

For the dwellings with special regime, the quality as lessor is limited only to the categories of persons fulfilling the specific requirements stated by the law.

Thus, to social housing have access, by leasing, only the families or persons with a net average monthly income per person in the past 12 months under the net average monthly income per economy, communicated by the National Institute of Statistics in his latest Monthly Statistical Bulletin previous to the month in which the application is analyzed, as well as previous to the month in which the dwelling is distributed (Art 42 of the Law No 114/1996).

Incapacities for use are expressly stated by the law, showing that a social housing cannot be owned by those persons who already have a dwelling, who have alienated one after 1st January 1990, who have had the support of the state in acquiring a loan for housing or own, as lessees, another dwelling from the states' patrimony.

According to the law, for these dwellings will have priority: the persons and families evacuated or who are about to be evacuated from the houses restituted to their former owners, youth aged up to 35 years, young people from social protection institutions who have reached the

age of 18 years, 1st and 2nd degree invalids, persons with handicaps, pensioners, veterans and war widows, the beneficiaries of the Law No 341/2004 of gratitude towards the heroes-martyrs and fighters who contributed to the victory of the Romanian Revolution in December 1989, as well as towards the persons who gave their lives or who have suffered after the anticommunist Rebellion of Brasov erupted in November 1987 and of the Decree-Law No 118/1990 regarding the granting of rights to persons persecuted for political reasons since March 6, 1945, and those deported abroad or in prison, republished, with subsequent modifications and amendments, other entitled persons or families (Art 43 of the Law No 119/1996).

For the *emergency housing*, the quality as lessee may be held by the persons and families whose houses have become unusable due to natural disasters or accidents or whose houses are subjected to demolition for public works, as well as for rehabilitation works which cannot be performed in inhabited buildings.

The lessee of a *company housing* may be the civil servant, the institution's employee or the economic agent's employee, and for the *intervention housing* the personnel of the economic or budgetary units, who, by the contract of employment fulfills activities or positions requiring the permanent presence or in case of emergency the presence within the economic units.

The *official residence* is the residence occupied by the President of Romania, the President of the Senate, the President of the Chamber of Deputies and the Prime-Minister.

The official residences may also be occupied by: the vice-presidents of the Senate and of the Chamber of Deputies, ministers or their equivalents, as well as the president of the Supreme Court of Justice, the president of the Constitutional Court, the president of the Court of Accounts, the president of the Legislative Council and the People's Advocate.

It is certain that particular situations stated in the area of leasing dwellings with special regime, conditioned by a certain quality or economic situation of the lessor, cannot be strictly analyzed as a limitation of the capacity of use of the person who does not fulfill the

legal requirements, due to the purpose for which were recognized by the law, revealed by the positive versions of the texts[15].

Regarding the legal persons, being removed in the actual regulation the principle of the specialty of the capacity of use, except the legal persons with a non-profit activity (Art 206 of the NCC), these collective subjects of law may conclude lease agreements without limitations. The law states that the legal persons may have any civil rights and obligations, apart from those which, by their nature or according to the law, can only belong to natural persons or, the use of the assets using the lease is not included in the text.

2. Legal competence

The area of the persons who may conclude such agreements is determined by the criteria and limitations stated by the law in relation to the legal capacity of the persons to administer, the lease being seen, according to some distinctions, as not overcoming the limits of such act, as a general rule.

Likewise, it must be considered the consequences generated by the lease for each of the parties, because the lessor never makes disposal acts, being sufficient his legal competence necessary for administration acts, while the lessee may place himself in the position of a dispose.

Towards Art 41 Para 3 of the NCC it results that the minor with limited legal competence can perform by himself lease acts as lessee and as lessor only if these fall into the category of administrative acts which does not prejudice him[16].

Art 641 Para 4 of the NCC, in the area of common co-property, states that are legal acts of disposal, regarding the common asset, the leases concluded for more than 3 years, given the fact that these acts,

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[15] Art 42 – social housing, Art 55 – emergency housing, Art 58-59 of the Law No 114/1996 for the protocol housing, official residences, and common law protocol housing.

[16] It is not possible the final hypothesis of Art 41 Para 3 of the NCC referring to the acts of disposal with small value, with a current feature, executed when concluded, because the lease is not an act of *uno ictu* execution

depriving the co-owners of the use of the asset, are more serious as are lengthier.

A similar interpretation is valid also for the leases of the assets property of a single owner, the duration of the agreement determining its more serious character or on the contrary, but Art 1784 of the NCC states that the leases concluded by the persons who, according to the law, are able to make only administration acts, shall not exceed 5 years, which means that during this period is sufficient the capacity to make administration acts, with the consequence that the act is also for administration if this period is not exceeded.

CONCLUSION

The capacity of use in the lease agreement is an important matter into the contract, because of the sanction which can be applied. The provisions of the new Civil Code and of the new Civil Procedure Code change a few rules of the ancient legislation and they mus be understood.

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NORMATIVE CONTENTS OF CONSTITUTION IN THE CONTEXT OF CONSTITUTIONAL REFORM

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Abstract:

The modification of the fundamental law of a state represents a very special political and juridical act with major significances and implications in the political social system as in the state's one, but also at each individual level. That's why such an approach needs to be well justified, to answer to some juridical and political social needs well defined, but mainly to correspond to the principles and rules specific to a constitutional and state's democratic system providing to the state the stability and functionality it needs.

In this study we analyze the necessity of such a constitutional reform in Romania, and also some provisions from the report of the Presidential Commission for the analysis of the political and constitutional regime in our country. We formulate our opinions in relation to the justifying some constitutional regulations. In this context, we consider that there are arguments for the maintaining of the bicameral parliamentary system and an eventual revising of the fundamental law needs to consider the measures needed to guarantee the political and constitutional institutions specific to the lawful state.

Key words: *Revising of the Constitution, limits of the constitutional revising, bicameral system, power excess, guaranteeing of the fundamental libertie, constitutional norms*

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I. INTRODUCTION

One of the most controversial and important juridical problems is represented by the relationship between the stability and innovation in law. The stability of the juridical norms is undoubtedly a necessity for the predictability of the conduct of the law topics, for the security and good functioning of the economical and juridical relationships and also to give substance to the principles of supremacy of law and constitution.

On the other hand it is necessary to adapt the juridical norm and in general the law to the social and economical phenomenon that succeed with such rapidity. Also the internal juridical norm must answer to the standards imposed by the international juridical norms in a world in which the 'globalization" and "integration" become more conspicuous and with consequences far more important in the juridical plan also. It is necessary that permanently the law maker be concerned to eliminate in everything that it is "obsolete in law", all that do not correspond to the realities.

The report between stability and innovation in law constitutes a complex and difficult problem that needs to be approached with full attention having into consideration a wide range of factors that can determine a position favorable or unfavourable to legislative modification[2] .

One of the criterions that help in solving this problem is the principle of proportionality. Between the juridical norm, the work of interpretation and its applying, and on the other hand the social reality in all its phenomenal complexity must be realized with an adequate report, in other words the law must be a factor of stability and dynamism of the state and society, to correspond to the scope to satisfy in the best way the requirements of the public interest but also to allow and guarantee to the individual the possibility of a free and predictable character, to accomplish oneself within the social context. Therefore, the law included in its normative dimension in order to be sustainable and to represent a

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[2] Victor Duculescu and Georgeta Duculescu, *Revizuirea Constituţiei* (Bucharest: Lumina Lex, 2002), 12.

factor of stability, but also of progress, must be adequate to the social realities and also to the scopes for which a juridical norm is adapted, or according to the case to be interpreted and applied. This is not a new observation. Many centuries ago Solon being asked to elaborate a constitution he asked the leaders of his city the question:" Tell me for how long and for which people" then later, the same wise philosopher asserted that he didn't give to the city a constitution perfect but rather one that was adequate to the time and place.

The relationship between stability and innovation has a special importance when the question is to keep or to modify a constitution because the constitution is the political and juridical foundation of a state[3] based on which is being structured the state and society's entire structure.

II . STABILITY AND CONSTITUTIONAL INNOVATION

On the essence of a constitution depends its stability in time because only thus will be ensured in a great extent the stability of the entire normative system of a state, the certitude and predictability of the law topics' conduct, but also for ensuring the juridical, political stability of the social system, on the whole. [4]

The stability is a prerequisite for the guaranteeing of the principle for the supremacy of constitution and its implications. On this meaning, professor Ioan Muraru asserts that the supremacy of constitution represents not only a strictly juridical category but a *political-juridical* one revealing that the fundamental law is the result of the economical, political, social and juridical realities. "It marks (defines, outlines) a historical stage in the life of a country, it sanctions the victories and gives

[3] Ion Deleanu, *Constitutional Law and Public Institutions*, Vol I (Bucharest: Europa Nova, 1996), 260.

[4] Elena Simina Tănăsescu and Ioan Muraru, *Constitutia Romaniei, Comentariu pe articole* (Bucharest: All Beck 2008), 1467-1469.

expression and political-juridical stability to the realities and perspectives of the historical stages in which it has been adopted" [5].

In order to provide the stability of the constitution, varied technical modalities for guaranteeing a certain degree of rigidity of the fundamental law, have been used, out of which we enumerate: a) the establishing of some special conditions for exercising of an initiative to revise the constitution, such as the limiting of the topics that may have such an initiative, the constitutionality control ex officio upon the initiative for the constitution's revising; b) the interdiction of contitution's revising by the usual legislative assemblies or otherwise said by the recognition of the competence for the constitution's revising only in favour of a Constituent assembly c) the establishing of a special procedure for debating and adopting of the revising initiative; d) the necessity to solve the revising by referendum; e) the establishing of some material limits for the revising, specially by establishing of some constitutional regulations that cannot be subjected to the revising [6].

On the other hand a constitution is not and cannot be eternal or immutable. Yet from the very appearance of the constitutional phenomenon, the fundamental laws were conceived as subjected to the changes imposed inevitably with the passing of time and dynamics of state, economical, political and social realities. This idea was consecrated by the French Constitution on 1971 according to which "A people has always the right to review, to reform and modify its Constitution, and in the contemporary period included the "International Pact with regard to the economical, social and cultural rights" as well as the one regarding the civil and political rights adopted by U.N.O. in 1966 - item 1 - is

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[5] Ioan Muraru and Simina Elena Tănăsescu, *Constitutional Law and the Political Institutions*, 11th edition (Bucharest: All Beck, 2003), 80.

[6] Muraru and Tănăsescu, *Constitutional Law and the Political Institutions*, 52-55; Tudor Drăganu, *Constitutional Law and the Political Institutions. Elementary Treaty*, Vol. I (Bucharest: Lumina Lex, 1998), 45-47; Marius Andreescu and Florina Mitrofan, *Constitutional Law. General Theory* (Piteşti: University of Piteşti Press, 2006), 43-44; Duculescu and Duculescu, *Revizuirea Constituţiei*, 28-47; Deleanu, *Constitutional Law and Public Institutions*, 275-278.

stipulating:"All nations have the right to dispose of themselves. By virtue of that right they freely determine their legal status.

The renowned professor Constantin G. Rarincescu stated on this meaning:" A constitution yet is meant to regulate in future for a longer or a shorter time period, the political life of a nation, is not destined to be immobile, or perpetuum eternal, but on the other hand a constitution in the passing of time can show its imperfections, and no human work is being perfect, imperfections to whose some modifications are being imposed, on the other side a constitution needs to be in trend with the social necessities and with the new political concepts, that can change more frequently within a state or a society". [7] Underlying the same idea the professor Tudor Drăganu stated: "The constitution cannot be conceived as a perennial monument destined to outstand to the viccisitudes of the centuries, not even to the ones of the decades. Like all other juridical regulations, the constitution reflects the economical, social and political conditions existing in a society at a certain time of history and aims for creating the organizational structures and forms the most adequate to its later development. The human society is in a continuous changing. What it is valid today tomorrow can become superannuated. On the other side, one of the characteristics of the juridical regulations consists in the fact that they prefigure certain routes meant for chanelling the society's development in one or another direction. These directions as well as the modalities to accomplish the targeted scopes may prove to be, in their confronting with the realities, inadequate. Exactly for this very reason, the constitutions as all other regulations, cannot remain immutable but must adapt to the social dynamics"[8].

In the light of those considerents we appreciate that relationship between the stability and the constitutional revising needs to be interpreted and solved by the requirements of principle of proportionality[9]. The fundamental law is viable as long as it is adequated

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[7] Constantin G. Rarincescu, *Constitutional Law Course* (Bucharest, 1940), 203.
[8] Drăganu, *Constitutional Law and the Political Institutions. Elementary Treaty*, 45-47.
[9] Marius Andreescu, *The Principle of Proportionality in the Constitutional Law* (Bucharest: C.H Beck, 2007).

to the realities of the state and to a certain society at a determined historical time. Much more – states professor Ioan Muraru – "a constitution is viable and efficient if it achieves the balance between the citizens (society) and the public authorities (state) on one side, then between the public authorities and certainly between the citizens. Important is also that the constitutional regulations realize that the public authorities are in the service of citizens, ensuring the individual's protection against the state's arbitrary attacks contrary to one's liberties"[10].In situations in which such a report of proportionality no longer exists, due to the imperfections of the constitution or due to the inadequacy of the constitutional regulations to the new state and social realities, it appears the juridical and political necessity for constitutional revising.

Nevertheless in the relationships between the stability and constitutional revising, unlike the general relationship stability – innovation in law the two terms have the same logical and juridical value. It is about a contrariety relationship (and not a contradiction one) in which the constitution's stability is the dominant term. This situation is justified by the fact that the stability is a requirement essential for the guaranteeing of the principle of constitution supremacy with all its consequences. Only through the primacy of the stability against the constitution's revising initiative one can exercise its role to provide the stability, equilibrium and dynamics of the social system's components, of the stronger and stronger assertion of the principles of the lawful state. The supremacy of the constitution bestowed by its stability represents a guarantee against the arbitrary and discretionary power of the state's authorities, by the pre-established and predictable constitutional rules that regulate the organization, functioning and tasks of the state authorities. That's why before putting the problem of constitution's revising, important is that the state's authorities achieve the interpretation and correct applying of the constitutional normative dispositions in their letter and spirit. The work of interpretation of the constitutional texts done by

[10] Ioan Muraru, *The Constitutional Protection of the Liberties for Oppinion* (Bucharest: Lumina Lex, 1999), 17.

the constitutional courts of law but also by the other authorities of the state with the respecting of the competences granted by the law, is likely to reveal the meanings and significances of the principles for regulating the Constitution and thus to contribute to the process for the suitability of these norms to the social, political and state reality whose dynamics need not be neglected. The justification of the interpretation is to be found in the necessity to apply a general constitutional text to a situation in fact which in factum is a concrete one"[11].

The decision to trigger the procedure for revising a country's Constitution is undoubtedly a political one, but at the same time it needs to be juridically fundamented and to correspond to a historical need, of the social system stately organized from the perspective of its later evolution. Therefore, the act for revising the fundamental law needs not be subordinated to the political interests of the moment, no matter how nice they will be presented, but in the social general interest, well defined and possible to be juridically expressed. Professor Antonie Iorgovan specifies on full grounds:" in the matter of Constitution's revising, we dare say that where there is a normal political life, proof is given of restraining prudence, the imperfections of the texts when confronting with life, with later realities, are corrected by the interpretations of the Constitutional Courts, respectively throughout the parliamentary usance and customs, for which reason in the Western literature one does not speak only about the Constitution, but about the block of constitutionality" [12].

The answer to the question if in this historical moment is justified the triggering of the political and juridical procedures for the modifying of the fundamental law of Romania can be stressed out in respect with the reasons and purpose targeted. The revising of Constitution cannot have as finality the satisfying of the political interests of the persons holding the power for a moment, in the direction of reinforcing of the

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[11] Ioan Muraru et al., *Interpreting of the Constitution*, (Bucharest: Lumina Lex, 2002), 14.

[12] Antonie Iorgovan, *The Revising of Constitution and Bicameralism*, Public Law Journal 1 (2001): 23.

discretionary power of the Executive, with the inacceptable consequence of harming certain democratical constitutional values and principles, mainly of the political and institutional pluralism, of the principle of separation of powers in the state, of the principle of legislative supremacy of the Parliament.

On the other hand, such as the two decades lasting history of democratical life in Romania has shown, by the decisions taken for many times, were distorted the constitutional principles and rules by the interpretations contrary to the democratical spirit of the fundamental law, or worse, they didn't observe the constitutional dispositions because of the political purposes and their support in some conjunctural interests. The consequences were and are obvious: the restraining or violation of some fundamental rights and liberties, generating some political tensions, the nonobservance of the constitutional role of the state's institution, in a single word, due to political actions, some dressed in juridical clothes, contrary to the constitutionalism that needs to characterize the lawfull state in Romania. In such conditions, an eventual approach of the revising of the fundamental law should be centered on the need to strengthen and enhance the constitutional guarantees for respecting the requirements and values of the lawfull state, in order to avoid the power excess specific to the politician subordinated exclusively to a group interests, many time conjunctural and contrary to the Romanian people, which in accordance to Constituion item 2 paragraph (1) of the one who is the holder of the national sovereignity.

In our opinion, the preoccupation of the political class and state's authorities in the current period, in relation to the actual contents of the fundamental law, should be oriented not so for the modification of the Constitution, but especially into the direction of interpreting and correct applying and towards the respecting of the democratical finality of the constitutional institutions. In order to strengthen the lawfull state in Romania, it is necessary that the political formations, mostly those that hold the power, all authorities of the state to act or to exercise its duties within the limits of a *loyal constitutional behavior* that involve the respecting of the meaning and demoratical significances of the Constitution.

Currently, the political and juridical reality in Romania is confronting with an extensive political approach for the revising of the fundamental Law, substantied throughout the results of the referendum organized on 2009 having as objective the reducing of the number of parliamentarians and with the passing to a unicameral parliamentary system, in the "Report of the Presidential Commission for the Analysis of the Political and Constitutional regime in Romania" [13] that was published on April 28th 2010, the initiative of the President of Romania for revising the fundamental law at the Government proposal and the decision no. 799/17.06.2011 of the Constitutional Court targeting the law draft for Romania's Constitution revising[14].

This is up to now the only political initiative that has been materialized in a legislative draft for revising the fundamental law that was submitted to the Parliament. In the present social and political context other proposals, ideas for the modifying of the Constitution are being expoxed by the governing ones yet without being materialized in a new legislative initiative.

Our scientific approach has into consideration, from a critical perspective, mostly the political initiative for the Constitution revising that has already the form of a legislative project, though it is not on the Parliament 's roll for debating. We wish at the same time to underline few important themes which in our opinion need a more serious consideration, included in regard to the normative contents of the Constitution. In this epoch of political class' intense preoccupations for the modifying of the fundamental law it is important to reflect in the light of the political exigencies of the constitutional law, upon the normative content of the Constitution. The establishing based on some scientific criterions to what exactely needs to contain the fundamental law of a state, is essential to avoid that throughout political enthusiasm be ignored the basic aspects regarding the specific of the normative contents of the Constitution that explains thus last one's supremacy.

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[13] Published by C.H. Beck Publishing House, Bucharest, 2009.
[14] Official Gazette No 440/23.06.2011.

The proposals for the Constitution's revising have as an obvious finality the passing of Romania's constitution system from bicameral to unicameral and the strengthening of the executive power, mostly of the presidential institution.

The doctrine in specialty underlines the fact that in the unitary states, such as Romania, both the unicameral system, as the bicameral system have advantages and disadvantages [15]. There is no ideal constitutional solution on this meaning. Important is the fact that the Parliament's structure which the Constitution consecrates be adequate to the social, political and economical realities of a country, be functional and to integrate harmoniously within the system of authorities of the state with the observance of the principle of constitutional democracy principles and of the lawfull state. Nevertheless, prestigious authors such as professor Herbert Schambeck remark the importance of the parliamentary system: "From the second chamber of this type, it is expected to emanate *auctoritas*, which in a specific way grants personal fame, in plus to *potestas* or the political power. The second Chamber or the superior chamber has always existed in the area of tensions between the tradition inherited and the present political reality. It represents a part of the basic constitutional organization and a political reality of the state"[16].

Coming back to the essence of the problem, besides other authors[17] , we appreciate that in Romania, the bicameralism is adequate to the state and social system at this historical moment, corresponding better to the necessity to achieve not only the efficiency of the parliamentary legislative procedures but also the "norming ponderation"

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[15] Ioan Muraru and Mihai Constantinescu, *Romanian Parliamentary Law* (Bucharest: All Beck, 2005), 72-79.

[16] Herbert Schambeck, *Reflections on the Importance of the Bicameral Parliamentary System*, Public Law Review 1 (2010): 3.

[17] Muraru and Constantinescu, *Romanian Parliamentary Law*, 2-37; Iorgovan, *The Revising of Constitution and Bicameralism*, 3-7; Florian Vasilescu, *Questions about Bicameralism*, Romanian Public Law Review 3 (2010): 28-51; Ioan Alexandru, *Reflections regarding the bicameralism and asymmetry of the distribution of competences*, Public Law Review 3 (2010): 51-60.

and quality of the legislative act. The bicameralism is a necessity for Romania because the Parliament represents a valid counterpondering against the Executive, in the context of the exigencies and balance of the powers in a democratic state. With good reason the regretted professor Antonie Iorgovan underlined: " It would have been a very high political risk, in that post revolutionary tension, that in Romania to have designed a unicameral Parliament and such a risk exists still at present, considering that one cannot speak about a political life settled on natural pathes of the democratical doctrines accepted in Occident (the social-democratic doctrine, the democratic-Christian doctrine, liberal doctrines and ecologist doctrines)"[18]. The unicameralism in a semi-presidential constitutional system such as the one of Romania, in which the powers of the head of the state and in general those of the Executive are significant, having into consideration the excesive politicianism of the moment, would have as a consequence the severe deterioration of the institutional balance between the Legislative and Executive, with consequence the increase of the discretionary power of the Executive and the minimizing of the role of Parliament as a supreme representative organism of the Romanian people, as a unique law maker authority of the country, such as the provisions of item 61 paragraph (1) of the Constitution foresee.

The transition to a unicameral Parliament needs not be treated simplistic such as unfortunately comes out from the contents of the Law draft regarding the revising of Constitution elaborated by the Government, it rather needs a general modification of the Romanian constitutional system, a reconfiguring of the role and duties of the state authorities so that the balance between the Legislative and Executive be maintained and not create the possibility of an evolution towards an exaggerated preponderance of the institution of the head of the state in respect to the Parliament.

We underline the fact that all states with a unitary structure of Europe that have a unicameral Parliament have at the same time a constitutional system of parliamentary type in which the duties of the head of the state regarding the governing are being reduced. We do not

[18] Iorgovan, *The Revising of Constitution and Bicameralism,* 18-19.

wish to do a thorough analysis of this constitutional problem, we stress only the conclusion that the unicameralism may have be political and constitutionally justified in Romania and adequate to the democracy values in a lawfull state only if the legitimacy and the role of Romania's President as a constitutional institution, will be fundamentally be changed. The election of the President needs to be by the Parliament. At the same time in case of a unicameral structure of the Parliament it is necessary to reduce significantly the responsibilities of the President in respect to the Executive and the governing ones. In such a reconfiguring of the institutions of the state needs to be increased the role and duties of the Constitutional Court and those of the Justice, these ones being guarantees of the supremacy of the law and Constitution and for avoiding the power excess coming from the other authorities of the state. In one word, in our opinion the unicameralism cannot be associated in Romania other than with the existence of a constitutional system of parliamentary type.

The legislative proposal for the Constitution revising is of a nature to create a disproportion between the Parliament and Executive by the fact that the unicameral structure of the Parliament does not represent a guarantee sufficient to make an efficient counterponderance in respect to the Executive, mainly as the responsabilities of the President are obviously enhanced. The dispute between unicameralism and bicameralism with applying to the conditions of Romania is well characterized by the regretted professor Antonie Iorgovan: „...any bicameral or unicameral parliamentary system can lead into severe disfunctionalities such as professor Tudor Drăganu states, no matter how successful may be the constitutional solutions, if in the parliamentary practice evidence is given of politicianism, demagogy and lack of responsibility"[19].

Does the present Parliamentary system of Romania correspond to the exigencies of the democratic traditions of bicameralism and is it really adequate to the fulfilling of the role and functions of the Parliament? Professor Tudor Drăganu, in a flawless argumenting logic,

[19] Iorgovan, *The Revising of Constitution and Bicameralism,* 16.

in an extensive study answered to this question:"The revised Constitution establishes a system that claims to be bicameral but it functions currently like a unicameral system, condemned being to violate by certain of its aspect the most elementary principles of the parliamentary regime and which contains in itself the danger of producing in future of severe disfunctionalities in accomplishing the legislative activity"[20].The illustrious professor had into consideration that the law for the Constitution's revising does not contain references with regard to the number of deputies and senators it sets the matter of legitimacy of substance of the two chambers, because their members are appointed by the same election body and by the same type of system and election ballot; the responsibilities of the chambers in legislative matter are not sufficiently well differentiated; the exercising of the right to the legislative initiative of the senators and deputies, such as regulated, generates constitutional contradictions.

Together with other authors[21], we state that in the perspective of a future constitutional revising, to regulate the differentiation between the two chambers also by special types of representation. The law compared offers sufficient examples of this kind (Spain, Italy, France) and even the election law of Romania on March 27th 1926 offers a landmark on this meaning. The Senate may represent the interests of the local collectivities. Thus, the senators may be elected from an electoral college made of the local councils' chosen members. Interesting to underline is the fact that in the Constitution draft on 1991 the Senate was designed as a representant of the local collectivities, grouped on the country's counties and Bucharest municipality.

It is reasonable the critic of Professor Tudor Drăganu according to which the current constitutional regulation does not achieve a functional differentiation between the two chambers. This aspect was also noticed by the Constitutional Court that, referring to the

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[20] Tudor Drăganu, *Few critical remarks about the bicameral system established by the Law for Constitution's revising adopted by the Deputies Chamber and in the Senate*, Public Law Review 4 (2003): 55-66.
[21] Dănişor, 23-24.

parliamentary legislative procedure introduced in the draft for the Constitution revising, stressed: "The examining in cascade of the law drafts, in a chamber in the first lecture, and in the other one in the second lecture transforms the bicameral Parliament in a unicameral one"[22]. Therefore a new initiative for the modification of the fundamental law should have into consideration this aspect also and should achieve a real functional differentiation of the two chambers.

III. BRIEF CONSIDERATIONS REGARDING THE NORMATIVE CONTENTS OF THE CONSTITUTION

The Constitution is a law, but in the same time through it juridical force and its contents it distinguishes itself from any other laws. At the same time, the supremacy of the fundamental law grants to this one the quality of a main formal spring for all other law branches. Consequently, there are specific features of the normative contents of the Constitution in respect to the other normative acts, included compared to the existing codes. The normative specific of the Constitution makes an important criterion for explaining scientifically this one's supremacy and the structurant role of the fundamental law, not only by the system of law but also for the entire social, political and economical system of a state. Thus such as it is mentioned in the literature in specialty, the supremacy of the Constitution is a quality of the last one expressed throughout the supreme juridical force but also through its normative contents. As a first observation we specify that the norms forming the content of a constitution have the features of the constitutional law which I analyzed above. This observation is not enough to determine the normative content of the fundamental law because the sphere of the constitutional law norms is wider, including other formal sources specific to this branch of law.

The constitutional contemporary reality that is stressing also the diversity of the normative content removes the idea of general uniform standards valid for the contemporary constitutions. In this regard it is

[22] Decision no. 148/16.04.2003 (Official Gazette No 317/12.05.2003).

enough to remember that there are some states and constitutions whose provisions are inspired by the religious precepts. The diversity in the normative content is a consequence of the fact that the fundamental law of a state is determined in view of the aspect of the content of the social, political and economical realities, by the characters and attributes of the respective state historically expressed and in the same time by the will of the constituent law maker, in essence the political will, at a certain historical moment.

Besides other authors, we consider that the scientifical definition of the constitution is the main criterion for the identifying of the normative content. Such a criterion provides the generality necessary to give a scientific character to the scientific elaborations in the matter and at the same time it explains the existence of the differences between the fundamental laws of the contemporary states. The space allocated to this study, does not allow an extensive analysis of the definitions proposed in the literature in speciality. For the purpose of this scientific approach we bear in mind the essence of any attempt to define the fundamental law, namely "The constitution is the political and juridical fundamental foundation of any state"[23].

In juridical acceptation, the fundamental law is the act through which it is determined the statute of the power and at the same time all the juridical rules, having as regulating objective the establishment of exercising and maintaining of the power, as well as the regulation of the basis of the power, of the bases for power organizing. The juridical concept on the constitution can be expressed in two different meanings, respectively in the material meaning and in the formal one.

In the "material" acceptation, the constitution contains all the law rules, no matter of their nature and form, having as regulating objective the organizing and functioning of state power, the relations between the state's organs and society. Therefore they are part of the constitution body not only the so called constitutional regulations but also the norms contained in the ordinary laws and normative acts of the executive powers if through these are being regulated the social relations specific to

[23] Deleanu, *Constitutional Law and Public Institutions*, 88.

state power. In such a conception has preeminence the regulating objective of the constitutional norm and not its form of expression. The theory above stated was accepted by the Constitutional Council of France which elaborated the concept of "the constitutionality block".

In the formal acceptation, the constitution is all the law rules, no matter of their regulating objective, elaborated in a form different from other normative acts, by a state authority namely established (the constituent assembly) following a specific procedure, derogatory from the usual legislative procedure. This way of defining the constitution starts from the correct idea that a certain "procedure" defines a juridical form or a normative category. Consequemtly the categories of normative acts can be differentiated by the adopting procedures.

Analyzed separately, the formal acceptation and respectively the material one cannot be a criterion enough to identify the normative content of the fundamental law. The accepting of the formal criterion has as a consequence the fact that the law fundamental may regulate any kind of social relations, no matter of their importance or regulating objective. [24] The material criterion is also unilateral because it excludes the procedural elements, necessary for a scientific characterization of the fundamental law.

The scientific approach regarding the identifying of the normative content of the constitution needs to have into consideration cumulated both the formal acceptation as the material one to which adds the political dimension to which we referred to above. Therefore, we consider that three critera can be identified in view to establish the normative contents of a constitution:

A. The establishing of the normative content of the constitution is fulfilled depending on the specific, importance and value of the regulated social relations. We concur to the opinion stated by the literature in speciality according to which, unlike other normative act categories, the norms contained in the constitution must regulate the fundamental social relations that are essential for the establishment, maintaining and

[24] For example see the Switzerland Constitution, by item. 25 bis establishes rules for cattle cutting.

exercising of the power, but also those referring to the bases of the power, respectively the power organizing bases. There are three such categories of social relations, that can form the regulating objective of the norms contained in the constitution that allow their identification such as follows:

- The constitutional norms, some having values of principle, having a determining role in the establishing and functioning of the governing organs and in the establishing of the form of the state, respectively of its characters and attributes;
- the norms for the consecration and guaranteeing of the fundamental righs and liberties and those that regulate the citizens' fundamental duties;
- constitutional dispositions that have no direct connection with the governing process and regulate the bases for power organizing (sovereignity, territory, population) and the bases of the power (economy, social and cultural aspects etc)

B. The form for adopting the constitution or of the constitutional laws have a solemn character and are achieved according to a procedure derogatory from the usual legislative procedure and by a state authority specially established or by the Parliament, that acts as a constituent power and not as a usual legislative power;

C. The significance of the constitution as a fundamental poitical document determines the concrete content of some constitutional regulations, expressing the will of the legislator constituted at the historical time for adopting or as the case may be, for the revising of the fundamental law. The political dimension of the constitution evokes the complex and multiple characters of its exterior determinations, respectively the historical particularities of the society organized at state level, the development degree and corresponding to the political will of the constituent legislator.

It is important to underline the constitutional dynamism. The fundamental law is a dynamic and opened act, in a continuous crystallization process. The constitutionality status is achieved in a continuous and complex process for interpreting and applying by state's authorities of the texts contained in the body of the constitution. A

special role in this wide process of interpretation and concrete fulfilling of the constitutional provisions is in the charge of the constitutional authorities. The activity for interpreting the fundamental law texts is justified because in the normative content of the constitution there are categories and concepts whose sphere cannot be defined by the constituent law maker. Thus, the constitutional norms cannot and must not offer definitions. For example in Romania's constitution there are such concepts that are defining by interpretation way and have formed the objective of analysis of the Constitutional Court: " spirit of tolerance and mutual respect" (item 29, paragraph 3); "identity" (item 30, paragraph 3); "private life" (item 30, paragraph 6), " the principles of the lawfull state" (item 48 paragraph 2); "public utility" (item 44, paragraph 3); "public and moral proportionality" (item 116, paragraph 4).

IV. CONCLUSIONS

The interpreting and applying of the constitutional norms involve what in the literature in speciality is called the "loyal constitutional behavior", namely the authorities of the state have the obligation in the work of interpreting of the constitutional text to respect the spirit and mainly the finality of the juridical norm. That's why the work for interpreting and applying of the fundamental law is not legitimate if by such an activity the finality aimed consists in fulfilling the supporting interests of political nature. The juristprudential interpreting of the constitutional text can reveal new constitutional norms. For example, the jurisprudential interpretation of the Constitutional Court underlined a new fundamental law that has no express formulation in the Constitution, respectively "the right to one's image".The normative contents of the constitution must be understood and determined with having into consideration the teleological criterion emphasized in the above stated definition. Namely the fundamental law's structuring role for the entire social, political and state system, guarantor of the fundamental rights and liberties.Noticing a political and juridical reality yet present, G. Bourdeau stated:" The written constitution is the work of the theoreticiens preoccupied more by the elegance and juridical balance of the

mechanism they construct, than by its political efficiency [25]" Such a finding, we consider valid also for the Constitution, respectively the contemporary Romanian constitutionalism.

The fair determination of the normative contents of a constitution is expressed by its political and juridical efficiency. The fundamental law must achieve the social dynamic balance but also the stability and institutional harmony, the efficient guaranteeing of the fundamental rights, in essence the requirements of a real constitutional democracy based on the values of the state, of the institutional and social balance and of the proportionality[26]. Ion Deleanu noticed very well that: "the success of the constitution and constitutionalism is always a political one as far as it is the result of a transaction, of a relationship between what the constitution offers in a formalizing and objectiving term of the political matters and what the political actors ask or search for at a certain time in order to fulfill their own objectives. [27]

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[25] George Bordeau, *Traite de science politique* (LGDJ, 1969), 59.
[26] For developments regarding the applying of the constitutional principle of proportionality at the state power organizing see Andreescu, *Principle of proportionality in the constitutional law*, 267-298.
[27] Delenu, *Constitutional Law and Public Institutions*, 89.

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E-COMMERCE

Dumitru VADUVA[1]

Abstract:

E-commerce, although practiced on a growing scale and governed by national and international regulations is not yet defined. Intuitively, we can define e-commerce as representing all commercial legal trades performed using electronic means. The legal mean to perform e-commerce is the electronic contract. This is a type of contract distinguished by its specific way of conclusion. The electronic document is the form in which the co-contractors manifest their will regarding the e-commerce. By special laws, the electronic document is recognized as being a mean of communication of the parties' will identified by their electronic signature. The latter one can be simple or extended, the later one offering more safety for the identification of the signer

Key words: -commerce, electronic contract (e-contract), electronic written, electronic signature (e-signature), force of evidence

INTRODUCTION

The written on paper is the most used instrument in the judicial relations between parties. The e-document is a means of exchange of the parties' consent to conclude a remotely legal document. The internet network is the base for concluding agreements using this type of documents.

E-commerce is increasingly used determining the legislator's intervention to organize it by Law No 365/2002[2] and by its

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Methodological Norms of application (Government Decision No 1308/2002[3] transposing the Directive No 2000/31/EC[4]). Its purpose is to establish the conditions for providing services for the information society, providing security for e-commerce, issuing and using electronic payment instruments, using the identification data for the performance of financial operations, to insure a favorable framework for free movement and development securing these services.

In the doctrine there are multiple definitions of electronic commerce, emphasizing that this is the ensemble of economic trades using digital information[5].

E-commerce uses legal instruments and the special laws from the common law. We are talking about, on the one hand, the notion of distance agreements concluded by the mechanism of offer and acceptance (between services providers and recipients) (Art 9 of the Law No 365/2002) and on the other hand by the rules of the electronic documents. This is why the law of e-commerce refers to the rules of the common law regarding the conclusion and probation of distance agreements, as well as to the special law regarding the electronic documents (Art 7).

The normative acts in the area of e-commerce or related to them avoid defining the electronic agreement. Law No 365/2002 states the legal regime of this type of agreement (Chapter 3). In our opinion, a legal definition of the electronic agreement is not necessary, because it is an agreement like any other, with the particularity that the will of the parties is sent, and thus the agreement is concluded by electronic documents. It is the reason why some authors define it as an electronic contract[6].

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[2] Published in the Official Gazette No 483/5 July 2002 and republished in the Official Gazette No 959/29 November 2006.

[3] Technical and methodological rules for the implementation of Law No 365/2002, published in the Official Gazette No 877/5 February 2002.

[4] Official Journal of the European Communities 178/1 of 17 February 2000.

[5] Alexandru Bleoancă, *Contractul în formă electronică* (Bucharest: Hamangiu, 2010), 11-12.

[6] Bleoancă, *Contractul în formă electronică*, 16-27.

In the main, the legal regime of electronic agreements is the one stated by the common law, except the particular rules stated by Law No 365/2002 and except those for the creation of these agreements using the electronic document stated by the special law (Law No 455/2001).

The certification of the wills expressed by two persons through the electronic document is represented by the electronic signature.

The e-commerce agreement is just a species of the contract different than the one stated by the common law only regarding the rules for formation and probation of the electronic document[7], we define it as the agreement of wills for the birth of obligations using the electronic documents sent in an electronic system, in the absence of the parties[8].

1. The notion of electronic document

Directive No 2000/31/EC of 8 June 2000 compels the Member States to recognize the electronic documents in the mechanism of elaborating agreements through electronic means (Art 9). In this respect, Art 7 Para 1 of the Law No 365/2000 states that "the agreements concluded by electronic means generate all the effects that the law recognizes for the agreements when the requirements stated by the law are met for their validity".

The electronic document is, like the one on a material support, any electronic written containing intelligible information[9]. The difference between this document and the one sent away by telegraphic means is the fact that the recipient of the electronic document receives the original one and not its copy. It is not important the technical means that allows the reading of the document, computer or mobile phone, nor its format: .doc, .pdf, .txt, e-mail, SMS, etc.

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[7] See the distinctions made by the doctrine regarding the notion of agreement for electronic commerce, Bleoancă, *Contractul în formă electronica*, 17-18.

[8] Mihaela Tudorache, *Contractul încheiat prin mijloace electronice* (Bucharest: C.H. Beck, 2013), 67-68.

[9] According to the legal definition of Art 4 Pct. 2 "*Document in electronic form means a collection of logically and operationally interrelated data in electronic form that reproduces letters, digits or any other meaningful characters in order to be read through software or any other similar technique*".

The legislator has organized by special rules the regime of the electronic document because *a priori* the electronic document lacks the guarantee of identifying the issuer and the security of the content against intrusions. This is the reason why the new Code of Civil Procedure recognizes the probative value of the electronic document drafted in the form stated by the special law (Art 267).

According to the theory of evidences, the force of evidence of the document is offered by the issuer's signature, which can be, holograph or electronic, the latter one being valid only if it is legally reproduced (Art 268 Para 2 of the new Code of Civil Procedure).

The special law, Law No 455/2001[10] on electronic signature transposing the Directive No 1999/93/EC and its norms for application (Government Decision No 1259/2001[11]) admits 2 types of electronic signature: simple, without particular conditions, and elaborated, named extended signature, namely accompanied by numerous conditions, with the purpose of guaranteeing the security of the message written and the fact that it comes from the person who signed it.

2. The types of the electronic document

This document has attached the extended electronic signature offering the above mentioned guarantee, but is loaded with formalities, or a simple electronic signature, which has the advantage of favoring the fast transmission of the electronic message. The celerity of the operations between professionals dictates the removal of the security formalities of legal documents. This is the reason why the professionals use, beside the documents with extended electronic signature, also the electronic documents where the identification element, the electronic signature, is not accompanied by safety elements. Thus are, for example, the electronic writs in which the identification is made by pointing out the name at the end of the document or the e-mail address or phone number

[10] Published in the Official Gazette No 429/31 July 2001.

[11] Government Decision No 1259/2001 approving the Technical and methodological rules for the implementation of Law No 455/2001 on electronic signature, published in the Official Gazette No 847/28 December 2001.

used to send the SMS etc. The document with an extended electronic signature has a legal force of evidence, being presumed that the message sent is the one written and signed by the issuer. In exchange, a second type of document does not have a legal force of evidence, the judge having sovereignty in deciding whether to give credibility, in this case establishing its force of evidence, or if he removes it.

3. The electronic writ stated by the Law No 455/2001

The Law No 455/2001 on the electronic signature has created a mean granting truthfulness for written messages, their force of evidence being at least equal with the one of a document under private signature. Regarding the force of evidence the law distinguishes between 2 types of electronic signature: the simple electronic signature and the extended one.

3.1. The electronic signature

According to the legal definition, the electronic signature "*means data in electronic form, which are included in, attached to or logically associated with a document in electronic form and serve as a method of identification*" (Art 4 Pct. 3). The electronic signature simply reveals the means by which the author of an electronic message is identified as being the author[12].

There are multiple means by which the electronic signature can be created, such as: mentioning the name at the end of the electronic message sent via e-mail, a digitalized image of a handwritten signature attached to an electronic recording, a secret code or PIN for credit cards, a means of identification based on biometry, a digital print, a retinal scan or a digital signature created using cryptography.

Besides these, the law states a type of signature named the *extended electronic signature* by which it offers its users, issuer and recipient, the guarantee of authenticity and integrity of the data, as well

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[12] Camelia-Tatiana Ciulei, *Probleme juridice legate de introducerea semnăturii electronice şi folosirea ei în tranzacţiile încheiate pe Internet*, Comercial Law Magazine 6(2001): 88.

as that of the subscriber's identification[13]. For the latter one are established supplementary exigencies.

3.2. The extended electronic signature

The extended electronic signature "*means an electronic signature which meets all the conditions specified below: a) it is uniquely linked to the signatory; b) it allows the identification of the signatory; c) it is created using means that the signatory can maintain under his sole control; d) it is linked to the data in electronic form to which it relates in such a manner that any subsequent change of that document is detectable*" (Art 4 Pct. 4).

4. Legal regime

The party that claims in court an extended electronic signature must prove it, unless he has a qualified certificate (Art 9 and Art 4 Para 4).

4.1. The procedure for an extended electronic signature-creation (and the qualified certificate attached to it)

The extended electronic signature is conditioned by a series of exigencies insuring the security for its content and the possibility to identify its author:

- The creation of an electronic signature using proper electronic devices; the signature must be verified using electronic systems (Art 5 and Art 4 Pct. 5, 7, 8) (A);
- The certification of the signatory's identity by attaching to the extended electronic signature a valid certificate issued by the certification services provider. The absence of these requirements attracts the impossibility of assimilating the electronic document with the document under private signature (Art 5) (B).

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[13] Ştefan Mihăilă and Marcel Bocşa, *Semnătura electronică – mijloc de exteriorizare a voinţei comercianţilor (I)*, Comercial Law Magazine 6(2008): 77.

4.2. Extended electronic signature-creation

Any electronic signature requires the signature-creation data inserted using an electronic data base. For the extended electronic signature must be used configured hardware and/or software to implement the data for the electronic signature-creation (Art 4 Pct. 7). Supplementary exigencies are imposed for the signatory pretending to use a secured device for the creation of the signature (Art 4 Pct. 8)[14].

- ***Inserting the electronic signature-creation data***. According to Art 4 Pct. 6 the electronic signature means "*unique data in electronic form, such as codes or private cryptographic keys, which are used by the signatory to create an electronic signature*".

The "private key" is deposited by the signatory to a third party, a public authority, for it to authenticate the connection with its owner.

Also, according to Art 4 Pct. 9 the electronic signature must be identified by electronic data such as codes or *public* cryptographic keys. The authenticity of the "public key" is guaranteed by a third party, "certification services provider", who issues a certificate connecting the public key of the signatory with the identity of the user (Art 18 Para 1 Let b-d).

- ***Electronic signature-verification***. Using the "private or public key" the third party who stores them (the certification service, namely the public authority) verifies the existence of the connection between them and the signatory. The identification of the signatory is made using verification means, operation complementary to the one of the extended electronic signature-creation. The verification means are configured software/hardware, used to implement the data of the electronic signature.

4.3. The existence of a not suspended or not revoked certificate

The electronic signature-creation and verification is not directly performed by the signatory, but by using a certification service provider

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[14] Marcel Bocşa, *Semnătura electronică - mijloc de exteriorizare a voinței comercianților (II)*, Commercial Law Magazine 9(2008): 33-next.

offering conformity for the electronic transmitted data. According to Art 4 Pct. 11 "*certificate means a collection of data in electronic form that attests the link between a person and the signature-verification data, confirming the identity of that person*" and the "*qualified certificate means a certificate that meets the requirements specified in Art 18*".

5. The force of evidence of the electronic document

5.1. The force of evidence of the document under private signature

The electronic document which has attached to itself an extended electronic signature, based on a qualified certificate and generated using a secured device for electronic signature-creation has the force of evidence of a document under private signature (Art 5).

The exigencies of the extended electronic signature cover the ones on the form stated by the general or special rules. The extended electronic signature is assimilated with the holograph signature (Art 268 Para 2 of the new Code of Civil Procedure).

The existence of this signature also covers the exigencies of form regarding the condition of the multiple copies or that on the entire handwriting of the debtor or of the "passed and approved" mention, stated by Art 274-275 of the new Code of Civil Procedure; or that of the writing, signing and dating the holograph will.

Same, in the case in which the form of the document under private signature is stated *ad probationem* or *ad validitatem*, as for instance, the insurance contract, namely the writing and dating of the holograph will, "*a document in electronic form shall satisfy to this condition if an extended electronic signature, based on a qualified certificate and created using a secure-signature-creation device was incorporated to, attached to or logically associated with it*" (Art 7 of the Law No 455/2001).

5.2. The force of evidence of the authentic document

The electronic document with an electronic signature attached has the same effect as the authentic document if it is recognized by the

person opposed to, between its subscribers and between those representing their rights (Art 6).

5.3. The force of evidence in relation with the third party

Towards the third parties the electronic documents are opposable only if are registered into public electronic registers held by specialized operators.

6. Submitting the electronic document as evidence

The force of evidence of the document and the admissibility of the documentary evidence are based on the signature of the person to who are opposable (Art 268 of the new Code of Civil Procedure). It is the same situation for the electronic documents. The person invoking this document must prove its existence. For the extended electronic signature the signature assumes the fulfilment of all conditions stated by Art 4 Pct. 4 of the special law, namely the unique link between the signatory and signature, the identity of the signatory, the means of creation excluding the intrusion etc.

If the electronic document has attached an extended electronic signature, based on a certificate provided by a certification services provider, it is presumed to fulfil all requirements stated by Art 4 Pct. 4, because the certificate, being issued by an authorized third party, offers authenticity to the document (because it originates from the signatory) (Art 4 Pct. 9 of the special law).

It goes without saying that the absence of the qualified certificate, if this signature is invoked, the person invoking it must prove the fulfilment of the requirements regarding the identity between the signatory and signature etc. stated by Art 4 Pct. 4.

If one of the parties does not recognize the document or the signature, the court shall always order the verification to be performed by a specialized technical analysis (Art 8).

7. The document on an informatics support

This type of document and its legal regime is recognized by the new Code of Civil Procedure.

7.1. Notion

The document containing the data of a legal act displayed on an informatics support represents a means of evidence with the condition that it is intelligible and has serious guarantees to make full faith on its content and the identity of the issuer (Art 282 of the new Code of Civil Procedure).

8. The presumption of validity

The Civil Procedure Code presumes as valid and acceptable as evidences, the documents on an electronic support which are systematically written and without gaps if the data are protected against alterations and counterfeiting, thus the integrity of the document is fully insured (Art 283).

9. The probative force. Full proof.

The document reproducing the data of an act, written on an electronic support, *is the full proof between parties, until the evidence of the contrary* (Art 284 of the new Code of Civil Procedure). Thus, it is not necessary that the evidence indicated to be completed by another means of evidence to prove the legal act.

CONCLUSION

The commerce performed by electronic devices is in a continuous expansion. It is more and more preferred due to its economic advantages and time, but the legislation does not offer a full trust for the electronic transactions, the extended electronic signature technique being used especially between professionals. Though the internet transactions are mass practiced, the consumers still ignore the legislation in this area.

The agreements concluded electronically are customized to verbal or written agreements by several rules for creation, probation and enforcement.

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THE REVOLUTION FROM DECEMBRE 1989 - INVALIDITY OF THE CONVICTION SENTENCE OF THE DICTATORS

Flavius-Cristian MĂRCĂU [1]

Abstract:

My approach[2] *aims to assess scientific process the dictatorial couple dated december 25, 1989, considering the three phases of the exhibition process: prosecution, judgment and enforcement of the decision. i believe that the sentence was pronounced illegal and we will prove further, it is null and void. the steps leading up process did not meet the Criminal procedure code, and its progress can be cataloged as legal masquerade.*

Key words: *communism, dictators, romanian revolution, conviction sentence*

INTRODUCTION

The date of December 25, 1989 remained in Romanian history as the day when communism collapsed. Symbolically speaking, execution of the dictators accounted for our country what accounted the fall of the Berlin Wall for Central and Eastern Europe. Bringing into the discussion the conviction of the dictatorial couple, I wish to draw your attention, in

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[2] This article can be found, in an expanded form, in the book of Flavius Cristian Marcau, Revolutia Romana din 1989, Editura Academica Brancusi , Targu-Jiu, 2011

continuation of our article, how faulty was the constitution the panel of judges and the immediate execution of the sentence. It is possible that due to instability in which Romania is or just a lack of legal knowledge fresh leaders have led to a flagrant violation of the rules of law in force at that time. Thus, I believe that this episode may be assigned appellations masquerade and legal circus. You may be wondering why I came to this conclusion? First I want to mention that although it was about the two dictators, the law must prevail.

THE CONTENT OF THE PAPER

Talking about **the criminal investigation phase**, first mention that this was not done; Was violated the principle of ensuring the right of defense and this is due not participate in the presentation of material defenders prosecution; The court was notified by indictment, there is a case against the prosecution and criminal action was set in motion in the absence of such material. I see, from all mentioned above, serious violations of procedural rules, disallowed, which demonstrates flagrant violations, by people who were shown to be specialized in law, of the law[3].

Lawyers associated leadership group of the Council of National Salvation Front (CFSN) have drawn a judgment establishing the Exceptional Military Tribunal which contains 3 pages. Taking the document too wide and techniques, Ion Iliescu took personal responsibility for the recompose through both reduction and the simplification. Reading the text carefully made by lawyers, he sought to extract the essential parts, not realizing that the original formula "its judgment will become final and enforceable by the non-recurrence" Ceausescu cancel his right of appeal, and grant them the right of General Stănculescu move immediately to implementation. Judgment itself will not be published in the Official Journal, not being inscribed like an official act of the state. Text of CFSN of December 24, 1989 is written

[3] Flavius Cristian Marcau, *Romanian Revolution from December 1989, (*Targu-Jiu:Academica Brancusi, 2011), 110.

and signed by the hand of Ion Iliescu as the president[4]. Absolutely illegal this document since Ion Iliescu was elected president of the National Salvation Front On December 26, 1989[5]. On 24 December, as it had no legal or constitutional quality to allow him forming an Exceptional Military Tribunal.

Moreover, the establishment of the Tribunal in the text was clearly stated that *"this court will be made in the component settled by the Law on judicial organization,"* and the case will be judged *"according to the legal provisions remaining in force in terms of procedure and criminal substantive law"*[6].

The charges that were made to the two dictators can be regarded as ridiculous and fabricated actually fits into a product of diversion. These, initially, there were five in number, following the last to give up later:

1. **Genocide**, stipulated by *Art. 357, alin. 1, lit. a-c, C.Pen..*; - Over 60,000 victims
2. **Subversion of state power** by organizing armed action against the people and state power, *art. 162, alin. 1, c.pen;* ;
3. **Acts of diversion**, *art. 163 c.pen;*
4. **Undermining national economy**, *art. 165, alin. 2, c.pen, art. 33-34 and 41, alin. 2, c.pen.*

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[4] Marcau, *Romanian Revolution from December 1989,* 107-108.

[5] World Justice 20 December 2012, „Sentence of death of Nicolae and Elena Ceausescu given by colonel of justice Gica Popa, who fired a bullet in the head after he realized he had committed a crime (sentence)". Available from: http://www.luju.ro/dezvaluiri/dosarele-revolutiei/exclusiv-sentinta-de-condamnare-la-moarte-a-lui-nicolae-si-elena-ceausescu-data-de-colonelul-de-justitie-gica-popa-care-si-a-tras-un-glont-in-cap-dupa-ce-si-a-dat-seama-ca-a-savarsit-o-crima-sentinta, accesed 10 noiembrie 2014.

[6] Curentul December 22, 2011, „Iliescu Ceausescu killed on the orders of Moscow. Execution was fake". Available from: http://www.curentul.info/2011/index.php/2011122267120/Decembrie-1989-marturii-si-documente/Iliescu-l-a-ucis-pe-Ceausescu-la-ordinul-Moscovei-Executia-a-fost-trucata.html , accesed 10 noiembrie 2014.

5. Attempt to flee the country on the basis of funds over one billion dollars deposited in foreign banks "- *in this charge was dropped*[7].

The idea quickly proved genocide legal fantasy, born probably interpreting that phrase referring to groups of people in the article about the genocide of the Criminal Code. First you need to keep in mind that the total number of deaths was 1104. In the second, in December 22, 1989 Ceausescu had not been at the helm of state, and the death toll was much higher thereafter.

Charges were raised that had not sense simply were field of SF. Petre Roman said in 2007 that those were the information that they have benefited and took over from foreign radio station (Radio Belgrade). This statement is far beyond embarrassment - it was really possible for a foreign country to know about the exact situation in a neighbor country and those in charge of this country should not benefit from this information?[8]

Neither **the trial phase** can be classified as being legal due to serious deficiencies. The trial was held in illegal conditions, a court established outside the law; A principle of the right to defense was violated; lack of psychiatric expertise[9]. The two defendants were present and assisted in the arrest of two lawyers: lawyer Nicolae Teodorescu and lawyer Lucescu Constantine, both of College Lawyer of Bucharest. The latter were selected by General Stanculescu Atanasie, according to statements by Petre Roman[10], which was not part of the panel of judges and had no legal competence in this process.

Trial transcript was published in several books on the revolution and its content filmed was broadcast on numerous occasions. From this and the sentence can easily see how defense lawyers during the process were transformed into accusers: PROSECUTOR said during the trial that *"results conclusively that the alleged acts of the defendants were*

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[7] Official Gazette of Romania, Year I, no. 3 Tuesday December 26, 1989, 1.
[8] Marcau, *Romanian Revolution from December 1989*, 108-109.
[9] "Verdict of Moral Court of Revolution, January 11, 1996", published in Tana Ardelean, Salaiuc Razvan Ion Baiu, *Ceausescu's process* , Bucharest: Ed. Day, 1996
[10] *Caietele Revolutiei, no. 5(12)/2007,* 42.

committed in their entirety" Lucescu and lawyer claimed *that "the evidence is not evidence to doubt the facts committed by them"*[11]. Another violation of the procedure is the lack of psychiatric expertise. Given the causes of the object of judgment offenses that attract the death penalty became mandatory psychiatric expertise. This was omitted but was considered fulfilled due to the application of the defendants questions about their mental state. Mentioned that the only one who is competent awarding a verdict on the state of mental health of a person is a doctor.

The execution of the sentence have been violated as follows: the legal provision under which the enforcement is done only after the court judgment becomes final; legal provision which states that the judgment becomes final only after 10 days have elapsed from its delivery; prisoners the right to apply for a pardon after the court decision becomes final; legal provision under which the sentence cannot be executed until after a minimum of 5 days from the refusal of pardon[12]. The sentence was implemented on the same day so that Nicolae and Elena Ceausescu were executed at 2:45 p.m. by a firing squad consisting of a group of paratroopers brought in Bucharest by General Stanculescu.

CONCLUSION

In conclusion, although the text of establishing Exceptional Military Tribunal, drawn (as amended) and signed by Ion Iliescu is provided very clearly that judgment will be according to the laws in force, the panel of judges proved flagrant violation of the Code of Criminal Procedure. The Exceptional Military Court verdict is null and void in view of the following: lack of evidence management; hear the any witness; Ion Iliescu was not competent for the establishment of the Tribunal; execution was not carried to fruition after a legal procedure; defense lawyers became accusers; lawyers have appealed even though

[11] Tribunalul Teritorial Exceptional, 1989, 5-6.
[12] See Verdict of Moral Court of Revolution, January 11, 1996.

the law clearly states that in case of death sentences it became mandatory, whether the prisoners wanted or not.

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THE PROCESS OF HARMONIZATION FOR NATIONAL LEGISLATION WITH COMMUNITY LAW

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Abstract:

Creating a common legislation in certain areas, through which relations among States with common interests should be consolidated, in order to achieve the same objectives, is not only possible, but also necessary due to common economic interests, in particular, and then to those of socio-political order at the regional level.

It is also the case of the European Union States, a union with legislation of its own, direct and immediate applicability in the Member States. Thus, the harmonization of legislation represents a system evolved, bridging differing norms because it tries to delete everything opposed to produce similar effects in their application.

A globally legal unification that would respond to the needs of citizens, regardless of race, religion, language, sex or nationality, although ideally speaking it would have been a great achievement, basically is and will be a challenge. Creating a common legislation in certain areas, through which relations among States with common interests should be consolidated, in order to achieve the same objectives, is not only possible, but also necessary due to common economic interests, in particular, and then to those of socio-political order at the regional level. It is also the case of the European Union States, a union with legislation of its own, direct and immediate applicability in the Member States.

To this end, member states are obliged to harmonize domestic / internal laws with the European legislation, the process by which any disparity between the domestic law of a Member State and the European legislation, which occupy the first level in the hierarchy of sources of law by the applicability of its priority over other domestic / internal sources of law, must disappear. Thus, the harmonization of legislation

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represents a system evolved, bridging differing norms because it tries to delete everything opposed to produce similar effects in their application. Harmonization may come to the substance of the regulations in question, but, in principle, allow subsisting diversities of origin, structure and drafting them[2].

Key words: *harmonization of legislation, European Union States, Member States, regulations, internal laws.*

INTRODUCTION

In this respect, the harmonisation process would constitute a comprehensive, complex and dynamic pursues a fundamental objective, namely that of the establishment of a modern national legislations to harmoniously integrate a European area in which the confrontation of national laws to be reduced to the minimum rates. It must be done, however, in such a way as to be limited in so far as is strictly necessary as the margin of the national legislature, not to interfere with the legislative authority in its strategy and may not relate to a predetermined European model, especially in the case of legal institutions which do not have uniform rules even in all countries of the European Union.

However, harmonisation must remain within certain limits for *the harmonization of* laws that she would require to be carried out effectively and with a minimum of heterogeneity in terms of equality. Failure to comply with these requirements is liable to turn into a simple harmonization and formal exercise in transposition[3].

The period of adjustment is provided for in article 51since the Maastricht Treaty, according to which „the liberalisation of banking and insurance services that are connected with movements of capital shall be made *through harmonization* with the liberalisation of movement of capital", or in the article. 93: „The Council, acting unanimously on a proposal from the Commission. ...adopted the provisions on the *approximation of the laws* relating to the

[2] *Legislative Information Bulletin* 3 (2002) 4.

[3] For details, see the *White Paper*, which is part of the pre-accession strategy adopted by the European Council in Essen in December 1994, for the associated countries of Central and Eastern Europe, published by the European Commission delegation in Romania, Bucharest, 1996.

turnover, the excise duties and other indirect taxes, to the extent that such harmonisation is necessary to ensure the establishment and functioning of the internal market[4]".

1.The process of harmonization of legislation with the European legislation is an essential objective, which can be found in the strategy of accession of all States which are candidates for membership of the European Union.

The harmonization of national legislation with *the community acquis* is also one of the conditions that determine the progress in the negotiation process for accession commitments in position papers referring largely to the adoption of regulations for this area.

At the same time, the harmonisation of legislation should not be seen as an integration of the legal point of view, but as a political cooperation. Legislative harmonization does not mean legislative identity, but also seeks to harmonise the principles of law and rules of national legal systems, organized by specialized domains.[5]

On the ways *of proper adjustment* there are numerous criteria:

Regarding the way harmonisation takes place through effective implementation of some European acts in the domestic law or interpretation of the rules of national law in a manner that ensures compliance with European law, legal doctrine[6]distinguishes between *legislative method* and *interpretative method*.

1.1. The legislative harmonisation method is achieved by adjustment of national legislation to the EU acquis and *the interpretative method* is accomplished by interpreting the national law in a manner that ensures compliance with the provisions of the European Community.

The interpretative method cannot substitute the legislative method, which remains the basic rule in the legislative harmonisation, but can have a beneficial effect in efforts to implement the European acquis. For example, the court

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[4] Viorela Bubău and Vlad Lăcătușu, "Aspecte privind armonizarea legislației românești la acquis-ul comunitar în materia migrației și azilului" in *Aspecte referitoare la armonizarea legislației românești cu cea comunitară* (Bucureşti: Universul Juridic, 2010), 469 and seq.

[5] Augustin Fuerea, *Manualul Uniunii Europene* (Bucureşti: Universul Juridic, 2006), 227-229.

[6] Cristina Daniela Morariu, *Adaptarea legislatiei romanesti la acquis-ul comunitar – Aspecte speciale privind acquis-ul relatiilor externe* (Bucureşti: Universul Juridic, 2008), 204-205.

system has a special role in the implementation of the acquis, both in the pre-accession period, through the interpretation of national law in conformity with Community law, and after accession to the European Union, when national judge has the obligation to apply European law in accordance with the principles that governs it.

The legislative method is the most important and consists either in the repeal of the existing national legislation, so as to ensure compliance with the European or the adoption of new legislative acts to take the provisions of the European acquis, both methods with the objective of ensuring the conformity of national legislation with the European one.

In order to harmonize domestic / internal legislation with the European legislation, practice has shown that the repeal of the provisions of the domestic / internal law is rarely encountered, because usually by the same normative act is a combination of the two operations, the repeal of certain provisions of the domestic laws and the implementation of other provisions of a European instrument.

The adoption of domestic laws by taking the European acquis provisions is the most effective method of harmonizing domestic / internal laws.

Harmonization by adopting legislation that introduces entirely new European legislation, national law transposing a European act, is found mainly in the newly created law branches, such as: competition.

In a process of legislative harmonisation with the EU and Romania, the country which followed a difficult road of history, as shown in the legal literature[7], became a member of the European Union on the 1st of January, 2007.

It shows that Romania undertakes to ensure that the legislation to be gradual, consistent with that of the European Union. In this regard, are set out the areas in which it will extend, in particular, harmonisation of the customs law and company law, banking law, company accounts and taxes, intellectual property, protection of labour and employment, social security, financial services, rules on competition, protection of health and life of humans, animals and plants, the protection of consumers, direct taxation, technical rules and

[7] Augustin Fuerea, "Tratatul de aderare a României la Uniunea Europeană, (II) Libera circulație a persoanelor", *Revista de Drept Comunitar* 6 (2008): 26.

standards, laws and regulations in the field of nuclear energy, the transport and the environment,[8]etc.

The term *European integration*[9], has the meaning of process, in which the Member States of the European Union, must transfer, progressively, from the national level to the supranational level, a series of skills related to national sovereignty, by accepting to perform jointly and working in their respective fields of activity, in order to achieve political, economic, social and cultural objectives in order for these countries to progress and develop.

Some authors describe *the integration* as a process of free association, which seeks to promote the respect for the rule of law, political pluralism, the full manifestation of the identity of the participating States, the respect for human rights[10].

In connection with the *integration of European law* into national law of the Member States, involving certain ways, such as: *the coexistence* of European law with *the national law* of each Member State (for example, in competition law, there are national rules co-existing with European ones); but it cannot be said that European law is included in the right of those countries, because it is a specific duty, self-contained, ensuring a uniform application of EU rules; in all Member States, it has a direct effect, being over the national rule, evolutionary, due, particularly, to the systematic judicial review; to *the coordination of* national laws with the purpose of elimination of European disparities between national laws and European ones and their standards.

European Union integration requires therefore, the harmonization of legislation, a process particularly important from the perspective of the consequences it produces in all areas of economic and social life.

The integration theories distinguish between recent formal and informal integration, if the European process engaged with the Treaty of Rome.

Formal Integration requires changes in legal regulations and otherwise, in the direction of mutual compatibility and in the achievement of the efficient functionality of the community.

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[8] Dumitru Mazilu, *Integrarea europeană. Drept comunitar şi instituţii europene* (Bucureşti: Lumina Lex, 2001), 503.

[9] Romul Petru Vonica, *Introducere generală în drept* (Bucureşti: Lumina Lex, 2000), 330.

[10] Dumitru Mazilu, "Contribuţii ştiinţifice la promovarea dreptului european, la analiza dreptului constituţional comparat, la statuarea dreptului parlamentar şi la protecţia juridică a drepturilor omului", *Revista de Drept Comunitar* 5(2009): 40 and seq.

Unlike the formal integration, the informal integration covers the dynamics of production and trade in the market of communication products and systems.

The term European integration has been applied so far justified to refer to the European process.

In fact, the process of integration for national legislation was manifested primarily on jurisprudential level (the European jurisprudence constitutes an „effective and stimulating agent" of the various processes of legislative harmonization, of assimilation and implementation of the European law[11]) and later, in the legislation.

Regarding legislative developments, the integration of national legislation with European law has been carried out on the basis of a common methodology for all candidate countries, the methodology developed by the Bureau of information exchange on the technical assistance of the European Commission. This methodology used the database (Armonograma) that contained information on the transposition of European legislation, usually updated once every two months. For each European regulatory act are specified the corresponding national normative acts, the date of entry into force, the degree of compatibility and the responsible institutions.

With regard to the coordination of policies and instruments, the European Union initially has not sought to *impose a uniformity* of laws and practices, ensuring a *closer cooperation* in various fields, taking account of the type and level of development of member countries, in order to approximate their views and strengthen the integration process.[12] Europe „*united in diversity*" offers the best chance of pursuing, with due regard for the rights of conscience and responsibility toward future generations, a space of freedom and of human hope (Part III, Title V of the Treaty on the functioning of the European Union).For example, preliminary references is the most important *instrument of cooperation* between the Court of Justice and the national courts, meant to ensure the uniform application of European law and to ensure the validity of acts adopted by the institutions, bodies and agencies of the European Union.„Preliminary questions concerning the interpretation are essential means of imposing national jurisdictions the correct interpretation of the European

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[11] Dumitru Adrian Crăciunescu, "Dimensiunea competențelor Uniunii Europene și suveranitatea comunitară", *Revista de Drept Comunitar* 3(2009): 194.

[12] Gillles Ferréol et al*, Dicționarul Uniunii Europene,* (Iaşi: Polirom, 2001), 21.

law"[13], while the "preliminary questions relating to the validity is a means of implementing the principle of the hierarchy for the sources of European law"[14];*the substitution of national law by the European law.* In this regard, the European law replaces the national law, while the national authorities can no longer issue legal rules in that regard.

In the literature[15], it is stated that the *closing* designates those legislative measures which the authorities of the Member States shall require that the legal rules in some areas to be in line with the legal acts of the European Union.

As we stated, the correlation between national laws with European legislation constitutes a challenge for all States that joined the European Union. The European Commission asked EU Member States to implement *EU acquis*, in their national legislation; this requirement is not a simple taking-over, but an adaptation of the provisions contained in the European regulations, to the specific political realities, social and economic context of those countries.

1.2.The Community Acquis the legal provisions adopted in the constituent treaties of the European Union, mainly the treaties of Rome, Maastricht and Amsterdam, represent the totality of the legal norms governing the work of the EU institutions, policies and community actions, and consists of: the content, the political principles and objectives of the treaties of the European communities, and the subsequent ones (the Single European Act, the Maastricht Treaty and the Amsterdam Treaty), legislation passed by the EU institutions for the implementation of the provisions of the Treaties (regulations, directives, decisions, opinions and recommendations);the jurisprudence of the Court of Justice of the European Communities; declarations and resolutions adopted within the European Union; joint actions, common positions, signed agreements, resolutions, declarations and other documents adopted within the framework of Foreign and Security Policy (CFSP) and the cooperation in the field of Justice and Internal Affairs (JIA);the international agreements to which the EC is a party, as well as those concluded between EU Member States with reference to its work.

There are opinions that the adoption of the Community acquis, narrowly, involves carrying out several stages including: *implementation, transposition, applying and monitoring of its implementation*[16].

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[13].Philippe Manin, *Droit constitutionnel de l'Union Européenne* (A. Pedone, 2004) 443.
[14] *Ibid.*
[15] Mihai Bădescu, *Teoria generală a dreptului* (Bucureşti: Lumina Lex, 2013), 100.

Putting into practice the priorities of the accession partnership, the countries of central and Eastern European countries have developed a "National programme of *European acquis*".

The adoption of the Community acquis requires that the applicant countries to adapt, to the greatest possible extent, businesses and institutions to important infrastructures in order to comply with European norms/community. To be sure, this process requires some costs, particularly in relation to the application of rules in the field of the environment, nuclear safety, transport safety, the working conditions, the marketing of food products, consumer information or control of manufacturing processes. To this end, in addition to the effort of the countries concerned, the European Union will donate funds to support the implementation of the Community acquis.

Also, *the European acquis* represents the rights and obligations which bind the Member States of the European Union, namely, the totality of the legal norms governing the work of the EU institutions, European policies and actions.

In another opinion, the *European acquis* means all legal norms which regulate the activity of EU institutions, European policies and actions which consist of: the content, the political principles and objectives of the original Treaties of the European Communities[17]and subsequent ones (the single European Act, the Maastricht Treaty[18], the Amsterdam Treaty and the Lisbon Treaty[19] (we note that the entry into force of the Treaty is of particular interest for the international universal society and for the European regional one, solving many of the problems remained in the waiting, but for Romania, given that it is the first legal instrument at the end of which it took part, completing all procedural stages, as a Member State of the European Union).

The acquis taking-over is a time-consuming process, whose difficulty cannot be hidden, but the result is beneficial to the applicant countries, since acquiring a system of quality standards and made the sample running ability in the other Member States and is in operation to ensure proper terms, structures and mechanisms necessary for a healthy market economy.

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[16] Augustin Fuerea, *Manualul Uniunii Europene*, 2nd ed. (Bucureşti: Universul Juridic, 2006) 228.

[17] Romul Petru Vonica, *Introducere*, 320.

[18] "Traité sur L'Union Européenne, Le texte integral, Signé à Maastricht le 7 février 1992", *Journal L'Humanite* Paris (1992): 12.

[19] The full title of the Treaty is *Tratatul de la Lisabona de modificare a Tratatului Uniunii Europene şi a Tratatului de instituire a Comunităţii Europene.*

With regard to the implementation of the European acquis in national legislation of the countries, as a condition that was required for integration into the structures of the European Union, it is observed that it was necessary to take account of the European institutional law, representing a set of legal norms contained in treaties and drawn up by the institutions, whose main aim was the establishment and the proper functioning of the European Union.

Within them, the account should be taken of the correspondence with the internal rules of the national law of the Member States, which are influenced by the supranational character of the communities, and the fact that, in this case the operating principle of the "delegation of sovereignty", for matters which falls within the EU laws.

Regarding the introduction of European regulations into national law, it is observed that "the right of the normative work of the institutions, will be essential in the national legal order of States, without transformation, without executing the order, and even without issue, at national level, even though it is inevitable that the dual States, as in the case of Germany, to consider it by default, as in Denmark, United Kingdom or Ireland, explicitly considering it"[20]and felt that there was a comprehensive and early admission, and that, by entering the treaty into an internal order, the ratification law, also introduced, virtually, the derived right arising out of it.

The mechanism of elaboration and implementation of the Community acquis has two components, namely the national assimilation or enforcement as such of the acquis by the Member countries' legislation and its implementation by the institutions, economic operators and citizens and the multinational (transnational) the basic institutions of the EU, where the European Council sets guidelines on integration, the European Parliament and the Council of Ministers for the EU, shall draw up and approve the acquis, the European Commission and the European Court of Justice will ensure its implementation[21].

For example, Romania has concluded the accession negotiations at the Summit of the EU's winter meeting in Brussels on 17 December 2004.The Treaty of accession was signed on 25 April 2005 at the Abbey of Neumtinster in Luxembourg, the two countries should accede on the 1st of January 2007, except that, reported serious violations of agreements were laid down, in which case,

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[20] Ion P. Filipescu and Augustin Fuerea, *Drept instituţional comunitar European* (Bucureşti: Actami, 1994) 37.

[21] I. Niță, *Integrarea României în Uniunea Europeană*, (Bucureşti: Lumina Lex, 2007) 12.

the accession will be postponed by one year, until January 1st, 2008 (safeguard clause).

The Commission of the European Communities published, in October 2005, a new country report on the progress of Romania in *the perspective of accession* to the EU.

According to it, Romania has continued to fulfil the political criteria, both for the Member State, as well as the criterion of a functioning market economy. The report states that *"a serious implementation of its structural reform programme will allow him to cope with competitive pressures and market forces within the EU"*. The report indicates that Romania has made significant progress in aligning the national legislation to EU legislation and will be able to fulfil the obligations of the Member State of the Union from the time of accession, expected if it accelerates the preparations in a number of areas and will focus on strengthening the administrative capacity as a whole. Starting from the 1st of January 2007, Romania is a Member State of the European Union.

In a broader sense, European law shall comprise all the rules of law applicable in the European legal order, including the General principles of law, the Court of Justice of the European Communities, the rules of law arising from the community's external relations and those arising from conventions and similar agreements concluded between the Member States in application of the provisions of the Treaty.

All these rules of law form part of what is known as the *community acquis*[22].

The process of harmonization of the Romanian legislation with the European legislation is a legal obligation arising from the European Association Agreement EU-Romania, ratified by law No.20/1993.

In 1995, our country has applied for membership, and in 2000, it started accession negotiations, opening and ending gradually, until December 2004, all 31 chapters, so it became possible to the signing of the Treaty of accession on 25 April 2005 and the actual accession on 1 January 2007.Negotiations have established the conditions for the integration of European legislation (*acquis*) to be treated as such by the national and any transitional periods, delineated in time and conditions of application.[23]

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[22] Philip Manin, Les communautés européennes. *L'Union européenne. Droit institutionnel* (Paris: A. Meenakshi Raghunath, 1993) 56.
[23] I. Niță, *Integrarea României,* 21.

Chapter III of Title V of the agreement is exclusively devoted to the harmonization of legislation. According to the article70 of the Agreement, harmonization of legislation extends to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of labour and employment, social security, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, laws and regulations in the field of nuclear energy transport and environment. The compilation of all draft laws are the rules of the Community acquis. The initiators of draft for regulatory acts include the presentation documents and the motivation of expressing the terms of the projects with Community harmonized provisions which are transposed in the respective projects, and indicate future measures for implementation.

Following the accession of Romania to the European Union, the process of harmonisation and implementation of the provisions of the Treaty of Accession, through the effect of provisions in article 148 of the revised Constitution of Romania, that establishes the fact that Romania's accession to the treaties constituting the European Union is made through the law passed in a joint session of the Chamber of the Deputies and the Senate, with a majority of two thirds of the number of Deputies and senators. The Parliament, the President of Romania, the Government and the judicial authority shall ensure compliance with the obligations arising from the Act of Accession; the Government transmitted to the two chambers of Parliament a draft with compulsory acts before they are subject to approval by the European Union institutions.

For example, in the White Paper, preparing the associated countries of Central and Eastern Europe for integration into the European Union common market, the Book was adopted in Cannes and it stipulates that the accession to the European Union implies the acceptance in full of the European acquis, representing the totality of the legal norms governing the work of the European institutions, the actions and policies of the European Union. The White Paper refers to the components of the European acquis.

In the book it is stated that the work of *harmonization* of laws rests only in associated countries and must be done through its own coordination mechanisms to stimulate and supervise the process of approximation and the legislative strategies, based on comprehensive, consistent strategies with its own interests and its own priorities. The White Paper contains the reference document which is not adapted to the specific needs of a particular country, every country in the Central and Eastern Europe must establish priorities, draw

up its own calendar, according to their own economic, social and political situation, and its progress.

In the White Paper is assigned that an essential element adapts to the pace of adjacency programmes of the countries in the region, to the progress towards economic reform. To gain access to the European internal market, associated countries must acquire what has become the European Union in the field of legal regulations.

At the same time, European law literature indicates that European integration is achieved, however, in spite of legislative harmonization trends and policies in the most important areas of activity, in a manner clearly uneven, indistinguishable from one sector to another. Thus, there are highly integrated policies, achieved through massive transfer of competences at European level and policies carried out since November, at Member State level.

As a fundamental problem of the national strategy for Romania's economic development, in the medium term, has been defined[24]the transformation of the Romanian economy, in a structural and market system, and as a fundamental pivot of this issue, clarifying the property rights.

Regarding the last point, it was considered necessary to: adopt rules designed to strengthen the trust of the population and businesses (domestic and foreign) in the soundness of the property regime in Romania and the adoption of a package of collective regulation to ensure consistency of economic legislation through:

a) removing contradictions and redundancies which facilitate the interpretation of the provisions and even the enforceability of certain provisions and
b) completion of "goals" of normativity in terms of alignment to European standards.

The approximation was structured on several areas of harmonisation laid down in the White Paper. It includes the measures for:

a) guarantee the free movement of capital;
b) guarantee the free movement of goods;
c) ensure the free movement, in terms of services;
d) ensure the free movement, in terms of people.

Therefore, the program for harmonization is the general framework of equality, while ensuring the creation and development of institutions designed to implement the harmonized legislation.

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[24] Dumitru Mazilu, "Contribuții științifice", 326.

The National Program for Accession of Romania was updated regularly, ensuring the inclusion of new priorities of Accession Parliament in legislative harmonisation and concentrating the areas deficient in this respect, as indicated in the regular report of the European Commission. Simultaneously, with the activity of legislative harmonization, national bodies have been created to ensure the implementation of European legislation.

We should note that States wishing to join the European Union must, necessarily, acquire not only targets, but also the means to achieve them. However, one of these remedies is as described, the harmonization of national legislation (correlation) with normative instruments already established, in the Union, the only ones in a position to facilitate their proximity to such a degree, that it can achieve the proposed objectives.

As a result, Romania will have to enrol in the course of these processes and to bring its contribution to the identification of the most appropriate solutions to resolve EU goals.

CONCLUSIONS

It is really hard to conceive the harmonization of the regulatory activity of the Member countries of the European Union with the legislative activity of the Union without the existence of order placement processes and consolidating the European Union without new relations that are established between the Member States as a result of these processes, not the liberalization of the movement of people, goods, capital, services and without the acceptance by Member States of their national sovereignty limitations, in order to be possible the unity of will and action of the European institutions.

All these new and fundamental processes for the existence and activity of the European Union are all prerequisites of legal integration and the creation of a European judicial space, the major objective of the European Union in the present stage of development of the Union. In this regard, the right, generally, serves as an instrument of achieving the objectives of the European Union, the European Union's regulatory activity established itself as an effective and decisive means, in carrying out all the European measures.

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THE POST-PARLIAMENTARY PHASE OF THE ORDINARY LEGISLATIVE PROCEDURE. THE PROMULGATION AND PUBLICATION OF THE LAW

Ramona DUMINICĂ[1]

Abstract:

The ordinary legislative procedure has in our national legal system three phases: a pre-parliamentary one, a parliamentary one and a post-parliamentary one. This article aims to emphasize the particularities of the post-parliamentary phase where the laws are subjected to the promulgation of the president and after that are published in the Official Gazette of Romania.

Key words: *: legislative procedure, promulgation, reexamination of the law, publication of the law*

INTRODUCTION

Legislation, which is the most important attribution of the Parliament, as resulted from the constitutional provisions, is performed according to certain institutional rules and regulations governing the

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distance covered by the law from the moment of exercising the right to legislative initiative to its promulgation and publication in the Official Gazette.

The legislative procedure has three phases: pre-parliamentary, parliamentary and a post-parliamentary one. Therefore, preparing projects of law, legislative proposals, as well as the approval of the projects of law and of the legislative proposals performed by the Legislative Council, the Economic and Social Council, the Supreme Council of National Defense or by the Government, for the examination of the budgetary effects of the legislative proposals, in accordance with Art 111 of the Constitution, represent the pre-parliamentary phase. The parliamentary phase of the legislative procedure includes the notification of the Parliament, the first lecture, the examination and debate of the projects of law and legislative procedures by the permanent committees, the second lecture in the plenum of the Chambers and the vote of the projects of law. In the post-parliamentary phase, the laws are subjected to the constitutionality control and can be resent to the Parliament for reexamination either as a consequence of declaring it unconstitutional, or after the request of the President of Romania and, finally, the latest phase of the legislative procedure, also extra-parliamentary, is represented by the promulgation and publication of the law in the Official Gazette of Romania.

Considering as a starting point this logic and considering the nature of the specific procedures and rules governing these procedures, in the following we shall briefly show the particularities of the last phase of the legislative procedure.

1. The promulgation of the law. Notion

Following the adoption by vote of the legislative project or proposal and its signing by the presidents of the two Chambers of the Parliament, moment marking the end of the first parliamentary phase of the legislative process, in accordance with Art 77 of the Romanian Constitution, is the phase of the promulgation by the Romanian President of the laws.

The promulgation is defined as the "act authenticating the text of the law, namely the establishment and certification of the compliance with the constitutional, legal and regulatory norms regarding its draft and adoption. The promulgation is not a discretionary measure, the head of the state being compelled to promulgate the law if its adoption was legal"[2].

This final operation of the legislative procedure allows the head of the state to enforce the law, forcing the public authorities to apply its provisions. The decree of promulgation, the President orders the publication of the law in the Official Gazette. The Romanian head of state has, for the promulgation of the law, a period of maximum 20 days since he has received the law signed by the presidents of the two Chambers[3]. This term is a deterioration period because, after its expiration, the President no longer has the possibility to promulgate the law, which shall enter into force even in the absence of the promulgation.

In the doctrine it is stated that "the promulgation is not a reflex act. The head of the state may decline the promulgation, generating important consequences: either in the form declined the law can only be adopted by a qualified majority, or it can only be adopted by a future legislature, or it is subjected to popular approval. Sometimes the attribution of the President is resumed only to ask for a new deliberation, the Parliament having the possibility to adopt the law with the same quorum, the promulgation is this case being mandatory"[4]. In our national legal system, the phase of the promulgation is possible to be delayed, in two situations: if the Constitutional Court is notified or if the law is subjected to a reexamination requested by the Romanian President.

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[2] Attila Varga, *Constituționalitatea procesului legislativ*, (Bucharest: Hamangiu Publishing House, 2007), 246.

[3] Constanța Călinoiu and Victor Duculescu, *Drept parlamentar*, (Bucharest: Lumina Lex Publishing House, 2009), 233.

[4] Dan Claudiu Dănișor, Ion Dogaru and Gheorghe Dănișor, *Teoria generală a dreptului*, (Bucharest: C.H. Beck Publishing House, 2008), 149.

2. The notification of the Constitutional Court

The notification of the Constitutional Court regarding the unconstitutionality of a law, within the *prior* control performed by the Constitutional Court shall generate the suspension of the term of 20 days for the promulgation of the law.

According to the fundamental law, any law, before being promulgated, can be appealed at the Constitutional Court for reasons of unconstitutionality. To guarantee the supremacy of the Constitution, Art 15 Para 2 of the Law No 47/1992[5] states that "for the exercise of the right to notify the Constitutional Court, with 5 days before being sent for promulgation, the law shall be communicated to the Government, to the High Court of Cassation and Justice, as well as to the People's Advocate and shall be submitted to the general secretariat of the Chamber of Deputies and of the Senate. If the law has been adopted in an emergency procedure, the term is of 2 days". During these terms, the President of Romania is stopped from promulgating the law, precisely for the protection of his right to notify the Constitutional Court.

According to Art 146 Let a) of the Constitution "the Constitutional Court shall adjudicate on the constitutionality of laws, before the promulgation thereof upon notification by the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Advocate of the People, a number of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise the Constitution".

Therefore, any of these subjects can notify the Constitutional Court regarding the unconstitutionality of a law or of certain provisions of a law before its promulgation. The notification must be submitted with the compliance, under the sanction of inadmissibility, of the conditions stated by the Constitution and by the organic law of the Court, the jurisprudence of the Constitutional Court being relevant in this meaning. Thus, the Court has decided to be illegal the notification submitted by

[5] Republished in the Official Gazette of Romania, Part I, No 807/3 December 2010.

less than 50 deputies established by the Constitution[6] or it decided that the notification is inadmissible when it does not concern the unconstitutionality of a law before its promulgation, but the texts of certain not yet adopted projects of law[7]. Also, in order to be admissible, the notification for unconstitutionality must have as object a law or a provision of a law before its promulgation, thus we will not be in the presence of an *a priori* control[8].

The notification must be made in written and motivated and it must state, on the one hand, a precise determination of its object, by pointing the law or, where appropriate, of the provisions of the law considered as being unconstitutional, and, on the other hand, stating the constitutional provision or provisions considered to have been violated by those norms. Without such determination of the object of the notification on for unconstitutionality and without its motivation, by stating the constitutional provisions presumed to have been violated the control for constitutionality is not possible. In its jurisprudence, the Constitutional Court distinguishes between the notification for unconstitutionality not containing grounds and the one wrongfully motivated, being obvious that only for the first case is possible the inadmissibility. The principle stated by the Constitution and by the organic law of the Constitutional Court is that the judgment for constitutionality, within the *prior* control, takes place within the limits of the notification. In our national constitutional system, the notification for unconstitutionality represents the document necessary for the initiation of

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[6] Constitutional Court, Decision No 73/19 July 1995 regarding the constitutionality of certain provisions of the Law clarifying the judicial situation of certain housings, registered in the property of the state, published in the Official Gazette of Romania, Part I, No 177/8 August 1995.

[7] Constitutional Court, Decision No 42/8 July 1993 regarding the constitutionality of the Law for the modification and completion of the Law No 35/1991 regarding the foreign investments regime, as an effect of eliminating Art 301 of that project, published in the Official Gazette of Romania, Part I, No 175/23 July 1993.

[8] Constitutional Court, Decision No 233/20 December 1999 on the objection of unconstitutionality regarding the Law on the Statute of civil servants, published in the Official Gazette of Romania, Part I, No 638/28 December 1999.

the control within the limits established by it, and not an opportunity to perform the control and extend the object of the judgment for constitutionality beyond the limits established by the notification. As a consequence, even if the Constitutional Court would ascertain the unconstitutionality of other provisions than the ones enlisted by the notification, it could not rule over them, because it would exceed the limits of its competence established by the Constitution[9].

If the Court decides the partial unconstitutionality of the law, the Parliament is compelled to reexamine those norms in order to adjust them with the decision of the Court. In such case, it is possible to send the law for promulgation only after the adjustment of the unconstitutional provisions with the decision of the Constitutional Court in maximum 45 days. If the law is entirely declared unconstitutional its promulgation becomes impossible according to the interpretation of Art 147 Para 2 which states that "in cases of unconstitutionality of laws, before the promulgation thereof, the Parliament is bound to reconsider those provisions, in order to bring them into line with the decision of the Constitutional Court", thus forcing the Parliament to reexamine only the unconstitutional provisions, and not the whole law. This means that it is necessary for the regulation of that area to reinitiate the entire legislative procedure.

The laws declared to be constitutional by the Court are sent for promulgation to the President of Romania, as well as those which have been declared partially unconstitutional, definitely, after bringing them into line with the Constitution, the President of Romania having the obligation to promulgate the law within 10 days.

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[9] Costică Bulai, *Obiectul judecății de constituționalitate*, *Buletinul Curții Constituționale* 6 (2003), accessed December 18, 2014, http://193.226.121.81/default.aspx?page=publications/buletin/6/bulaic

3. The reexamination of the law at the request of the President of Romania

From the analysis of Art 77 Para 2 of the Constitution, according to which "before promulgation, the President of Romania may return the law to Parliament for reconsideration, and he may do so only once" it results that the head of the state, within the promulgation procedure, must examine the law and observe if it is in accordance with the constitutional texts, with the parliamentary procedures and with the political imperatives of the moment. If it is ascertained that the law departs from the constitutional provisions, he may appeal to the constitutional justice in order to remove the unconstitutionality errors, and if he ascertains other deficiencies of the law, either are connected with the procedure of adoption, or the content of the law, especially by observing certain departures from the international treaties to which Romania is part or even for opportunity reasons, he may notify the Parliament only once for the reexamination of the law[10]. In the latter case, the notification has the form of a presidential message with the effect of reinitiating the parliamentary procedure from the Chamber which was the first to adopt the law.

The request of the President may have as object any form of critique: of legality, of constitutionality, of opportunity, may concern the law in its ensemble or just certain provisions of it, may have as object the promotion of the public good or the national defense, considering the role of the President of Romania, as stated by Art 80 of the Constitution. Also the request of the President may also enlist proposals to improve the legal text. Usually, the reexamination is addressed to each Chamber if, according to the parliamentary procedure, the law is adopted by each Chamber individually, or by both Chambers reunited in a common

[10] Ioan Vida, *Legistică formală. Introducere în tehnica şi procedura legislativă*, 4th Edition (Bucharest: Lumina Lex Publishing House, 2010), 229.

meeting, if the law is in their competence[11]. It must also be mentioned that sending the law for reexamination and the notification of the Constitutional Court by the President of Romania are not mutually exclusive procedures.

Thus, from the Romanian Parliament's practice we can mention the situation of the Project of law for the approval of the Government Emergency Ordinance No 99/2005 for the modification and completion of the Law No 3/2000 regarding the organization and holding of the referendum (currently Law No 243/2006), where the President of Romania asked the reexamination (18 October 2005) and then expressed a notification for unconstitutionality (8 May 2006). An eloquent example in this meaning is the Law No 96/2006 (on the statute of deputies and senators), in whose case the President of Romania initially sent a request for reexamination, on 11 January 2006, and after that a notification for unconstitutionality, on 28 February 2006, the definitive form of the law being adopted by the two Chambers of the Parliament on 5 April 2006[12].

Finally, the promulgation is performed only for the organic and ordinary laws, not for the laws revising the Constitution, for which there is a specific procedure for adoption meant to express a special competence in the virtue of which the President, even if he does not express the legislative will, confirms the legality of the adoption of a law.

4. The publication of the law

The publication of the law does not represent only a simple technical operation which concludes the legislative process, but also a condition of form of its applicability and to ensure their compliance by all subjects of law.

According to Art 78 of the Constitution "the law shall be published in the Official Gazette of Romania and come into force 3 days after its publication date, or on a subsequent date stipulated in its text".

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[11] Constanța Călinoiu and Victor Duculescu, *Drept parlamentar*, (Bucharest: Lumina Lex Publishing House, 2009), 237.
[12] Călinoiu and Duculescu, *Drept parlamentar*, 237.

Thus, the constitutional text states 2 means for the entrance into force of a law: the entrance into force 3 days after its publication in the Official Gazette of Romania, as a rule, or at a subsequent date mentioned in the text of the law, in certain special cases.

Beside the effect that the publication has over the moment of the entrance into force of the law, it also generates two important effects: the publication makes the law opposable for the public and proves the existence and authentic content of the law.

CONCLUSIONS

As a conclusion, the legislative activity assumes a complex process within which are emphasized two important interdependent aspects, the aspect regarding the knowledge of the social realities and the formal one regarding, among other things, the specific procedure for adoption with its particular issues involved. The legislative procedure is not resumed only to the activity of the Parliament, within it being engaged other political, social, state organisms, as well as the citizens which, either separately or together with the legislative authority have an effective participation in the legislative process, in its different phases, and, not at least, as we already shown, the President has an important role in the final phase of the legislative procedure.

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CONSIDERATIONS ON THE ROMANIAN FISCAL COUNCIL AND ITS ACTIVITY

Adriana PARVU[1]

Abstract:

The Fiscal Council is an independent authority, which, according to Art 40 Para 1, has the role to support "the activity of the Government and Parliament during the elaboration and performance of the fiscal-budgetary policies, to insure the quality of the macro-economic prognosis which is the base for the budgetary projections and for the medium and long-term fiscal-budgetary policies".

Assuming the role offered by law, the Fiscal Council has criticized, by its reports, the financial policy of the Romanian Governments.

The European Commission has expressed its direct support for the Fiscal Council in performing its tasks. In a Report for 2013 of the European Commission[2]*, it emphasized the importance that the national authorities must grant for the opinions issued by the Fiscal Council.*

Key words: *The Fiscal Council, fiscal-budgetary policies, consultative role*

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[2] European Commission, European Economy, Occasional Papers 168 – December 2013, *Fiscal frameworks in the European Union: Commission services country factsheets for the Autumn 2013 Peer Review*, accessed decembrie 11, 2014, http://media.hotnews.ro/media_server1/document-2013-12-19-16245642-0-analiza-comisiei-europene.pdf

INTRODUCTION

Considering as main objectives the insurance and maintenance of the fiscal-budgetary discipline, of the medium and long-term transparency and sustainability of the public finances, for the establishment of a framework of principle and rules based on which the Government must implement the fiscal-budgetary policies leading to a better financial administration of the resources, but also with the purpose of the efficient administration of the public finances to serve the public interest, the insurance of the economic prosperity and anchoring the fiscal-budgetary policies in a sustainable framework (Art 1), in April 2010 was adopted the Law No 69/2010[3] on the fiscal responsibility (FRL).

To achieve the previous mentioned objectives (stated by Art 1 of the FRL), was created, by the same law, the Fiscal Council.

THE CONTENT OF THE PAPER

The Fiscal Council is, according to Art 40 Para 1 an independent authority, formed by 5 members experienced in the area of macro-economic and budgetary policies. The Fiscal Council has the role to support "the activity of the Government and Parliament during the elaboration and performance of the fiscal-budgetary policies, to insure the quality of the macro-economic prognosis which is the base for the budgetary projections and for the medium and long-term fiscal-budgetary policies".

The members of the Fiscal Council are appointed from 5 institutions: the Romanian Academy, the National Bank of Romania, the Bucharest University of Economic Studies, the Romanian Banking Institute and the Romanian Banking Association (Art 42 Para 2). The 5 members (each of them originating from one of the mentioned institutions) perform their activity independently, according to the law,

[3] Published in the Official Gazette No 252/20 April 2010.

do not request nor receive instructions from the public authorities or from any other institution or authority (Art 40 Para 1).

Among the main tasks of the Fiscal Council, stated by Art 40 Para 2 of the law, we mention:

- Analysis and issuing opinions and recommendations on official macroeconomic and budgetary forecasts;
- Analysis and issuing opinions and recommendations on the fiscal strategy and assessing its compliance with the principles and rules specified in this law;
- Assessment of the budgetary performance of the Government against the fiscal targets and policies specified in the fiscal strategy and the compliance of such policies with the principles and rules specified in this law;
- Analysis and issuing opinions and recommendations on the annual budget laws as well as on other legislative initiatives that may have an impact on the budgetary targets, as well as assessing their compliance with the principles and rules specified in this Law;
- Preparation of cost estimates and issuing opinions on the budgetary impact of the normative ordinances and the amendments made on the annual budget law during the parliamentary debates.

The Fiscal Council requires, for the performance of its tasks and responsibilities, from any institution or public authority information, documents or relevant data (Art 41 Para 1).

According to art 40 Para 4 of the law, the Parliament and Government analyze the opinions and recommendations when elaborating and approving the fiscal strategy and the annual budgets, as well as for their appropriation/approval.

Assuming the role offered by law, the Fiscal Council has criticized, by its reports, the financial policy of the Romanian Governments. It has been noticed that, most often, the Council's critics have aimed "the opacity with which the Government operates the budgetary rectifications and modifies the taxation policy"[4]. Nevertheless,

[4] Zamfir, Claudiu, *Comisia Europeană: Consiliul Fiscal trebuie să aibă un rol mai important, pentru a evita revenirea părtinirii optimiste a autorităților române în*

the opinions issued by the Fiscal Council did not have attracted the attention of the authorities. Contrariwise, it has been noticed that in numerous situations, the members of the Fiscal Council have complained that they received the project for budgetary rectification or for the modification of the Fiscal Code "with just a few hours before the Government meeting where actually the decisions were taken, under the circumstances in which the executive power had the obligation to consider – even if only advisory – the opinion stated by the academic forum"[5].

According to the Fiscal Council's opinions issued in December 2014, it maintains the same dissatisfaction, namely the absence of a reasonable time to fulfil its legal tasks. As a conclusion, regarding the actions of the Government, the Fiscal Council has appreciated that, justifiably according to us, that "the persistence of this behavior reveals the lack of consideration towards the FRL and towards the Fiscal Council as an institution"[6].

Another harsh critic brought to the executive power refers to the non-compliance with the legal provisions, due to the numerous derogations from it. As an answer to this issue, the Fiscal Council recommends the legislation of certain functional fiscal-budgetary rules stated by the Constitution[7].

We adhere, in this regard, to the opinion of the Fiscal Council, according to which the repeated budgetary rectification proves "an

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proiecția veniturilor bugetare, 2013, accessed decembrie 11, 2014, http://economie.hotnews.ro/stiri-finante-16245647-document-comisia-europeana-consiliul-fiscal-trebuie-aiba-rol-mai-important-pentru-evita-revenirea-partinirii-optimiste-autoritatilor-proiectia-veniturilor-comisia-europeana-consiliul-fiscal-trebuie-ai.htm

[5] Idem.

[6] Dumitru, Ionuț (President of the Fiscal Council), *Opiniile Consiliului fiscal – 2014*, (Bucharest, 2014), accessed decembrie 13, 2014, http://www.consiliulfiscal.ro/opinii.2014.pdf

[7] Idem, 68.

obvious administrative incapacity of programing and executing the budget (…)"[8].

Opposable to the aforementioned attitude of the national authorities, the European Commission has expressed its direct support for the Fiscal Council in performing its tasks. In a Report for 2013 of the European Commission[9], it emphasized the importance that the national authorities must grant for the opinions issued by the Fiscal Council, stating that: "In order to prevent the possible return of an optimistic bias in the previsions of the authorities regarding the 2015 budgetary incomes, when the international assistance shall no longer be available, the current conditionality anticipates a more important role for the Fiscal Council in the preparation and publication of its own income previsions and the exact deficit target on cash (according to the ESA and the necessary structural adjustment) before the budgetary process"[10].

The Fiscal Council did not escaped the critics, some justified, according to us.

One of the critics aims its composition, its members coming in 65% from the banking environment. We consider as useful the presence of a representative of the Romanian business environment[11], because the most important fiscal policies affect, mainly, this area.

Another critic expressed aims the possibility that the Fiscal Council to request, from any institution or public authority, information, documents, or relevant data, in a first form of the law being classified as state secrets[12]. We consider that their exclusion from the enumeration, in

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[8] Idem, 70

[9] European Commission, European Economy, Occasional Papers 168 – December 2013, *Fiscal frameworks in the European Union: Commission services country factsheets for the Autumn 2013 Peer Review*, accessed decemebrie 11, 2014, http://media.hotnews.ro/media_server1/document-2013-12-19-16245642-0-analiza-comisiei-europene.pdf

[10] Idem, 69, translated by Claudiu Zamfir.

[11] Iulian Urban, "Despre reglementarea Consiliului fiscal în proiectul Legii responsabilității fiscal-bugetare", *Juridice.ro* (2010), accessed decembrie 13, 2014, http://www.juridice.ro/98617/despre-reglementarea-consiliului-fiscal-in-proiectul-legii-responsabilitatii-fiscal-bugetare.html

[12] *Ibidem*

the adopted form of the law is convenient, the more so as the Fiscal Council's role is consultative.

CONCLUSION

After the summary analysis of the above mentioned aspects, we consider that the regulation of such an independent authority, as the Fiscal Council, is convenient, but also perfectible. It is expected that the shortcomings met in practice, but also the ones pointed out by the doctrine, by specialist and by authorities competent in this area, to be considered in a possible modification of the FRL.

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GENERAL CONSIDERATIONS ON THE PROCEDURE OF ACQUIRING ROMANIAN CITIZENSHIP UPON REQUEST[1]

Andra PURAN[2]

Abstract:

The institution of citizenship is very important for the legal statute of the person, both in the internal law, as well as in the international law. This interest is especially determined by the difference between the legal regimes applicable for citizens and that applicable for foreigners and stateless persons.

The Romanian citizenship proves the affiliation to the Romanian state and offers to its beneficiary the possibility to be the holder of all rights and fundamental freedoms stated by the Constitution and laws.

The main way in achieving the Romanian citizenship is by birth, but, foreigners and stateless persons may acquire Romanian citizenship upon request, complying with the conditions and legal procedures.

Key words: *citizenship, conditions, procedures, National Citizenship Authority*

INTRODUCTION

The notion of citizenship has two meanings: legal and political. In its political meaning, it invokes the belonging of an individual to a human collectivity organized as a state. Legally, the citizenship is used to

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designate a legal institution, namely a group of legal norms governing constitutional legal relations[3].

The Romanian citizenship is considered to be that quality of a natural person expressing socio-economic, political and legal permanent relations between the natural person and the stat, proving his belonging to the Romanian state and attributing for the natural person the possibility to be the holder of all rights and obligations stated by the Romanian Constitution and the laws[4].

The citizenship is an element, a component part of the legal capacity. Unlike the civil law, in the constitutional law, the legal capacity cannot be split into capacity of use and legal capacity, because this distinction is not possible considering the particularities of the constitutional law relations.

Due to the Romanian adhesion to the European Union, the Romanian citizens also enjoy the European citizenship.

The European citizenship has been defined by the Treaty on the European Union, signed in 1992 in Maastricht, representing a major conceptual innovation, representing, as some doctrinaires rightly say, the first official "constitutionalization" of the European Union citizenship. Thus, the TEU (new Art 17, former Art 8 of the TEC) states that a citizen of the European Union is any person having the nationality of one of the Member States, according to the national laws in force of that state. Copying the notion of national citizenship, the European citizenship describes the relation that unites the citizen of a Member State with the European Union[5].

The European citizenship implies that the European Union's citizens beneficiate, in this quality, of the same rights traditionally granted for its own citizens in the internal judicial order. The European

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[3] Marius Andreescu and Andra N. Puran, *Drept constituțional. Teoria generală. Drepturi, libertăți şi îndatoriri fundamentale. Instituția cetățeniei*, 3rd Edition revised and completed (Craiova: Sitech, 2014), 349.

[4] Ioan Muraru and Elena S. Tănăsescu, *Drept constituțional şi instituții politice*. 13th Edition. 1st Vol., (Bucharest: C.H. Beck, 2008), 116

[5] Elise Nicoleta Vâlcu, *Introducere în dreptul comunitar material* (Craiova: Sitech, 2010), 13.

citizenship is different than the national one, which, according to the Treaty of Amsterdam "it completes […] and does not replace"[6].

1. Conditions for requesting the Romanian citizenship

The person requesting the Romanian citizenship must fulfil the following conditions:

a) has been born and resides, at the moment when submitting the request, in Romania or, though he has not been born within its territory, resides here for at least 8 years or, if the person is married to a Romanian citizen, for at least 5 years;

The terms stated by these regulations can be reduced to half only in the following situations:

1. the applicant is an international known personality;
2. the applicant is a national of one of the EU's Member States;
3. the applicant has received the statute as a refugee, according to the special laws;
4. the applicant has invested in Romania amounts exceeding 1.000.000 Euros.

If the applicant is located outside the Romanian territory for a period longer than 6 months within one year, that year shall not be considered in the determination of the period of residence within the Romanian territory.

b) Proves by his behavior, actions and attitude, loyalty towards the Romanian state and people, does not unfold or supports actions against the rule of law or national security and states that in the past he did not unfolded such actions;

c) Has turned 18 years old;

d) Has insured the legal means for a decent life, under the conditions of the legislation regarding the regime for foreigners;

e) He is known for having a good behavior and has not been sentenced within or outside the country for a crime qualifying him as unworthy of the Romanian citizenship;

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[6] Andra Dascălu and Daniela Iancu, "National and European citizenship", *Agora International Journal of Juridical Sciences II* (2010): 95.

f) Knows the Romanian language and has elementary notions of Romanian culture and civilization, enough for his integration in the social life;

g) Knows the Romanian Constitution and national anthem.

The child, who has not turned 18 years old, having foreign or stateless parents, shall receive the Romanian citizenship with his parents.

If only one of the parents receives the Romanian citizenship, the child's citizenship shall be decided by both parents, and in case of disagreement, the supervising judge. It is necessary the consent of the child who has turned 14 years old, the citizenship being received on the same date as his parent.

2. The procedure of granting the Romanian citizenship upon request

The request for the Romanian citizenship, or for reacquiring the Romanian citizenship for the cases stated by Art 10 and 11 of the special law, shall be submitted personally or by a representative with a special and authenticated proxy and shall address the Commission for Citizenship of the National Citizenship Authority, being accompanied by documents proving the fulfilment of the previously mentioned legal conditions. The request shall be registered by the technical secretariat of the Commission.

Also, for the registration shall be verified if all documents necessary for the resolution of the request are complete, if not the chairperson of the Commission shall require, by a resolution, the completion of the case file. If, within 6 months from receiving the notification, are not sent the necessary documents, the request shall be rejected as unsupported.

For the request for reacquiring the Romanian citizenship according to Art 10 and 11, the applicant has the possibility to submit his request to one of the Romanian diplomatic missions or consulate. If the requests were submitted to the Romanian diplomatic missions or consulates, they shall send them immediately to the Commission for Citizenship of the National Citizenship Authority.

The Commission is an entity without legal personality. It has a technical secretariat, formed within the National Citizenship Authority. The Commission has a permanent activity, if formed by a chairperson and 20 members, staff of the National Citizenship Authority.

The members of the Commission together with its chairperson are appointed by order of the Minister of Justice, for 2 years and can be revoked during the duration of their mandate also by order of the Minister of Justice.

The Commissions meetings are not public, being held in the presence of at least 3 members and presided by the chairperson, and in his absence, by one of the members appointed by him.

The chairperson of the Commission, by resolution, establishes the date when the request for granting or reacquiring the citizenship shall be debated, term which cannot be later than 5 months from the date of submitting the request, also requesting information from any authority regarding the compliance with the conditions of loyalty to the Romanian state and good behavior of the applicant, conditions stated by Art 8 Para 1 Let b) and e) of the Citizenship Law. The authorities to who was required information must answer within 60 days from the request, and in exceptional situations, within 5 months starting from the date when the request is registered at the technical secretariat of the Commission. At this date, the Commission shall analyze the requests and shall verify the compliance of the legal provisions, fulfilled or not, established by a reasoned report, which is adopted by the Commission with the majority of the present members.

If the Commission ascertains the necessity of hearing certain persons who may provide useful information for the solution of the case, shall order their summoning, establishing a new term.

If the conditions stated by the law are not fulfilled for granting or reacquiring the citizenship, as well as in the case of failing the interview for the verification of the Romanian language and culture, as well as for the verification of the knowledge about the Romanian Constitution and anthem, or in the case of unjustified absence from this interview, the Commission, by a reasoned report, shall propose to the chairperson of the National Citizenship Authority to reject the application. The chairperson

of the NCA shall issue an order in this meaning, which shall be immediately communicated to the applicant, by a registered letter with acknowledgment of receipt. This order can be appealed, within 15 days from communication, at the Bucharest Court of Appeal, the Section for Administrative Contentious. The decision of the Court of Appeal is definitive and can be subjected to appeal at the High Court of Cassation and Justice, the Section for Administrative Contentious.

A new request for granting or reacquiring the Romanian citizenship can be submitted after 6 months from the rejection of the previous one.

If all the legal conditions are fulfilled, the Commission shall establish, within maximum 6 months, the appointment of the person for the previous mentioned interview.

If the applicant passes the interview, the Commission shall file a report mentioning the fulfilment of the legal conditions for granting, or, where appropriate, reacquiring the citizenship. The report, accompanied by the request for granting or reacquiring the citizenship shall be submitted to the chairperson of the NCA who shall issue, within maximum 3 days, the order for receiving or reacquiring the Romanian citizenship.

The order for receiving or reacquiring the Romanian citizenship shall be communicated to the applicant by a registered letter with acknowledgment of receipt within maximum 3 days from issuance.

Within maximum 3 months from the communication of the order to receive or reacquire the Romanian citizenship the applicant has the obligation to take the oath of allegiance to Romania.

The oath shall be taken in front of the Minister of Justice and of the chairperson of the NCA or in front of one of the two vice-presidents of the authority appointed for this purpose, and consists of: "***I swear to be devoted to the Romanian country and people, to defend the national rights and interests, to respect the Romanian Constitution and its laws***".

The date of the oath is also the date of receiving the Romanian citizenship, in this meaning being released the Romanian citizenship

certificate. In this certificate shall be enlisted also the minor children of the applicant who receive the citizenship together with their parents.

If the child becomes major during the procedure for solving the application and until the date of receiving the Romanian citizenship by his parents, he shall take the oath and shall receive a citizenship certificate different than his parents.

Given that taking the oath has as effect the acquisition of the Romanian citizenship, the legislator has stated certain exceptional situations in which the oath is not taken.

Thus, according to Art 21 Para 1-2 of the Law No 21/1991 the situation in which, for reasons imputable to the applicant, he does not take the oath. This shall entail the cessation of the effect of the order of acquisition or reacquisition of Romanian citizenship regarding that person. The task of finding the cessation of effect of the order of acquisition or reacquisition of Romanian citizenship for persons who have not taken the oath under the law belongs to the chairperson of the National Citizenship Authority, upon notification by the specialized directorate within the authority, or, where appropriate, by the head of the diplomatic mission or consular office.

The legislator has stated two conditions in which, for reasons not imputable to the person, he cannot take the oath of loyalty:

a) The case of a person who dies before taking the oath of loyalty to Romania shall be recognized as a Romanian citizen, based on an application submitted by his or her legal heirs, from the date of issuing of the order by the chairperson of the National Citizenship Authority regarding the acquisition or reacquisition of Romanian citizenship. Such an application may be submitted within one year from the date of death of the holder of the application for acquisition or reacquisition of Romanian citizenship.

b) The case of a person who cannot take the oath of loyalty to Romania because of permanent disability or chronic illness shall obtain Romanian citizenship at the date of issuing of the order regarding the acquisition or reacquisition of Romanian citizenship, based on the application and on medical documents. The application may be made within one year of the date of notification of the time limit for taking the

oath of loyalty, the failure to submit the application shall entail cessation of the effect of the order regarding the acquisition or reacquisition of Romanian citizenship.

CONCLUSIONS

The citizenship is an element, a component part of the legal capacity and it is very important for the legal statute of the person, both in the internal law, as well as in the international law.

Foreigners and stateless persons may acquire Romanian citizenship upon request, complying with the conditions and legal procedures presented in this paper and stated by the Law no. 21/1991.

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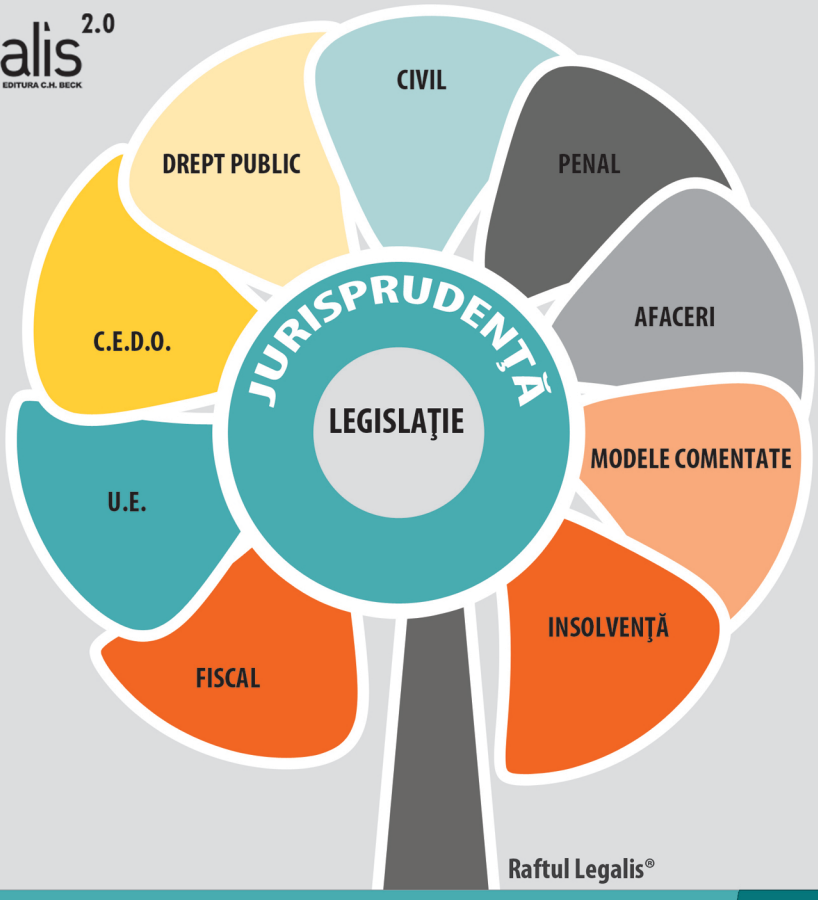

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